1 Introduction

This guide has been developed to assist Commonwealth agencies fulfil their obligations under the *Public Interest Disclosure Act 2013* (PID Act) and Public Interest Disclosure Standards Determination 2025 (PID Standard).

The PID Act was substantially amended from 1 July 2023 to implement key recommendations of the 2016 Review of the Public Interest Disclosure Act by Mr Philip Moss AM and subsequent Parliamentary committees. This guide reflects the PID Act as amended by these reforms which strengthen protections for disclosers and witnesses; focus the scheme on integrity-related wrongdoing; make the scheme easier to administer; and enhance oversight of the scheme by the Commonwealth Ombudsman (Ombudsman) and the Inspector-General of Intelligence and Security (IGIS). The guide also reflects new powers, duties and functions relating public interest disclosures, implemented as a result of the commencement of operation of the National Anti-Corruption Commission (NACC).

The guide has ten chapters:

1 *Introduction* – explains the guide's structure and the relevant legislation

2 *How the PID scheme works* – outlines the scope and elements of the public interest disclosure scheme

- 2.1 The purpose of the PID Act
- 2.2 What is a public interest disclosure?
- 2.3 Who can make a public interest disclosure?
- 2.4 What can be disclosed?
- 2.5 What is not disclosable conduct?
- 2.6 Who can receive a public interest disclosure?
- 2.7 What happens if information is disclosed outside these circumstances?

3 *Agency obligations* – sets out the need for strong agency commitment to encourage reporting of wrongdoing and take appropriate action, and identifies the responsibilities of key agency staff

- 3.1 Why public interest disclosures are important
- 3.2 Principal officer responsibilities
- 3.3 Other key PID roles and responsibilities

4 *Receiving internal disclosures* – sets out how disclosures should be encouraged and received

- 4.1 Receiving an internal disclosure from a public official
- 4.2 What information should the discloser provide?
- 4.3 Protection for the discloser
- 4.4 The discloser's obligations

5 *Allocating disclosures for handling under the PID Act* – discusses how disclosures are allocated for investigation

- 5.1 Initial assessment - is the information an 'internal disclosure'?
- 5.2 Decisions not to allocate under the PID Act
- 5.3 Decisions to allocate under the PID Act
- 5.4 Conducting an initial risk assessment

6 *Assessing whether to investigate* – explains key considerations in deciding whether to investigate, and what happens if an agency decides not to investigate under the PID Act

- 6.1 General requirement to investigate a disclosure
- 6.2 When can an agency decide not to investigate?
- 6.3 Does a decision not to investigate prevent other action?
- 6.4 What records must be made of a decision not to investigate?
- 6.5 Who must be notified of a decision not to investigate?

7 *Conducting an investigation* – discusses agency obligations regarding the conduct of investigations including procedural fairness, investigation reports and notification requirements

- 7.1 General requirement to investigate an internal disclosure
- 7.2 What sort of investigation is required?
- 7.3 Investigations under the PID Act
- 7.4 After the investigation
- 7.5 Some administrative considerations

8. *Support and protection* – discusses how disclosers are protected under the PID Act and avenues for assistance

- 8.1 Confidentiality and sharing of information under the PID Act
- 8.2 Protection for the discloser
- 8.3 Protection for witnesses in a PID investigation
- 8.4 Officials exercising powers or performing functions under the PID Act
- 8.5 Preventing and protecting from detriment and reprisal
- 8.6 Practical support and protection strategies
- 8.7 Access to court
- 8.8 Reprisal is a crime

9. *The role of key agencies* – sets out the role of the Ombudsman, the Inspector-General of Intelligence and Security (IGIS) and prescribed investigative agencies

- 9.1 Ombudsman
- 9.2 Inspector General of Intelligence and Security
- 9.3 Prescribed investigative agencies

10. *Interaction between the National Anti-Corruption Commission and the PID scheme* – sets out the role and function of the NACC and how public officials are required to exercise powers and perform duties and functions under both the PID scheme and the *National Anti-Corruption Commission Act 2022* (NACC Act).

This guide refers, where relevant, to provisions of the PID Act and PID Standard (made by the Ombudsman under s 74 of the PID Act). Individuals and agencies must comply with those provisions. The guide also refers to the PID Rules, which the Minister may make under s 83 of the PID Act.

The guide also includes suggestions for agencies to follow when applying the law: these are recommended as good practice but are not a legal requirement. Agencies may wish to adapt these suggestions to suit their own purposes, depending on their size, functions and contact with external entities. The Ombudsman and IGIS may follow their own procedures when investigating public interest disclosures.

If anything in this guide is inconsistent with requirements in the PID Act or the PID Standard as made and amended from time to time, the PID Act or Standard are to be followed. Unless otherwise indicated, references to legislative provisions in this Guide are references to sections of the PID Act.

The following are useful sources of information to assist agencies and public officials in carrying out their responsibilities under the PID Act.

- The Administrative Review Council has produced a range of Best Practice Guides on aspects of administrative decision-making, including natural justice requirements, assessing evidence and decision writing, available at www.ag.gov.au.
- The Australian Government Investigation Standards (AGIS) are available at www.ag.gov.au. All non-corporate Commonwealth entities must comply with the AGIS which sets out minimum standards for agency investigations involving suspected breaches of the law. It has useful information on such topics as investigation planning, interviewing witnesses and finalising investigations.
- The PID Act and PID Standard on the Federal Register of Legislation available at www.legislation.gov.au.
- For information about the role and functions of the IGIS, see www.igis.gov.au.
- For information about breaches of the APS Code of Conduct, see www.apsc.gov.au.
- Information about Australian workplace rights and rules and the role of the Fair Work Ombudsman is at www.fairwork.gov.au.
- More information on the PID scheme, including fact sheets and guides, is on the Ombudsman's website at www.ombudsman.gov.au.

Contact the Ombudsman's PID Team:

Email: pid@ombudsman.gov.au (preferred contact method)
Telephone: 1300 362 072
Post: GPO Box 442 Canberra ACT 2601
Website: https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 2: How the public interest disclosure scheme works

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

June 2026
Version 3.1

COMMONWEALTH OMBUDSMAN

2 How the public interest disclosure scheme works

2.1 THE PURPOSE OF THE PID ACT

The purpose of the *Public Interest Disclosure Act 2013* (PID Act) is to promote the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the making of disclosures of wrongdoing by public officials and former public officials
- ensuring public officials and former public officials who make protected disclosures, and witnesses who provide assistance in relation to disclosures, are supported and protected from adverse consequences relating to the making of a disclosure
- ensuring that disclosures are properly investigated and dealt with (s 6).

The PID Act complements existing notification, investigation, complaint handling and corruption reporting schemes in the Commonwealth public sector. For example, where a public interest disclosure relates to suspected fraud, the investigation should be conducted in accordance with the Commonwealth Fraud Control Guidelines. The PID Act provides additional protections for disclosers and reporting obligations for agencies.

2.2 WHAT IS A PUBLIC INTEREST DISCLOSURE?

The PID Act makes distinctions between different types of public interest disclosure. A public interest disclosure may be an internal disclosure, external disclosure, emergency disclosure, a legal practitioner disclosure, or a NACC disclosure, as set out in ss 26(1) and (1A) of the PID Act and s 23 of the NACC Act, respectively.

The PID Act provides immunities for current and former public officials who make disclosures in the circumstances set out in ss 26(1) and (1A). If a person makes a disclosure other than in the circumstances defined in ss 26(1) or (1A), the immunities in the PID Act do not apply, meaning that they are not protected from the consequences of breaching any privacy, confidentiality, or secrecy requirements that apply to the disclosed information.

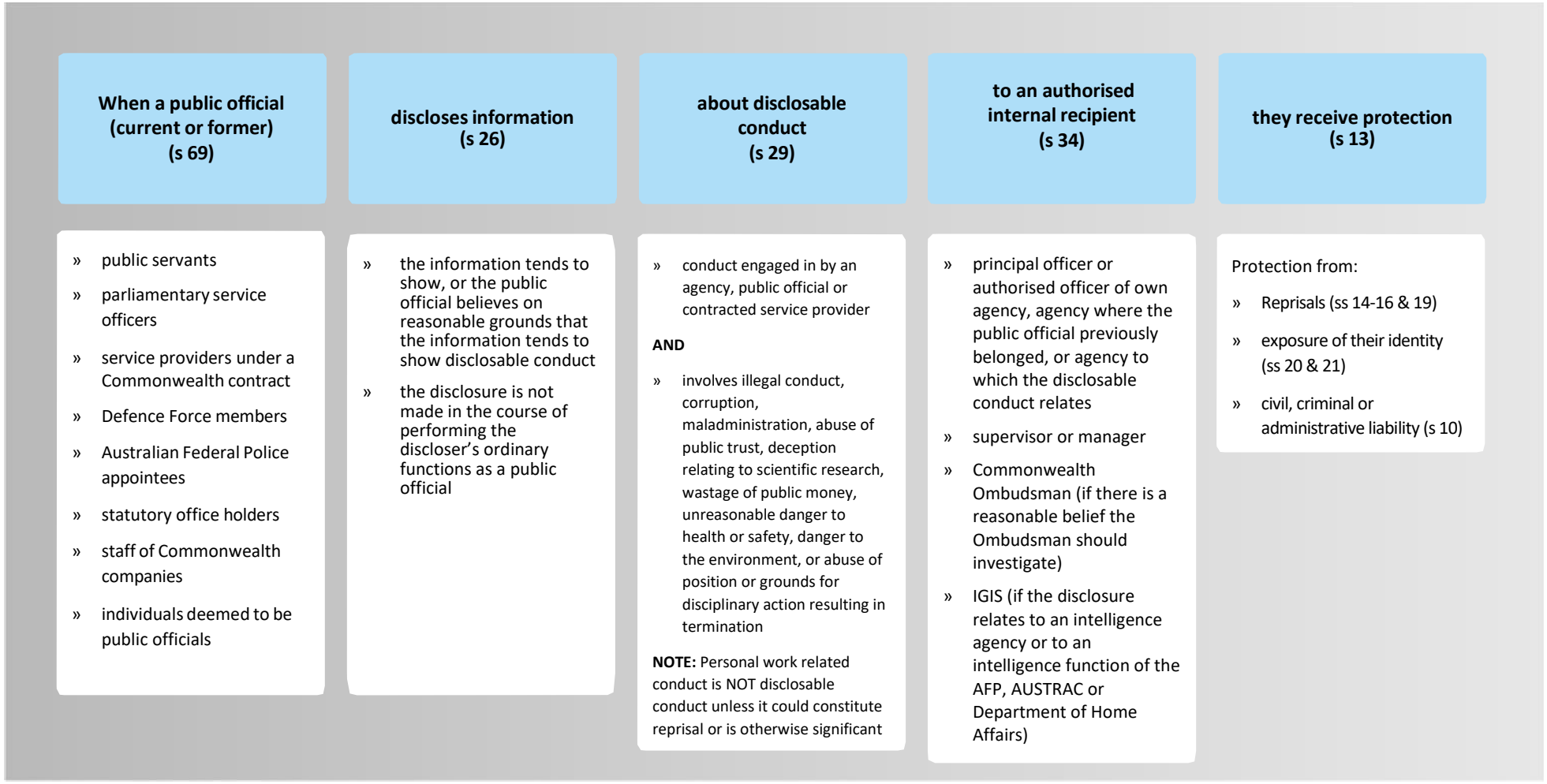
An 'internal disclosure' is the most common type of disclosure under the PID Act. To make an internal public interest disclosure, the person disclosing suspected wrongdoing must:

1. be a current or former public official (or deemed to be a public official),
2. make their disclosure to an authorised person within an Australian Government agency (their supervisor or an authorised internal recipient), and
3. provide information that they believe tends to show, on reasonable grounds, disclosable conduct within an Australian Government agency or by a public official.

In limited circumstances, a public official may disclose such information to a person outside government – this is known as an 'external disclosure' or 'emergency disclosure'. Neither the external disclosure or the emergency disclosure types can consist of or include intelligence information (s 41).

OFFICIAL

The following diagram summarises the elements of making an internal disclosure under the PID Act.



2.2.1 Figure 1 – What is an internal disclosure

A public official may also seek advice from a legal practitioner about making a public interest disclosure – this is referred to in the PID Act as a 'legal practitioner disclosure'. A disclosure will be a legal practitioner disclosure if:

- the information is disclosed to an Australian legal practitioner
- it is disclosed for the purpose of obtaining legal advice or professional assistance from the legal practitioner in relation to the discloser:
  - having made one of the other types of public interest disclosure
  - proposing to make one of the other types of public interest disclosure
- the information does not consist of or include intelligence information
- if the discloser knows, or ought reasonably to have known, that any of the information disclosed has a national security classification or other protective security classification, the legal practitioner must hold the appropriate level of security clearance to view that information.

A legal practitioner disclosure could be made, for example, to seek advice about the process of making a public interest disclosure, or about whether the PID scheme or another integrity or complaint framework would be the most appropriate means to address the alleged wrongdoing.

The final type of public interest disclosure a public official can make is a 'NACC disclosure'. A person makes a NACC disclosure under the PID Act if:

- they are a public official or former public official who makes a NACC disclosure under s 23 of the NACC Act and
- the information in the disclosure tends to show, or the public official believes on reasonable grounds that the information tends to show, disclosable conduct.

The interaction between the PID scheme and the NACC is discussed further in Chapter 10.

2.3 WHO CAN MAKE A PUBLIC INTEREST DISCLOSURE?

In order to make a public interest disclosure, a person must be a current or former 'public official', as defined in ss 69-70 of the PID Act (s 26(1)(a)).

2.3.1 Public officials

In general, a person can make a disclosure if they belong, or previously belonged, to one of the agencies covered by the PID Act (see the discussion in 2.4.1.1 of this guide). This includes Commonwealth public servants, members of the Defence Force, appointees of the Australian Federal Police, Parliamentary Service employees, directors or staff of Commonwealth companies, statutory office holders or any other person who exercises, or exercised, powers under a Commonwealth law.

Individuals and organisations that provide goods or services under a Commonwealth contract (defined in s 30(3)), and their officers or employees, are also public officials for the purposes of the PID Act. This includes subcontractors who are responsible for providing goods or services, either directly or indirectly, to an agency covered by the PID Act for the purposes of a Commonwealth contract (s 30(2)). See 2.4.1.3 for more information about Commonwealth contracts.

The PID Act specifically excludes some individuals from being public officials under the Act. Public official does not include a Member of Parliament, staff employed under the *Members of Parliament (Staff) Act 1984* (MOP(S) Act employees), a judicial officer, a member of a Royal Commission or grant recipients.

2.3.2 'Deemed' public officials

An authorised officer may deem an individual to be a public official if they reasonably believe the individual has information about wrongdoing and proposes to make a disclosure (s 70). Authorised officers are the principal officer of an agency (i.e., the agency head) and officers that the principal officer appoints as authorised officers under the PID Act (s 36). It is not necessary for the disclosing individual to request that they be deemed a public official, but the authorised officer must provide the individual with a written notice of the determination.

An authorised officer might consider it appropriate to deem an individual to be a public official if the individual is not a public official, but nevertheless has 'inside information' about the agency's wrongdoing. Examples might include:

- a current or former volunteer with an agency
- a member of an advisory body to a Commonwealth agency (where the member's terms of engagement do not meet the definition of a public official)
- an employee of an organisation that receives grant funding from the Australian Government, or
- state and territory department officials who work alongside Commonwealth officials.

An authorised officer may also decide to deem a person to be a public official if they do not know, or cannot be certain, whether the person is a public official. For example, the person may be unwilling to provide identifying information for fear of reprisal. The relevant test is that the person was not a public official at the time the information they are disclosing was obtained (s 70(1)(b)). If the authorised officer is otherwise satisfied that the person is or has been a public official, then deeming is not required.

An authorised officer's power to deem a person to be a public official operates only for the purposes of allowing that person to make a disclosure under the PID Act (s 70). An authorised officer cannot extend the reach of the PID Act by deeming a person to be a public official for the purposes of allowing a second person to make a disclosure about that first person's conduct. Additionally, a judicial officer, member of parliament, member of a Royal Commission or a person employed under the *Members of Parliament (Staff) Act 1984* cannot be deemed a public official for the purposes of making a disclosure (s 70(3A)).

The formal requirements for an authorised officer to deem a person to be a public official are explained in 4.1.2 of this guide.

2.3.3 Joint disclosures

Individuals cannot jointly make a single disclosure. However, two or more individuals may each make their own disclosure about the same conduct. In this case, provided each of the disclosures meets the criteria for a public interest disclosure, both individuals would receive the protections under the PID Act for making their own disclosure.

While protections would apply to the individuals, it is also open to the principal officer to decide not to investigate a disclosure if the information is the same or substantially the same as information previously disclosed and either:

- a decision was previously made not to investigate, or
- the earlier disclosure has been or is being investigated.

Chapter 6 provides more information about what a principal officer can do when substantially the same conduct has previously been disclosed and/or investigated under the PID Act or another Commonwealth law or power.

2.3.4 Public officials performing their ordinary functions

A public official whose ordinary functions include sharing information about wrongdoing in the agency with their supervisor or an authorised officer (for example, those working in internal fraud control, case management, or protective security) will not meet the requirements for making an internal disclosure if the disclosure is made in the course of performing the discloser's ordinary functions as a public official (s 26(1) – see 4.1.3.1 of this guide).

If a public official in such a role intends to make a public interest disclosure, they will need to clearly express that intent when making the disclosure.

2.4 WHAT CAN BE DISCLOSED?

Under s 26 of the PID Act, a public official can disclose information that they believe, on reasonable grounds, tends to show 'disclosable conduct'.

Disclosable conduct is defined in s 29 of the PID Act. There are 2 elements to the definition. The first element is that disclosable conduct has to be engaged in by a person or body covered by the PID Act (see 2.4.1 below). The second element is that the disclosable conduct has to be of a type covered by the PID Act (see 2.4.2 below).

2.4.1 Whose conduct?

Disclosable conduct covered by the PID Act has to be conduct on the part of one of the following:

- an agency (see 2.4.1.1)
- a public official in connection with their position (see 2.4.1.2)
- an officer or employee of a contracted service provider, in connection with entering into or giving effect to a Commonwealth contract (see 2.4.1.3).

2.4.1.1 What is an 'agency'?

An agency is broadly defined (s 71). It means:

- a Commonwealth entity under the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).[1] This includes:
  - Departments of State and the Parliamentary Departments
  - listed entities (which can be a body, person, group of persons or organisation (or combination thereof) that are prescribed in an Act or in the PGPA Rules
  - body corporates that are established by a law of the Commonwealth
  - body corporates that are established under a law of the Commonwealth (other than Commonwealth companies) and are prescribed by an Act or the rules to be a Commonwealth entity.
- a prescribed authority, which is defined in s 72 and includes:
  - Commonwealth companies (see s 89 of the PGPA Act and the PGPA Flipchart), the Australian Geospatial Intelligence Organisation (AGO), which is an agency in its own right and not in its capacity as part of the Department of Defence, and the Defence Intelligence Organisation (DIO), which is also an agency in its own right and not in its capacity as part of the Department of Defence
  - the High Court, and any other court created by the Parliament
  - any body established by a Commonwealth law and prescribed by the PID rules
  - a person holding, or performing the duties of, an office established by a Commonwealth law and prescribed by the PID rules.

A Royal Commission is not an agency for the purposes of the PID Act.

2.4.1.2 Who is a 'public official'?

A 'public official' under the PID Act is a broad term which includes any person who belongs to one of the agencies covered by the PID Act. Whether a person 'belongs' to agency (and which agency they belong to) is established by the table provided at s 69. As addressed in 2.3 above, this includes Commonwealth public servants working in Departments and other Commonwealth entities and prescribed authorities, members of the Defence Force, appointees of the Australian Federal Police, Parliamentary Service employees, directors or staff members of Commonwealth companies, statutory office holders and any other person who exercises powers under a Commonwealth law. A 'public official' includes a former public official.

'Public official' does not include a member of parliament, a MOP(S) Act employee, judicial officers, members of a Royal Commission or grant recipients.

Certain contracted service providers are also considered to be 'public officials' under the PID Act (see 2.4.1.3 below). This includes:

- individuals who are contracted service providers for a Commonwealth contract (s 69 table item 15)

[1] The Department of Finance maintains the PGPA Flipchart which is a reference of all non-corporate and corporate Commonwealth entities and Commonwealth companies. If your organisation is not on the Flipchart then it is not a Commonwealth entity or company. It may be another type of government body. The Flipchart is available at: https://www.finance.gov.au/government/managing-commonwealth-resources/structure-australian-government-public-sector/pgpa-act-flipchart-and-list.

- individuals who are officers or employees of contracted service providers for a Commonwealth contract, and who provide services for the purposes of that contract (s 69 table item 16)
- individuals who are subcontractors to a person who is a contracted service provider for a Commonwealth contract, and who provide services for the purposes of that Commonwealth contract (s 30(2)).

When determining whether an officer or employee of a contracted service provider engaged in conduct in connection with their position as public official, only conduct in connection with entering into or giving effect to the Commonwealth contract is covered by the PID Act.

2.4.1.3 What is a contracted service provider for a Commonwealth contract?

The PID Act applies to contracted service providers for a 'Commonwealth contract'. A Commonwealth contract is defined in s 30(3) of the PID Act. It is a contract:

- to which the Commonwealth, or an agency (as defined by the PID Act), is a party
- under which goods or services are to be provided:
  - to the Commonwealth or an agency, or
  - for or on behalf of the Commonwealth or an agency AND in connection with the performance of its functions or exercise of its powers.

Not all organisations who receive Commonwealth funding will automatically be covered by the PID Act. Contracts between the Commonwealth and another party under which goods or services are to be provided to the Commonwealth are covered by the PID Act and will be relatively straightforward to identify. However, it is important to carefully examine the terms of any contract under which a party receives payment from the Commonwealth in return for providing goods and/or services to a non-Commonwealth body or to individuals.

As a general principle, an organisation which is party to a contract that prescribes the terms for grant funding is not a contracted service provider for the purposes of the PID Act. See 2.5.4.3 below.

2.4.2 What kinds of disclosable conduct are covered by the PID Act?

The kinds of conduct that a disclosure can be made about are outlined in s 29 of the PID Act. They include conduct that:

- contravenes a Commonwealth, state or territory law
- occurred in a foreign country and contravenes a foreign law that applies to the agency, official or service provider
- perverts the course of justice
- is corrupt
- constitutes maladministration, including conduct that is based on improper motives or is unreasonable, unjust, oppressive or negligent
- is an abuse of public trust
- involves fabrication, falsification, plagiarism or deception relating to scientific research, or other misconduct in relation to scientific research, analysis or advice
- results in wastage of public money or public property
- unreasonably endangers health and safety
- endangers the environment, or
- is prescribed by the PID rules.

Disclosable conduct also includes conduct by a public official that:

- involves or is engaged in for the purposes of abusing their position as a public official, or
- could, if proved, give reasonable grounds for disciplinary action resulting in the termination of the official's engagement or appointment (s 29(2)).

The term disciplinary action is not defined in the PID Act. It covers a range of actions taken by an employer intended to correct and/or punish an employee's wrongdoing (as opposed to underperformance). Disciplinary action does not include performance development and improvement activities for an employee, such as counselling, mediation or training.

Furthermore, personal work-related conduct (see 2.5.1 and Chapter 5 of this guide) will not be disclosable conduct unless it constitutes one of the types of disclosable conduct outlined in s 29 *and* meets one of the following exceptions:

- it constitutes taking a reprisal against another person, or an offence under s 19 (reprisals in relation to disclosures—offences)
- it is of such a significant nature that it would undermine public confidence in an agency (or agencies), *or*
- it has other significant implications for an agency (or agencies).

2.4.1 Public interest vs personal interest

The PID Act does not require an official to show that it is in the public interest for them to make a disclosure. A public official is therefore entitled to choose to make a disclosure under the PID Act about a matter that appears to reflect a personal interest. If that disclosure meets the requirements in the PID Act, the fact that it is primarily a matter of personal interest is not relevant. The agency's obligations under the PID Act to manage the disclosure will apply regardless.

When handling a disclosure in which a public official may have a private interest (or which has private impact), it is appropriate for an agency to have regard to the overall seriousness of the subject matter of the disclosure, and any other mechanisms available to deal with it.[2] However, agencies should not assume that disclosures about conduct that appears to have only a private impact upon an individual are somehow less serious or do not warrant investigation under the PID Act. The individual's experience may be representative of a larger or systemic issue in that agency.

2.4.2 Time limits for making a disclosure

There are no time limits for making a disclosure.

A disclosure can be made about conduct that occurred at any time, including before the PID Act commenced.

The PID Act continues to apply after:

- the public official or contracted service provider alleged to have committed the wrongdoing has ceased to be a public official or contracted service provider (s 29(3)(c))
- the agency ceases to exist (s 29(3)(b) – although note that ss 73A-73D account for handling of public interest disclosures following machinery of government changes.

However, if the age of the disclosed information would make an investigation impracticable, the principal officer or their delegate may decide not to investigate the disclosure (see 6.2.6.3 of this guide).

2.4.3 Belief on reasonable grounds

When making a disclosure, disclosers need only provide the information that they believe on reasonable grounds tends to show disclosable conduct to an authorised officer or their supervisor. There is no requirement in the PID Act to for the discloser to investigate or otherwise collect evidence to prove the disclosable conduct. An official may not receive immunities under the PID Act for actions taken to investigate or otherwise collect evidence to support the making of a disclosure.

2.5 WHAT IS NOT DISCLOSABLE CONDUCT?

The PID Act is concerned with integrity-related wrong-doing – conduct that is illegal or corrupt, or that results in wastage of public money, unreasonable danger or risk to health and safety, or danger or increased risk of danger

[2] Chapter 6 explains when it may be appropriate to decide not to investigate a disclosure under the PID Act. Chapter 7 explains when it may be appropriate to conduct a different type of investigation under another Commonwealth law.

to the environment. To maintain this focus, there are a number of categories of conduct that are not disclosable conduct under the PID Act.

2.5.1 Personal work-related conduct

The PID Act provides that personal work-related conduct (s 29A) is not disclosable conduct. Personal work-related conduct is conduct engaged in by one public official in relation to another public official that has personal implications for the second official. The conduct must have occurred in relation the second official's engagement or appointment and/or in the course of their employment or exercise of their functions and powers as a public official. It includes, but is not limited to, conduct relating to:

- interpersonal conflict, such as bullying or harassment
- changing a person's duties
- disciplinary action
- adverse decisions about promotion or temporary acting arrangements
- terms and conditions of employment or engagement
- suspension or termination
- actions that could be reviewed under s 33 of the *Public Service Act 1999*, or comparable review processes relating to terms or conditions of engagement or appointment

Excluding personal work-related conduct from the scope of disclosable conduct recognises that personal work-related conduct is often dealt with more effectively under other frameworks, as distinct from the PID Act, which is focused on significant integrity wrongdoing.

Personal work-related conduct will be disclosable conduct where the personal work-related conduct:

- amounts to reprisal action (see Chapter 8 of this guide)
- is of such a significant nature that it would undermine public confidence in an agency, or
- has other significant implications for an agency.

Personal work-related conduct that could be considered to be of a significant nature or have such significant implications for an agency as to affect public confidence in the agency, would depend on the circumstances of each case.

Disclosures of solely personal work-related conduct will not, unless an exception applies, constitute an internal disclosure for the purposes of the PID Act. Disclosures of information that tends to show both personal work-related conduct *and* disclosable conduct will still need to be allocated as an internal disclosure under the PID Act. More information on making allocation decisions about disclosures that contain personal work-related conduct is at Chapter 5 of this guide.

2.5.2 Conduct related to courts, tribunals and the Parliament

The PID Act has limited application to courts and tribunals. The following aspects of court and tribunal operations are excluded from the categories of disclosable conduct in the PID Act (s 32):

- the conduct of judicial officers (defined in s 32(1))
- the judicial functions of court staff, tribunal staff or tribunal members
- the conduct of tribunal members or tribunal staff when exercising a power of the tribunal
- any other conduct related to a court or tribunal unless it is of an administrative nature and does not relate to the management or hearing of matters before the court or tribunal.

The conduct of members of parliament or of MOP(S) Act employees is not covered by the PID Act (because they are not 'public officials' as defined in s 69). However, the departments of the Parliament and their employees are covered.

2.5.3 Disagreement with government policy or actions

It is not disclosable conduct if a person *only* disagrees with:

- a government policy or proposed policy
- action or proposed action by a minister, the Speaker of the House of Representatives or the President of the Senate
- expenditure or proposed expenditure related to such policy or action (s 31).

However, if the conduct disclosed constitutes both a disagreement with a policy, action or expenditure *and* disclosable conduct (as well as meeting the other requirements of the PID Act), then the conduct disclosed will likely constitute an internal disclosure under the PID Act. Protections under the Act would apply to the disclosure in this case.

2.5.4 Other categories

2.5.4.1 Proper performance of the functions and exercise of the powers of intelligence agencies

Disclosable conduct also does not include the proper performance of the functions and proper exercise of the powers of an intelligence agency or its officials (s 33).

2.5.4.2 Connection with position as a public official

Disclosable conduct by a public official must be conduct in connection with their position as a public official. In other words, conduct that is wholly private and has no bearing on their position as a public official is generally not disclosable conduct. However, serious unethical or criminal behaviour on the part of a public official, even if not connected to their employment, might nevertheless be grounds for disciplinary action resulting in the termination of the official's engagement or appointment. Thus, conduct outside of the terms of employment that is nevertheless incompatible with the person's position as a public official would meet the extended definition of disclosable conduct in s 29(2)(b).

2.5.4.3 Activities of grant recipients

Grant recipients are not public officials for the purposes of the Act, meaning that the conduct of the recipient of a grant, or of employees of a recipient of a Commonwealth grant, would not be disclosable conduct. However, grant recipients may be deemed public officials under s 70 of the PID Act (see 4.1.2 of this guide).

The fact that the PID Act does not apply to recipients of grant funding does not mean that agencies should not have systems in place to collect information that might be relevant to the conditions and administration of grants. Agencies should consider alternate ways of protecting and supporting individuals who may be important sources of information about how funded organisations are meeting their obligations.

2.6 WHO CAN RECEIVE AN INTERNAL PUBLIC INTEREST DISCLOSURE?

In order to gain the protections available under the PID Act, a disclosure must be made[3] to an authorised recipient (s 26). The PID Act focuses on the reporting and investigating of wrongdoing within government (internal disclosures) but allows for reporting outside government in specified circumstances.

2.6.1 Internal disclosure to the agency concerned

The majority of public interest disclosures are internal disclosures made to the agency concerned. An internal disclosure attracts the protections of the PID Act for the discloser and brings into play obligations for the agency (and the official who received it).

Making a disclosure internally gives the agency the chance to investigate the matter and remove any danger or correct any wrong practices as quickly as possible. Each agency must have procedures for dealing with public interest disclosures (ss 59(3) and (4)) and should set out in its procedures how a disclosure should be made.

Under the PID Act, a public official can make an internal disclosure to their current supervisor or an authorised officer in:

[3] The information may be disclosed in any form, and the discloser does not need to identify themselves, or that they are making a disclosure under the PID Act (or even intend to use it). See 4.1.4-5 of this guide for further explanation.

- their current agency, or
- the agency to which they previously belonged, or
- the agency to which the disclosure relates.

2.6.1.1 Who is an authorised officer for an agency?

Authorised officers for each agency are the principal officer (i.e., the agency head) and officers that the principal officer appoints as authorised officers under the PID Act (s 36). If a public official has information about suspected wrongdoing in an agency other than the one in which they work, they can choose to make their disclosure directly to an authorised officer in that other agency. However, if the conduct disclosed relates to an intelligence agency, the public official must disclose it to an authorised officer in that agency (or the IGIS) and not to their own agency.

The PID Act extends to conduct on the part of individuals and entities that provide goods or services under a Commonwealth contract (see 2.4.1.3 for more information about what is considered to be a Commonwealth contract), concerning suspected wrongdoing related to entering into or giving effect to the contract. Disclosures about a contracted service provider's suspected wrongdoing can be made to an authorised officer appointed by the principal officer, of the Commonwealth agency that is party to the contract (or directly to the principal officer).

2.6.1.2 Making an internal disclosure to a supervisor

A public official can also make a disclosure to their current supervisor (defined in s 8 to mean someone who supervises or manages them). A supervisor who receives a disclosure from someone they manage or supervise is obliged to give the information to an authorised officer in their agency as soon as reasonably practicable (s 60A). The supervisor must also explain certain matters to the discloser (supervisor responsibilities are discussed in 3.3.2 of this guide). The supervisor's obligation applies as soon as the supervisor has reasonable grounds to believe the information concerns, or could concern, one or more instances of disclosable conduct.

2.6.2 Internal disclosure to the Ombudsman or the IGIS

A public official can also make a disclosure to authorised officers of the Commonwealth Ombudsman, if they believe on reasonable grounds that it would be appropriate for the Ombudsman to investigate (ss 26(1), 34). This could include, but would not be limited to, circumstances where the discloser believes that the agency will not take appropriate action to deal with the conduct disclosed.

Authorised officers within the Ombudsman's office may seek information from the discloser about the reasons why they believe the Ombudsman should investigate their disclosure, rather than the agency to which the disclosure relates. In most cases, the Ombudsman will consider allocating the disclosure to the agency concerned for handling, unless that would be clearly inappropriate, for example, because of an unavoidable conflict of interest. The Ombudsman operates on the general principle in the PID Act that disclosures are best allocated to, and handled by, the agency to which they relate (consistent with s 43(5)(a) of the Act). The relevant agency has access to information, records and personnel, and is best placed to protect a discloser from reprisal action.

If the matter involves an intelligence agency or agency with intelligence functions (see s 8 definition), there are 2 options. Either the public official can make a disclosure to an authorised officer in the intelligence agency or, if they believe on reasonable grounds that it would be appropriate for the IGIS to investigate, the public official may make a disclosure to an authorised officer of the IGIS (see www.igis.gov.au).

2.6.3 Internal disclosure to a prescribed investigative agency

The PID Act also allows for agencies with special investigative powers to be prescribed under PID rules. If the matter concerns their functions and powers, a disclosure may be made to those special investigative agencies. However, at the time of publication there are no prescribed investigative agencies.

2.6.4 Internal disclosures and machinery of government (MOG) changes

A machinery of government change may affect how or where an internal disclosure is handled under the PID Act. The PID Act accounts for machinery of government changes to ensure all disclosures are appropriately handled by a relevant agency within statutory timeframes.

A machinery of government change may include where an agency has ceased to exist or where a function has moved, either to be added to the functions of an existing Commonwealth agency or to a new Commonwealth agency created as result of a machinery of government change.

Sections 35 and 73A-73D clarify when an agency is responsible for handling a disclosure following a machinery of government change, and the process for doing so.

Section 73B provides that *conduct* which occurred in relation to an agency affected by a machinery of government change (the affected agency) before such a change occurred would be taken to relate to a new agency after the machinery of government change if:

- the conduct relates to a function transferred from an affected agency to the new agency, or
- the PID rules provide that conduct of that kind is taken to relate to the new agency.

This means that the *new* agency would be responsible for the handling of a disclosure in relation to that conduct and would be subject to relevant obligations under the PID Act.

Section 73C clarifies how the PID Act would apply where a *disclosure* is made to an affected agency before a machinery of government change, in circumstances where:

- a person has disclosed information to an authorised officer or supervisor of an affected agency
- the information disclosed concerns conduct that is taken to relate to a new agency after the machinery of government change under s 73B, and consideration of the disclosure had not started or was not finalised immediately before the machinery of government change.

In these circumstances, the disclosure is taken to have been made to an authorised officer of, or a supervisor belonging to, the *new* agency. Section 73C also provides that:

- if the disclosure had been allocated to the affected agency before the machinery of government change, it is taken to be allocated to the new agency, and
- if an investigation under the PID Act had begun before the machinery of government change, the investigation into the disclosure may continue as if the disclosure had been made in relation to conduct that relates to the new agency.

Furthermore, anything done by any person (including decisions made) for the purposes of the PID Act before the machinery government change will continue to be considered to have been done following the machinery of government change. Importantly, the PID Act, and investigation timeframes, continue to apply in relation to the disclosure after the machinery of government change.

Section 73D expressly authorises the transfer of information related to a disclosure between the principal officer of the affected agency and the principal officer of the new agency, where:

- a disclosure has been made to an authorised officer or a supervisor *prior to* the machinery of government change
- the information concerns conduct that is taken to relate to the new agency under s 73B – that is, the conduct relates to a function that was transferred as part of a machinery of government change that is now part of the new agency, or is prescribed as such by the PID Rules, and
- either consideration of the disclosure has not started prior to the machinery of government change, or the principal officer of the affected agency has completed a s 51 investigation report (before or after the machinery of government change).

In these circumstances, the PID Act authorises the transfer of the following information:

- a s 51 investigation report, if one has been completed
- any notice of recommendations by the Ombudsman or the IGIS (under s 55), and
- any other information related to a disclosure.

2.6.5 Complaints to the Ombudsman or the IGIS

A public official can make a complaint to the Ombudsman about the handling of a disclosure by an agency under the PID Act (see s 7A of the PID Act and ss 5 and 5A of the *Ombudsman Act 1976*). If the disclosure relates to conduct of an intelligence agency, the intelligence function of an agency as prescribed by the PID Act or an official belonging to an intelligence agency, the discloser may complain to the IGIS.

A complaint to the Ombudsman or the IGIS may be about any matter relating to the handling of the disclosure, which might include complaints about:

- whether the disclosure has been handled reasonably
- the allocation of the disclosure (including any delay or failure to allocate the disclosure)
- the investigation of the disclosure (including any delay or failure to investigate the disclosure)
- compliance with the PID Act and the Public Interest Disclosure Standards Determination 2025 by the agency or any of its officers, including its principal officer (including any failure to comply with this Act).

The Ombudsman can also receive complaints about the handling of a disclosure by the NACC, in limited circumstances. The Ombudsman has a limited oversight role in relation to the operation of the NACC, specifically the 'administrative actions' of the NACC. Examples of what might fall within the definition of 'administrative action' include complaints about delays in the NACC taking action or communicating with complainants. Further information on the NACC including oversight of its functions can be found on the NACC website.[4]

Further information on the roles of the Ombudsman and the IGIS is at Chapter 9 of this guide.

2.6.6 Disclosures to other people – external and emergency disclosures

The overall aim of the PID Act is to encourage public officials to disclose suspected wrongdoing to an authorised officer within an agency, so that the agency can investigate and address the problem as soon as possible.

A public official may wish to make a disclosure to other people, including people outside government (for example to the media, a union official or a member of parliament). They may also wish to publish the information more broadly, for example by using social media. However, this will rarely be permissible under the PID Act.

Disclosures to people outside an agency are protected by the PID Act only in the limited circumstances set out below.

External disclosures and emergency disclosures cannot be made to a foreign public official and must not include any intelligence information. 'Intelligence information' is a term defined in s 41 and includes 'sensitive law enforcement information', which is also defined in s 41 (see 2.6.6.1).

The other restrictions that apply to external and emergency disclosures can be complex, and disclosers should carefully consider the requirements before making these types of disclosure. A high-level summary of these requirements is provided below (see 2.6.7 and 2.6.8).

A public official contemplating making a disclosure to someone other than an authorised officer, their supervisor, the Ombudsman, the IGIS or the NACC should consider seeking legal advice about the application of the PID Act to their circumstances. The Ombudsman's office can provide general guidance about the application of the PID Act but cannot provide legal advice.

2.6.6.1 Intelligence information and sensitive law enforcement information

'Intelligence information' is information, or a summary or extract of information, that:

- originated with or was received from an intelligence agency
- might reveal such information or the technologies or operations of an intelligence agency
- was received from a foreign intelligence agency and might reveal a matter communicated in confidence
- originated or was received from the Department of Defence and might reveal operational intelligence or a program under which a foreign government provides restricted access to technology

[4] At the time of publication to: https://www.nacc.gov.au

- identifies a current or former member or agent of ASIS or ASIO or could lead to their identity being reasonably inferred or established
- is sensitive law enforcement information (see the full definition in s 41(1)).

'Sensitive law enforcement information' is information whose disclosure is reasonably likely to prejudice Australia's law enforcement interests, including a range of listed matters such as:

- avoiding disruption to national and international law enforcement and criminal investigation
- protecting informants and witnesses, and
- protecting the technologies and methods used in dealing with criminal intelligence and investigation (see the full definition in s 41(2)).

2.6.6.2 Does an agency have to investigate an external or emergency disclosure?

The PID Act does not require a person who receives an external or emergency disclosure to take any action upon it or pass it to the agency concerned. An agency is also not required to take action when it becomes aware, or suspects that an emergency or external disclosure has been made. However, an agency is not precluded from investigating the subject matter, to ensure that appropriate action is or has been taken to address it.

2.6.7 External disclosure

A public official who has already made an internal disclosure under the PID Act may in some circumstances subsequently make a disclosure to any person (except a foreign public official), if (s 26(1) item 2):

- the final report of the internal PID investigation has not been prepared within 90 days of allocation, or the extended investigation period approved by the Ombudsman or the IGIS (this condition does not apply to Ombudsman/IGIS investigations under their respective legislation)
- the PID investigation has been completed and the discloser believes on reasonable grounds that the investigation was inadequate
- an investigation has been completed (whether the investigation was conducted under the PID Act or under other legislation) and the discloser believes on reasonable grounds that the response to the investigation was inadequate.

The external disclosure must not include intelligence information, including sensitive law enforcement information, and none of the information disclosed can concern the conduct of an intelligence agency. Further, the definition of 'disclosable conduct' excludes conduct that an intelligence agency, or one of its officials, engages in as part of the proper exercise of the intelligence agency's functions (see 2.6 of this guide).

If the agency decides not to allocate or investigate the official's disclosure (i.e., by making a decision under s 43 or s 48 of the PID Act, including a decision not to allocate or investigate because the conduct would be better investigated under another law or power), this will not meet the criteria for an official to make an external disclosure. The official may complain to the Ombudsman about the agency's decision not to allocate or investigate their disclosure. If the disclosure relates to one of the intelligence agencies or the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs, the official may complain to the IGIS.

Additional restrictions apply to external disclosures (s 26):

- the public official must not disclose more information than is reasonably necessary to identify the wrongdoing
- all of the externally disclosed information must have been the subject of at least part of a prior internal disclosure
- on balance, making that external disclosure must not be contrary to the public interest.

2.6.7.1 When is an investigation or subsequent action inadequate?

The PID Act does not define when an investigation or action taken by an agency as a result of the investigation is inadequate. However, an investigation is likely to be considered inadequate if:

- the investigator showed bias or there was a strong apprehension of bias in how the investigation was conducted
- information that was reasonably available, relevant and materially significant was not obtained or considered
- the findings or recommendations set out in the report were unreasonable based on the information obtained during the investigation
- the investigation report did not set out findings or recommendations that should reasonably have been made based on the information obtained.

Some of the pitfalls for agencies to avoid when investigating a disclosure include:

- significant delay in completing investigations
- lack of awareness of legislation, procedures and guidance material
- not maintaining confidentiality in investigations
- conflicts of interest
- giving witnesses the opportunity to collude
- not pursuing obvious lines of enquiry
- poor quality of investigation reports, with findings lacking sufficient substantiating evidence, and
- investigators having little or no experience or training in conducting investigations.[5]

Action taken as a result of an investigation may be considered inadequate where the report recommended certain action be taken and no action was or is planned to be taken.

If the response to an investigation involves action that has been, is being or will be taken by a Minister, the Speaker of the House of Representatives or the President of the Senate, that fact alone will not be grounds for a reasonable belief that the response is inadequate (s 26(2A)).

2.6.7.2 What is 'contrary to the public interest'?

The PID Act specifies various factors that must be considered in determining that a disclosure is not 'contrary to the public interest' for the purposes of making an external disclosure (s 26(3)). These are:

- whether the disclosure would promote the integrity and accountability of the Commonwealth public sector
- the extent to which the disclosure would expose a failure to address serious wrongdoing
- the extent to which it would help to protect the person who made the disclosure from adverse consequences
- the principle that disclosures should be properly investigated and dealt with
- the nature and seriousness of the disclosable conduct
- any risk the disclosure could damage the security or defence of the Commonwealth, or its relations with a state or territory, Norfolk Island or another country
- the principle that Cabinet information should remain confidential unless it is already lawfully publicly available
- if any information was communicated in confidence by or on behalf of a foreign government or authority or an international organisation, the principle that such information should remain confidential unless consent is given
- any risk that disclosure could prejudice the proper administration of justice
- the principle that legal professional privilege should be maintained

[5] See Ombudsman Victoria, Annual Report 2010, pp 74-76, for discussion of these recurring issues in public interest disclosure investigations in Victoria.

- any other relevant matter.

The identity and role or function of the person or body to whom the external disclosure is made is likely to be relevant when considering whether that disclosure is contrary to the public interest.

An official contemplating making an external disclosure may wish to consider first seeking legal advice (see 2.6.9) or a making a complaint to the Ombudsman's office or the IGIS (see 2.6.5).

2.6.8 Emergency disclosure

If a public official believes on reasonable grounds that the information they have involves a substantial and imminent danger to the health or safety of one or more people or to the environment, they may make an emergency disclosure to any person except a foreign public official (s 26(1) item 3), provided they meet certain requirements:

- The extent of the information they disclose must be only what is necessary to alert the recipient of the substantial and imminent danger.
- If they have not previously made an internal disclosure about the matter, or if they have done so and the investigation is not yet completed, there must be exceptional circumstances justifying their decision to make an external disclosure. This might include, for example, if the investigation was taking too long to complete having regard to the risk to a person's health and safety.

An emergency disclosure must not include intelligence information, including sensitive law enforcement information.

2.6.9 Disclosures to other people - legal practitioner disclosure

An official may make an emergency or external disclosure to a legal practitioner (noting these disclosures may be made to any person other than a foreign public official in the circumstances discussed above).

There is also a specific category of public interest disclosure under the PID Act – 'a legal practitioner disclosure' - which allows a public official to disclose information to an Australian legal practitioner for the purposes of seeking legal advice or professional assistance in relation to the official's actual or proposed disclosure elsewhere (i.e., an internal disclosure, an emergency disclosure or an external disclosure).

An Australian legal practitioner is an Australian lawyer admitted to the legal profession by a Supreme Court of an Australian State or Territory and who holds a practising certificate under a law of an Australian State or Territory (s 8 PID Act). In order to make a 'legal practitioner disclosure', the disclosure by the public official to the lawyer must be made for the purpose of obtaining legal advice or professional assistance from the lawyer in relation to a disclosure that the discloser has made or proposes to make.

For a 'legal practitioner disclosure', the official must not disclose intelligence information including sensitive law enforcement information (s 26(1) item 4).

If the public official knew, or should reasonably have known, that any of the information they were disclosing had a national security or other protective security classification, the legal practitioner they make the disclosure to must hold an appropriate security clearance.

It is an offence for the legal practitioner to disclose to another person the information that the official (i.e., their client) disclosed to them, or to use that information for any purpose other than providing advice or assistance to the official relating to the official's actual or proposed disclosure elsewhere (s 67).

2.6.10 Disclosures to the National Anti-Corruption Commission (NACC)

A public official may make a public interest disclosure directly to the NACC. The NACC Commissioner has discretion to investigate a corruption issue raised through a disclosure if they are of the opinion that the issue could involve serious or systemic corrupt conduct. If the disclosure is made to the NACC and the Commissioner decides not to investigate it, the Commissioner may refer it back to the relevant agency for consideration or investigation.

The NACC Act and the PID Act offer different protections to disclosers. The NACC Act protections are available to any person who provides information or evidence related to a corruption issue to the Commission. Importantly, a public official will be able to access protections under both schemes where the information or evidence disclosed to the Commission also constitutes disclosable conduct under the PID Act.

Chapter 10 provides additional detail about the interaction between the PID Act and the NACC.

2.7 WHAT HAPPENS IF INFORMATION IS DISCLOSED OUTSIDE THESE CIRCUMSTANCES?

Public officials are privy to significant amounts of private and sensitive information about individuals and government matters. Maintaining confidentiality is an important part of a public official's role and this obligation is often reinforced by criminal sanctions.

A public official must use one of the proper avenues to gain the protections available under the PID Act. Those protections include making it an offence to disclose or use the identifying information of a discloser, immunity for the public official from criminal, civil and administrative liability (including disciplinary action), and protection from reprisal (see Chapter 8 of this guide).

A public official will not receive the immunities under the PID Act, or the protection of their identifying information, if they give the information about disclosable conduct to someone outside government like a journalist, Member of Parliament or union representative, *unless* the conditions for an external or emergency disclosure are met. If these conditions are not met, the official may be in breach of their duty to maintain appropriate confidentiality in relation to official information they have gained in the course of their work, or be subject to other civil, criminal or disciplinary action. For example, the official could be in breach of s 122.4 of the *Criminal Code* (unauthorised disclosure of information by current and former Commonwealth officers) or secrecy or confidentiality provisions in the legislation under which the information was collected. If the disclosing official is an APS officer, they could also be subject to disciplinary procedures under the APS Code of Conduct.

The limitations on protection under the PID Act should encourage public officials to make a disclosure to the people and agencies that have the responsibility to act. Consistent with that aim, the PID Act requires agencies to have proper processes in place to manage an investigation and remedy problems, and mandates certain steps in handling an internal disclosure made in accordance with the provisions in the PID Act. These requirements are explored in later chapters of this guide.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 3: Agency obligations

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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COMMONWEALTH OMBUDSMAN

3 Agency obligations

3.1 WHY PUBLIC INTEREST DISCLOSURES ARE IMPORTANT

The objects of the *Public Interest Disclosure Act 2013* (PID Act) include encouraging and facilitating the making of public interest disclosures by public officials, and former public officials (s 6(b)). Making a public interest disclosure accords with the ethical culture of the Commonwealth public sector, including the employee's duty to act with integrity in the course of Australian Public Service and Parliamentary Service employment (s 13 of the *Public Service Act 1999*; s 13 *Parliamentary Service Act 1999*).

Employees and contractors have a close-up perspective on what happens in the workplace. Those who are prepared to report wrongdoing can be important and reliable sources of information to identify problems which should be addressed, including unethical practices. However, many employees and contractors are reticent to report wrongdoing, or to do so in a timely way. Barriers to disclosing might include uncertainty about the seriousness of the problem, unwillingness to 'rock the boat', wishing to avoid conflict and protect career prospects, and fear of reprisal, coupled with doubt that the agency will provide adequate protection and/or properly investigate the disclosure.

An effective public interest disclosure scheme has many benefits to agencies and the broader Commonwealth public sector. Properly managed, the public interest disclosure scheme enhances an agency's capacity to:

- identify, as early as possible, conduct that needs correction
- detect any weak or flawed systems which may make the agency vulnerable
- manage disclosed information appropriately and address problems before they escalate
- avoid inefficiency and financial loss
- reduce risks to the environment, or the health or safety of staff or the community
- prevent damage to the agency's reputation and standing, and that of the Australian Government
- support a coherent and comprehensive integrity system, and cultivate a culture of integrity in the Australian Public Service
- facilitate public trust in government.

The PID Act, Public Interest Disclosure Standards Determination 2025 (PID Standard) and agency procedures can only go part of the way to creating an effective public interest disclosure scheme. An essential part of a successful scheme is agencies being committed to a culture that encourages the reporting of wrongdoing, ensures timely action on disclosures, delivers appropriate training and supports for public officials, and protects disclosers and witnesses from any adverse consequences.

Strong agency commitment to the public interest disclosure scheme requires:

- policies and procedures that demonstrate the agency's endorsement of reporting suspected wrongdoing and protecting disclosers
- endorsement by senior management of the principles in the PID Act
- commitment by supervisors and line managers, given that they will often be the first point of contact for disclosers and have immediate responsibility for staff welfare
- trust by public officials that agency procedures are sound, and that the agency will ensure that disclosures

are acted on and disclosers are protected from reprisal.[1]

3.2 PRINCIPAL OFFICER RESPONSIBILITIES

The principal officer of each agency has a range of obligations under the PID Act aimed at ensuring public officials who belong to that agency are aware they can make a disclosure, authorised officers are accessible, and the agency deals appropriately with every disclosure made.

The principal officer is the agency head – that is, the departmental secretary, chief executive officer, or head of agency (however described), including an individual prescribed under the PID rules (see the full definition in s 73).[2]

A principal officer's specific responsibilities under the PID Act include:

- appointing authorised officers (s 36), and ensuring the number of authorised officers of the agency is sufficient to be readily accessible by public officials belonging to the agency and public officials are aware of the identity of each authorised officer within the agency (s 59(1))
- encouraging and supporting public officials who make, or are considering making a disclosure, as well as to those who may assist with such disclosures (s 59(2))
- establishing written procedures for facilitating and dealing with public interest disclosures relating to their agency (s 59(3)) – these procedures must deal with assessing risks that reprisals may be taken in relation to disclosures, provide for confidentiality of investigative processes, and comply with any standards in force under s 74(1) and (s 59(4))
- ensuring that disclosures are properly investigated (ss 47, 52 and 53), including preparing an investigation report (s 51) and taking appropriate action in response to the report (s 59(6))
- providing ongoing training and education on the PID Act to all public officials belonging to an agency (s 59(7)) and ensuring that those appointed to a position that may require them to discharge functions or duties under the PID Act are given training and education appropriate for the position within a reasonable time (s 59(8))
- taking reasonable steps to protect public officials who belong to the agency against detriment and reprisals that have been, or may be, taken in relation to a public interest disclosure that has been made, could be made, or proposed to be made to an authorised officer or supervisor within the agency (s 59(9))
- notifying the discloser and the Ombudsman or the IGIS (as appropriate) at various stages in handling a disclosure (ss 44, 44A, 44B,45A, 50, 50A, 51(4))
- providing information and assistance to the Ombudsman and the IGIS, including in relation to the preparation of reports to Parliament on the operation of the PID Act (s 76(3)).

Each of these responsibilities is discussed in more detail in this guide. The principal officer can delegate any or all of those functions or powers to a public official who belongs to the agency (s 77).

The principal officer of an agency is also an 'authorised officer' of that agency, meaning they can receive disclosures about the agency, or from the public officials who belong to the agency.

Most disclosures are likely to be made to the other authorised officers appointed by the principal officer (see 2.7.1.1 of this guide), or via a public official's supervisor (see 2.7.1.2). However, the principal officer remains an 'authorised officer' even after they appoint other authorised officers in the agency.

3.2.1 Appointing authorised officers and ensuring that officials can contact them

An authorised officer is a public official who belongs to the agency and is either the principal officer or is appointed in writing as an authorised officer by the principal officer (s 36).

The principal officer must ensure there is a sufficient number of authorised officers to be readily accessible to public officials who belong to the agency (s 59(1)). This includes former public officials and staff of contracted service providers (s 69).

[1] P Roberts, A J Brown & J Olsen, Whistling while they work, 2011, ANU E Press, p. 18.
[2] The principal officer may be different from the accountable authority under *Public Governance, Performance and Accountability Act 2013* and the head of agency under the *National Anti-Corruption Commission Act 2022*.

Authorised officers require good judgement and should be skilled in dealing with sensitive matters. Importantly, the principal officer must take reasonable steps to ensure that an authorised officer belonging to the agency is given training and education appropriate for the position within a reasonable time of assuming that position (s 59(8)). Authorised officers must be familiar with the provisions of the PID Act so they can provide advice to disclosers and potential disclosers about the process and the protections available to them (s 60).

To maintain the separation of allocation and investigative processes, officials who are appointed as authorised officers generally should not also be delegates of the principal officer. However, if this is not feasible due to an agency's size, it is best practice that an investigation is not undertaken by the same authorised officer that received and allocated the disclosure.

Authorised officers are not required to be the most senior officers in an agency. Rather, it is preferable to establish a network of authorised officers that are appointed across various levels (i.e., APS, EL, SES), and located in different work areas and, where applicable, geographic locations within an agency to ensure that they are accessible to all staff in the agency.

There is a risk that requiring disclosures to be made to a particular area or officer may discourage certain staff to be forthcoming or may raise a conflict of interest. In deciding how many authorised officers to appoint, and who they should be, the principal officer should consider factors such as:

- the size of the agency
- the profile and seniority of the officials who belong to the agency
- the nature of the work performed in the agency
- areas with higher risk and opportunity for 'disclosable conduct' such as fraud
- the geographical location of staff (and their supervisors and managers).

The principal officer must ensure public officials who belong to the agency are aware of the identity of each authorised officer in the agency (s 59(1)). Section 7 of the PID Standard states that principal officers must ensure their agency provides an effective means for potential disclosers to find out how to contact authorised officers.

The contact details of authorised officers should be easy to find, for example, on the agency's intranet or in staff bulletins. Given that public interest disclosures may be made by former public officials or officials in other agencies, details for contacting authorised officers should also be available on each agency's website.

Provided there are also avenues for making disclosures by telephone or in person, it is open to an agency to set up an online system for receiving written disclosures, such as through a web-based form, or to use a generic email address such as 'pid@agencyname.gov.au'. However, it is important to restrict access to disclosures received through these channels, so that only people legitimately performing a function under the PID Act can become aware of the disclosed information (noting that only an authorised officer can receive and allocate an internal disclosure[3]).

3.2.2 Establishing agency PID procedures

The principal officer of each agency is responsible for establishing written procedures for facilitating and dealing with public interest disclosures relating to their agency (s 59(3)). Those procedures must, as a minimum, meet the requirements under the PID Act and PID Standard:

- The PID Act requires that the procedures must deal with the assessment of risks that reprisals may be taken in relation to disclosures about the agency, provide for confidentiality of investigative processes, and comply with any standards in force under s 74(1) and (s 59(4)).
- The PID Standard establishes additional requirements for agency procedures relating to record keeping and notification in relation to allocating or the handling of a disclosure, conduct of disclosure investigations, and support for public officials who make disclosures relating to the agency.

[3] Although a supervisor may receive an internal disclosure from an official that they supervise, if the supervisor is not an authorised officer, their role in handling that disclosure is to give the information to an authorised officer of the agency as soon as reasonably practicable (s 60A(3), PID Act). A supervisor also has other obligations under the PID Act, including to explain to the discloser that the disclosure could be treated as an internal disclosure, that an internal disclosure would be given to an authorised officer, allocated and investigated under the PID Act, that it may be referred to another agency, person or body and that there are civil and criminal protections in relation to such disclosures (see 3.3.2 of this guide).

To minimise uncertainty within the agency, and to promote consistency in handling disclosures across the public sector, agency PID procedures should be comprehensive, clearly expressed and use terminology consistent with the PID Act and PID Standard.

Provided the legal requirements are met, agencies may develop their own policies and procedures to reflect their specific functions and responsibilities. Agencies may wish to specify in their PID procedures their preferred pathway for making a disclosure. For example, an agency's procedures might encourage officials to make disclosures about certain matters to an authorised officer in a particular area, or directly to an authorised officer rather than via a supervisor. However, an agency cannot prevent a person from making a disclosure anonymously or via another avenue, such as their manager or supervisor, or directly to the principal officer.

Each agency should carefully consider the target audience for its procedures. This includes current and former public officials, contracted service providers and their sub-contractors, as well as other people who might be 'deemed' public officials because they have information about suspected wrongdoing as a result of their close contact with agency officials (s 70 – see 4.1.2 of this guide). The agency's PID procedures should not only be available to those people, but also be appropriate to their situation.

Some agencies will choose to have an overarching policy document which sets out general principles –including the agency's commitment to public interest disclosures and expectations of staff – with a separate document containing more detailed procedures for receiving, managing and investigating public interest disclosures. Other agencies will prefer to include general policy and detailed procedures in a single document.

Whatever format is used, agency PID procedures should:

- explain the legislative basis of the PID scheme and what it is about
- state the agency's commitment to a culture that encourages reporting wrongdoing
- define 'public official' as the term applies within that agency
- explain how someone may be 'deemed' a public official so they can make a disclosure
- identify the types of wrongdoing that can be reported
- set out the protections available under the PID Act, for disclosers and others (e.g., witnesses and other officials) and the consequences at law (both criminal and civil) that apply to a person who takes reprisal action
- outline the obligations of principal officers, authorised officers and supervisors under the PID Act
- explain how reprisal risk will be assessed and when the risk assessment will be reviewed
- explain the circumstances in which a public interest disclosure may be referred to an agency or body under another law of the Commonwealth, including under the *National Anti-Corruption Commission Act 2022* (NACC Act). This should, among other matters, cover:
  - the mandatory obligation under s 35 of the NACC Act for PID officers (including authorised officers and principal officers) to refer corruption issues to the NACC that they suspect raise serious or systemic corrupt conduct, and
  - that, where a referral has been made to the National Anti-Corruption Commission (NACC), an agency should continue to investigate the disclosure, unless a stop action direction under s 43(1) of the NACC Act is issued in relation to the disclosure (s 39 of the NACC Act)
- outline confidentiality, anonymity, and secrecy considerations at all stages of an agency handling a public interest disclosure, as well as the role of authorised information sharing between agencies (see 8.1 of this guide)
- provide for thorough documentation of all actions, conversations and decisions (including the reasons for decisions) relating to a disclosure
- include the contact details for the agency's authorised officers (or provide links to that information in a form accessible for all current and former officials belonging to the agency)
- provide advice for disclosers, including:

- advising disclosers to be clear and factual, and to avoid speculation, personal attacks and emotive language, which can divert attention from the real issues in their disclosure
- stipulate that disclosers should not investigate a matter themselves before making a disclosure, as this may hinder a future investigation
- inform disclosers that the sooner they raise their concerns, the easier it is likely to be for the agency to take action

» outline the investigative process and notification requirements

» complement other relevant agency procedures, such as those relating to performance management, disciplinary action and investigation of fraud and corruption

» specify how the agency will manage its reporting obligations to the Ombudsman and the IGIS, including the requirement to provide the Ombudsman or the IGIS (as appropriate) with a copy of every investigation report

» include reference to the options of making a disclosure to the Ombudsman, the IGIS or prescribed investigative agencies

» set out the grounds under which external disclosures, emergency disclosures and legal practitioner disclosures may be made.

Agencies may wish to specify in their procedures that, depending on the circumstances, a discloser should think about covering as many of the following matters as possible in their disclosure so as to help the agency to determine how to proceed:

» their name and contact details

» the nature of the suspected wrongdoing

» who they believe committed the suspected wrongdoing

» when and where the suspected wrongdoing occurred

» how they became aware of the suspected wrongdoing

» whether the suspected wrongdoing has been reported to anyone else

» if so, what that person has done to fix, stop or prevent it

» whether they are concerned about possible reprisal as a result of making a disclosure.

3.2.3 Fostering agency culture

People are more likely to have confidence in the PID scheme and report wrongdoing if they trust that appropriate action will be taken, and they will be supported in raising their concerns and be protected from reprisals. The PID Act is designed to promote a pro-disclosure culture by ensuring there is a clear framework under which public officials can report wrongdoing and be protected and supported when doing so. Principal officers have a crucial role in fostering a pro-disclosure culture through their obligation to encourage and support public officials in their agency who make, or are considering making, a disclosure, as well as any other persons who provide assistance in relation to those public interest disclosures (s 59(2)). As part of this obligation, principal officers should ensure that agency managers at all levels fully support reporting of wrongdoing and are committed to ensuring appropriate action is taken in response.

Components of a pro-disclosure culture in an agency include:

» policies and procedures which demonstrate the agency's endorsement of the reporting of wrongdoing and the protection of disclosers and other officials in the agency (including witnesses), covering both current and former officials of the agency

» a clear statement of the agency's commitment to the highest standards of integrity and accountability, and support for officials who report wrongdoing – for greatest effect, this would be signed by the principal officer and placed at the start of the agency's policy or procedures on public interest disclosures

- adequate resources (both human and financial) allocated to implement the PID policies and procedures
- senior managers who endorse the principles of the PID Act and work to ensure that managers below them have a positive attitude to the reporting of wrongdoing and are aware of their responsibilities under the PID Act
- managers and supervisors who believe that early identification of concerns within their team or work unit will assist them to resolve issues directly and avoid criticism for having failed to prevent problems in the first place, noting that managers may themselves be disclosers
- line managers and supervisors who provide genuine support to disclosers and are empowered to effectively manage their workplace in the event of any conflict or threat of reprisal
- specialist areas (such as human resources, internal audit and ethical standards units) that promote and advise people about the PID scheme and understand how it intersects with their work
- proactive corporate governance systems which treat dealing with potential wrongdoing as part of the provision of a safer workplace, for example by taking reasonable steps to prevent and address inappropriate behaviour such as harassment and victimisation
- staff who are aware of and support agency systems, policies and procedures relating to public interest disclosures.

Addressing these matters will also go some way to meeting a principal officer's obligation to support officials in their agency, and to protect them from reprisal action (ss 59(2) and 59(9)).

3.2.4 Staff awareness and training

Each agency should ensure that its staff and contracted service providers are aware of what a public interest disclosure is, what action to take if they suspect wrongdoing, how disclosures will be dealt with, and the protections that are available to them. Research has shown a strong relationship between an employees' belief they are covered by public interest disclosure legislation and their likelihood of reporting wrongdoing.[4]

The PID Act requires principal officers to encourage and support public officials who make a public interest disclosure, as well as those who are considering making a disclosure or providing assistance in relation to a disclosure. Principal officers must also provide public officials belonging to their agency with ongoing training and education about the PID Act, including on:

- integrity and accountability
- how to make a public interest disclosure
- the protections available under the PID Act
- the performance of functions under the PID Act by officials in the agency, and
- the circumstances (if any) where a public interest disclosure must be referred under another law of the Commonwealth.

The principal officer must also take reasonable steps to ensure that public officials appointed to a position that may require them to perform functions under the PID Act are given training and education appropriate for the position, including for managers and supervisors. The training must be provided within a reasonable time of the person being appointed to that position. Additional or renewed training should be provided if a person's functions or duties under the PID Act evolve or change or where refresher training would be beneficial.

Agencies should consider the need to develop specialised training for different audiences amongst their staff:

- Supervisors should receive ongoing training or education to recognise when a matter may be a public interest disclosure and what action to take. This includes ensuring staff are protected against reprisals and that supervisors can meet their obligation under the PID Act to provide assistance and explain certain matters to disclosers (see 3.3.2 of this guide). They should be aware of how their agency's various policies relate to each

[4] Roberts, Brown & Olsen p. 28, citing P Roberts, 'Evaluating agency responses: the comprehensiveness and impact of whistleblowing procedures' in A J 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, Canberra, pp. 237-243.

other, so that they can make judgements to inform the discloser about the appropriate course of action and explain relevant matters to them (for example, policies on bullying and harassment, workplace health and safety, Code of Conduct matters). This training should be recognised as part of general management competency requirements.

- Authorised officers need ongoing training and education about their specific responsibilities under the PID Act, including making allocation decisions, notification requirements, conducting risk assessments and supporting disclosers. As part of their training on making allocation decisions, authorised officers should be provided with training and education about any related or available pathways that a public official in their agency may use to pursue an allegation of wrongdoing.
- Investigators may need specialised training in conducting investigations, including investigation planning, procedural fairness requirements, interviewing witnesses, analysing evidence and report writing. It is up to each agency to ensure the necessary specialist skills are available. However, it is appropriate for agencies to have a number of different investigators available with a variety of skills and experience, who can be allocated matters to investigate according to their skills and experience.

It is also recommended that agencies provide training to staff in specialist areas (e.g., human resources, internal audit, fraud prevention and integrity hotlines) who need to understand how their subject matter interacts with the PID Act, how an official may use the PID Act, and their agency's PID processes to report suspected wrongdoing and receive protections for doing so.

Staff training and awareness activities that focus on the PID Act can also be a useful way to emphasise the positive aspects of a culture of disclosure. Agencies can explain that making a disclosure under the PID Act is one way for officials to report suspected wrongdoing. Agencies can advise officials of the other reporting mechanisms available and give officials the information they need to choose the best path.

Agency PID procedures must be readily accessible to all current and former public officials belonging to an agency. At a minimum, the procedures should be published on the agency's intranet page (for current employees) and on the agency's website for former employees and those who are providing goods or services to, or on behalf of the agency under a Commonwealth contract.

Publication of public interest disclosure procedures on the agency's website is consistent with the requirements of the Information Publication Scheme under the *Freedom of Information Act 1982* (FOI Act).

The Ombudsman's office has a range of information sheets and other guidance materials about the PID scheme on its website www.ombudsman.gov.au. Agencies can download the Ombudsman's PID scheme logo to brand PID information on their internal and external websites.

3.3 OTHER KEY PID ROLES AND RESPONSIBILITIES

All public officials have responsibilities in relation to public interest disclosures. Some responsibilities are listed in the PID Act, while others reflect good corporate governance and ethical behaviour.

Following is a discussion of the role and responsibilities of:

- authorised officers (see 3.3.1)
- managers and supervisors (see 3.3.2)
- responsibilities of all public officials (see 3.3.3)

3.3.1 Authorised officer responsibilities

Authorised officers are officers of an agency authorised in writing by the principal officer for the purposes of the PID Act (s 36). Authorised officers are responsible for receiving and allocating disclosures under the PID Act, including carrying out the responsibilities that go along with these functions (see chapters 4 and 5 of this guide). It is *not* the role of an authorised officer to investigate a disclosure or determine the veracity of the allegations that make up a disclosure.

Authorised officers also have a range of other responsibilities under the PID Act, including:

- explaining the requirements of the PID Act to an individual, in particular, informing them that a disclosure

could be treated as an internal disclosure, before making an allocation decision (ss 60(1)(c)) and 60(1)(d))

- taking reasonable steps to protect public officials who belong to an agency against reprisals that have been, or may be, taken in relation to a public interest disclosure that has been made, may have been made, is proposed to be made or could be made to the officer (s 60(2)).
- advising the individual about the circumstances (if any) in which a disclosure must be referred to an agency, or other person or body, under another law of the Commonwealth – including to the NACC (s 60(1)(da))
- advising the individual of any designated publication restrictions[5] that the authorised officer is aware apply to the information they have disclosed (s 60(1)(e)), and
- deeming a person to be a public official to allow them to make a public interest disclosure (s 70).

Agencies may also wish to designate a particular authorised officer, or an officer in another area to:

- be a contact point in the agency for general advice about the operation of the PID Act
- liaise with the Ombudsman or the IGIS on related matters as required.

3.3.2 Manager and supervisor responsibilities

A public official may make a disclosure to their 'supervisor' (s 26). A supervisor includes any public official who supervises or manages the discloser (s 8), including the principal officer of an agency. It is recommended that each agency's internal PID procedures clearly describe who is considered to be a supervisor or manager for which officials, by reference to the specific working arrangements and structure in that agency.

Supervisors play a key role in the public interest disclosure process. If a public official discloses information to their supervisor and the supervisor has reasonable grounds to believe the information concerns, or could concern, disclosable conduct, the supervisor must give that information to an authorised officer in the agency as soon as reasonably practicable (s 60A(3)). Under the PID Act, a supervisor must also ensure they explain the following matters to a discloser:

- that their disclosure could be treated as an internal disclosure
- the procedures under the PID Act for the disclosure to be given to an authorised officer, allocated to an agency and investigated by a principal officer of the agency to which the disclosure is allocated
- the circumstances (if any) in which a disclosure must be referred to an agency, or other person or body, under another law of the Commonwealth, and
- the civil and criminal protections the PID Act provides to protect disclosers and witnesses from reprisal action (s 60A(2)).

Managers and supervisors also have a key role in ensuring the workplace culture supports the making of public interest disclosures, and the individuals that make them. They can help to do so by:

- having good general awareness of the PID Act and agency procedures, particularly in relation to what is 'disclosable conduct' and their obligation to inform an authorised officer
- being careful to observe confidentiality requirements
- knowing who the authorised officers are in their agency
- being approachable to staff who wish to raise concerns
- holding awareness sessions or discussion forums for their staff
- ensuring all staff undergo available training and education
- ensuring staff are aware of ways to submit an anonymous disclosure or by using a pseudonym

[5] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

- confronting any workplace prejudices about making a disclosure
- supporting a staff member who they know has made a public interest disclosure and ensuring they are protected from reprisal, and supported during an investigation
- paying close attention to interactions in the workplace (for example, if workplace conflict occurs after a disclosure is made or while it is being investigated)
- ensuring identified problems in the workplace are corrected
- setting an example for staff through their own conduct and ethical approach.

3.3.3 Responsibilities of all public officials

Section 61 of the PID Act requires all public officials to use their 'best endeavours' to assist the principal officer in the conduct of an investigation, and to assist the Ombudsman or the IGIS in their functions under the PID Act. In addition, it also requires all public officials to use their best endeavours to assist any other public official to exercise a right, or perform a duty or function, under the PID Act. Importantly, persons assisting the principal officer of an agency or their delegate with their functions under the PID Act are immune from criminal and civil liability, and disciplinary action, for acts or omissions done in good faith when providing such assistance. Persons providing assistance in relation to a public interest disclosure (a witness) also receive immunity from criminal, civil and administrative liability for providing assistance in accordance with s 12A of the PID Act (see chapter 8 of this Guide).

In seeking to promote a pro-disclosure culture, public officials might also be expected to share general responsibility for ensuring the PID scheme works effectively by:

- promoting awareness of PID scheme across all levels of staff (i.e., APS, EL, SES)
- escalating to an appropriate person (a supervisor or authorised officer) any matters where there is evidence that shows or tends to show disclosable conduct
- identifying areas where there may be opportunities for wrongdoing to occur because of inadequate systems or procedures, and proactively raising those with management
- maintaining confidentiality whenever they are aware of the identity of a discloser, of anyone against whom an allegation has been made, or of anyone who has contributed to a disclosure investigation
- providing assistance and support to staff in relation to a public interest disclosure
- reporting to an appropriate person (a supervisor or authorised officer) any threats or reprisal action in relation to a disclosure.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 4: Receiving internal disclosures

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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COMMONWEALTH OMBUDSMAN

4 Receiving internal disclosures

4.1 RECEIVING AN INTERNAL DISCLOSURE FROM A PUBLIC OFFICIAL

An 'internal disclosure' is a disclosure made by a current or former public official to an authorised recipient or a supervisor of the discloser, where the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct. A disclosure is not an internal disclosure if it is made in the course of performing the discloser's ordinary functions as a public official (see 4.1.3.1).

An internal disclosure can be made in a variety of ways. Agency procedures should make clear that a current or former public official has a choice about how to report suspected wrongdoing. Where agencies have a preferred option for how disclosures should be made (for example, large agencies may have specialist integrity units), they may wish to specify that preferred option in their procedures. However, an agency cannot prevent a person from making a disclosure via any of the avenues specified in s 26 of the PID Act.

4.1.1 A current or former public official

A current or former public official may make a public interest disclosure, and receive protection, under the PID Act. 'Public official' is broadly defined, covering people in or with a relevant connection to the Commonwealth public sector, including staff of contracted service providers (s 69 – see 2.3.1 of this guide for more information). Agencies' procedures should identify the categories of public officials that belong to that agency, considering all of the ways that it delivers its services to the public (including key contracted service providers and their officers or employees).

4.1.2 A 'deemed' public official

A person who is not a current or former public official can make a public interest disclosure under the PID Act only if they are 'deemed' to be a public official by an authorised officer. An authorised officer who believes on reasonable grounds that the person has information that concerns disclosable conduct may, by written notice, 'deem' someone to be a public official so they can receive a disclosure from them about the agency to which the authorised officer belongs (s 70 - see 2.3.2 of this guide for more information).

This may be appropriate, for example, if a former volunteer with an agency or someone who has received funding from the Australian Government (including grant recipients) has 'inside information' about wrongdoing in an agency. It might also be appropriate in circumstances where there is uncertainty around whether the person is a current public official, but the authorised officer is satisfied that the person was not a public official at the time the information they are disclosing was obtained.

4.1.2.1 How to 'deem' a person to be a public official

An authorised officer can deem a person to be a public official on the authorised officer's own initiative or in response to the person's request (s 70(2)).

The authorised officer does this by issuing a written notice to the person stating the PID Act has effect, and is taken always to have had effect, in relation to the disclosure of the information as if the individual had been a public official when they obtained the information (s 70(1)). This notice is not a legislative instrument (s 70(4)).

If the authorised officer refuses a person's request that they be deemed a public official, the authorised officer must tell the person the reasons for their refusal (s 70(3)).

The power to deem a person to be a public official does not apply if the person is a judicial officer, a member of a Royal Commission, a member of Parliament, or a person employed or engaged under the *Members of Parliament (Staff) Act 1984* (Cth) (Mop(S) Act) (s 70(3A)).

4.1.3 How can an internal public interest disclosure be made?

An internal disclosure can be made to a supervisor, manager or authorised internal recipient (see 5.1.2 of this guide).

In most circumstances, a person making a public interest disclosure does not need to expressly state, or even intend, the disclosure is being made under the PID Act (s 28(3)). A person does not even have to know the PID Act exists to make a disclosure or to be covered by the protections in the PID Act. Simply conveying information about possible disclosable conduct (see Chapter 2 of this guide) to a person who is entitled to receive a disclosure under the PID Act (an authorised officer, supervisor or the NACC) is sufficient.

If a disclosure is allocated for investigation by an authorised officer, the principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if they are advised by either the discloser, an authorised officer of the agency or a principal officer or authorised officer of another agency that the discloser does not wish the investigation to be pursued, **and** the principal officer is satisfied on reasonable grounds that there are no matters concerning the disclosure that warrant investigation (s 48(1)(h)). One situation where this ground might apply is if an official makes a disclosure unintentionally (see 6.2.5 of this guide).

4.1.3.1 Information disclosed as part of ordinary functions

Information which is conveyed in the course of a public official's ordinary functions is not a public interest disclosure (s 26(1), table item 1, column 3, paragraph (b)). This means that discussions that routinely occur in areas of an agency where the everyday functions involve inquiring into and investigating wrongdoing will not be a public interest disclosure. For example, routine discussions in an agency's fraud area about suspected incidents of fraud and related wrongdoing would be part of the role of public officials working in that area and would not constitute a public interest disclosure. In such circumstances, if a public official wants to engage the PID Act in relation to a disclosure, the public official will need to make clear that their intention is to make a public interest disclosure when they disclose suspected wrongdoing.

4.1.3.2 Form of disclosure

A person can make a disclosure orally or in writing (s 28(1)). If a disclosure is made orally, the officer receiving it (the authorised officer or supervisor) should make a record of what was said. It is good practice to ask the discloser to sign the record, or otherwise confirm in writing, to acknowledge it is correct.

4.1.3.3 Uncertainty about whether the information tends to show disclosable conduct

If a supervisor or manager is unsure whether the information disclosed to them tends to show disclosable conduct, they should err on the side of caution and refer the information to an authorised officer to decide whether to allocate for investigation under the PID Act (see 5.1.3 of this guide). This approach should also be taken if the information disclosed contains conduct that could be personal work-related conduct but may also include disclosable conduct (see Chapter 5 of this guide). In all cases, the supervisor should let the official know that the disclosed information will be referred to an authorised officer as soon as reasonably possible. The supervisor must also explain specific matters relating to the operation of the PID Act to the official (see 3.3.2 of this guide).

4.1.4 Can a discloser be anonymous or use a pseudonym?

Disclosers do not have to identify themselves and may remain anonymous (s 28(2)). Remaining anonymous means disclosers do not have to identify themselves at any stage to anyone, including the authorised officer who receives the disclosure. If the disclosure comes from an email address from which the person's identity cannot be determined, and the discloser does not identify themselves in the email, it should be treated as an anonymous disclosure.

Alternatively, a discloser may wish to use a pseudonym. This may be appropriate in circumstances where the discloser is identifiable to their supervisor or an authorised officer but decides to hide their identity from others.

As detailed in Chapter 5, an authorised officer must, as soon as reasonably practicable, provide written notice to relevant agencies and principal officers of various matters (ss 44(2) and (3)). Where a discloser has consented, this includes the discloser's name and contact details, if known to the authorised officer (s 44(2)(d)). Consent must be positive and cannot be assumed. As such, it is open to the discloser not to consent to the provision of their contact details to all relevant agencies and principal officers. For instance, a discloser may consent to their details being provided to the Ombudsman or the IGIS but not to the principal officer of the agency to which the disclosure is

allocated. A discloser's reasons for withholding or providing such consent is irrelevant. Where the contact details of a discloser are known to an authorised officer, it is good practice to ask the discloser if they consent to their name and contact details being providing to both relevant agencies *and* principal officers.

As provided in Chapter 2, one of the requirements for making a public interest disclosure is that the person is, or was, a public official (s 26(1)) (see 2.3). This does not mean that the person has to prove their status beyond doubt. They may simply give information that supports that status, for example, by stating that they used to work for the agency or otherwise explaining how they know about the suspected wrongdoing they are reporting. If they do not, the authorised officer may wish to ask questions along these lines (if the person has provided contact details).

However, given the purpose of the PID Act is to encourage disclosure of suspected wrongdoing and ensure it is properly dealt with, authorised officers should be generous in their interpretation of the requirement that the discloser is a current or former public official, and treat an anonymous discloser as such unless, on balance, the evidence suggests otherwise. If the authorised officer is not satisfied that the discloser is or was a public official, they should consider whether to deem the person to be a public official (see 2.3.2 of this guide).

Agency procedures should state that disclosures may be made anonymously and clearly explain what anonymity entails, and when a person may wish to consider using a pseudonym instead. Staff should be assured that anonymous disclosures will be acted on whenever possible. However, the procedures should also note that there are reasons why staff might consider identifying themselves to an authorised officer, or provide an anonymous means of contact (such as an email address that does not include their name), so that they can at least be notified of the progress of the matter as required by the PID Act:

- The PID Act requires agencies to keep a discloser's identity confidential, subject to limited exceptions including the discloser's consent (ss 20 and 21). The person's identity may nonetheless become apparent if an investigation is commenced. If the person's identity needs to be disclosed or is likely to become apparent, the agency should discuss this with them.
- It will be difficult to ensure protection from reprisal if the agency does not know the discloser's identity.
- If the authorised officer receives an anonymous report, it may be difficult for them to assess whether the discloser believes on reasonable grounds that the information tends to show disclosable conduct. In some cases, the matter may not be able to be allocated if the authorised officer is not able to contact the discloser because they have made their disclosure anonymously. However, authorised officers should also consider if there are other people from whom they can obtain information in order to inform their decision about allocation.
- It may also be difficult to investigate if the discloser cannot be contacted for further information. An investigator has discretion not to investigate, or further investigate, a disclosure if it would be impractical to do so because the discloser has not provided their name and contact details or is unable to give the investigator further information or assistance if needed (s 48(1)(i)).
- A discloser who does not provide a means of contact cannot be updated on the progress of the matter, including the outcome of the investigation.

Agency procedures should also note that a person who has made an anonymous disclosure may come forward at a later stage to disclose their identity and confirm that they have the protections of the PID Act.

4.2 WHAT INFORMATION SHOULD THE DISCLOSER PROVIDE?

4.2.1 Information about the suspected wrongdoing

The PID Act does not require the discloser to prove there has been disclosable conduct when they make a disclosure. The discloser only needs to provide information that tends to show one or more instances of disclosable conduct, or alternatively, that they believe on reasonable grounds that the information tends to show that there has been one or more instances of disclosable conduct. Once the disclosure is made, it is the responsibility of the principal officer to decide whether and how to investigate it.

Agency procedures should:

- advise disclosers to be clear and factual and avoid speculation, personal attacks and emotive language, which can divert attention from the real issues in their disclosure

- stipulate that disclosers should not investigate a matter themselves before making a disclosure, as this may hinder a future investigation
- inform disclosers that the sooner they raise their concerns, the easier it is likely to be for the agency to take action (see 3.2.2 of this guide).

Section 3.2.2 of this guide details information agencies may wish to include in their PID procedures about the information a discloser should consider covering in their disclosure to help the agency to determine how to proceed.

An authorised officer may ask the discloser for further information to inform their allocation decision. This could include any supporting correspondence or other documents, such as file notes or a diary of events, and the names of any people who witnessed the conduct or may be able to verify what the discloser is saying. While a discloser must use their best endeavours to assist a public official performing a duty under the PID Act, including authorised officers (s 61(4)), this does not involve collecting or producing information beyond what they would ordinarily and reasonably be able to access.

4.2.2 Is the discloser's motive relevant?

A person receives protection if they report disclosable conduct in compliance with the PID Act. The discloser's motive in making their disclosure is not relevant to a decision about allocation, as long as the information disclosed tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.

The discloser's motive or intention does not determine whether investigation is warranted. There can often be a history of conflict in a workplace, particularly if the person has tried to report wrongdoing in the past and they feel their concerns have been dismissed or ignored. This does not mean that their disclosure should be discounted. Authorised officers and supervisors receiving disclosures must be careful to look at the substance of the report rather than focusing on what they believe to be the person's motive for reporting.

When taking information from the discloser, it is nonetheless important to emphasise to the person that they should try to remain factual and focus on the issues related to the suspected wrongdoing, putting aside emotions or unrelated events.

4.3 PROTECTION FOR THE DISCLOSER

A person who makes a public interest disclosure in compliance with the PID Act will be covered by a range of legislated protections, including immunities from liability and protections from reprisal. These are discussed further in Chapter 8 of this guide.

Even if the disclosed information turns out to be incorrect, cannot be substantiated, or discretion is exercised not to investigate (or not to further investigate) the disclosed information (s 48), a discloser will receive the immunities under the PID Act, provided that they:

- made a public interest disclosure in accordance with the PID Act
- do not knowingly make false or misleading statements (s 11)
- do not knowingly provide information which contravenes a designated publication restriction, without a reasonable excuse for that contravention (s 11A).[1]

Agencies should make it clear that the immunities under the PID Act do not extend to protect a person from liability for knowingly making false or misleading statements (s 11). Agencies may wish to refer an incident of false reporting to the appropriate area for consideration of disciplinary action. However, agencies should be cautious about referring borderline cases of false or misleading statements, as this may unintentionally deter other staff from making disclosures.

Agency procedures should emphasise that making a disclosure does not protect the discloser from the consequences of their own wrongdoing, including where they have been involved in the misconduct they are reporting. The discloser's immunity from liability under the PID Act relates only to the act of making the public

[1] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

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interest disclosure, not the conduct the disclosure is about.

Where a discloser comes forward with information that tends to show serious wrongdoing in which they had minor involvement, it is up to the agency to decide whether the discloser's actions should also be investigated and addressed.

Even where a discloser is not entitled to immunities under the PID Act, the protections against reprisal action – including the positive duties of the principal officer and authorised officer – may still apply (see Chapter 8 and 5.6 of this guide).

4.4 THE DISCLOSER'S OBLIGATIONS

The authorised officer should emphasise to the discloser that they should not discuss the details of their disclosure with anyone who does not need to know about it. Discussions with people who are not performing a function under the PID Act will not be for the purposes of the PID Act and therefore would not be covered by the protections in the PID Act (unless the discussion meets the criteria for an external disclosure, emergency disclosure, legal practitioner disclosure or NACC disclosure, see 2.7.5 of this guide).

All public officials must use their best endeavours to assist in any investigation (s 61). Therefore, the discloser should be prepared to provide further information that they may reasonably hold, to help the investigator.

The authorised officer should emphasise to the discloser that they should not investigate a matter themselves before making the disclosure or during an investigation. The authorised officer should emphasise that any such action by a discloser may risk compromising an investigation into the conduct (either under the PID Act or another framework), including any outcome or sanction that may be applicable to the alleged wrongdoer. The authorised officer may also wish to advise that a discloser is also unlikely to receive immunities under the PID Act for any investigative actions they undertake, and therefore may be liable if they breach any law in the course of undertaking their own investigation.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 5: Initial assessment and allocation under the PID Act

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COMMONWEALTH OMBUDSMAN

5 Initial assessment and allocation under the PID Act

Once an authorised officer has received a disclosure of suspected wrongdoing (either directly from the discloser, or via the discloser's supervisor), the PID Act requires them to take certain steps.

The authorised officer should promptly perform an initial assessment of the disclosure, noting they must use their best endeavours to make an allocation decision within 14 days, unless there is a good reason why they need further time (s 43(11)).

The 14-day timeframe commences the day after:

- the day the disclosure is made or given to an authorised officer, if no previous decision has been made about the allocation
- the day the principal officer of the recipient agency receives the recommendation under that section, if the allocation decision is made following the reconsideration of a previous decision about the allocation in response to a recommendation from the Ombudsman or the IGIS, or
- if a stop action direction under the NACC prevented allocation, the day when the authorised officer becomes aware that the direction no longer applies.

An example of an acceptable reason for taking more than 14 days to allocate a disclosure would be when the authorised officer needs to undertake preliminary enquiries to decide whether a disclosure meets the threshold for an internal disclosure but cannot conclude those inquiries within 14 days.

In making an allocation decision, an authorised officer may either:

- allocate the disclosure to one or more agencies (s 43(3)(a)), or
- decide not to allocate the disclosure to any agency (s 43(3)(b)) where the authorised officer is satisfied on reasonable grounds that:
  - there is no reasonable basis on which the disclosure could be considered a public interest disclosure (as defined in s 26 of the PID Act) (s 43(4)(a)), or
  - the conduct would be more appropriately investigated under another law or power (s 43(4)(b)) (see 5.3.2 below).

The initial assessment and factors to consider in making an allocation decision are explained in more detail below.

5.1 INITIAL ASSESSMENT – IS THE INFORMATION AN 'INTERNAL DISCLOSURE'?

When an authorised officer receives a disclosure of suspected wrongdoing, they must consider the disclosed information and decide whether it meets the criteria for an internal disclosure under the PID Act, including whether they are an authorised internal recipient for that disclosure.

What constitutes an internal disclosure is set out at s 26(1) of the PID Act. An internal disclosure is made when:

- a person who is or has been a public official, or who is deemed to be a public official by an authorised officer (see 2.3.1, 2.3.2, 2.5.1.2, 4.1.1 and 4.1.2 of this guide)
- discloses to an authorised internal recipient - or to their supervisor, who refers the information to an authorised internal recipient – (see 4.1.3 of this guide and 5.1.2 below)
- information which tends to show, or the discloser believes on reasonable grounds tends to show, one or more instances of disclosable conduct (see 2.5 and 2.6 of this guide and discussed below in 5.1.3).

Authorised officers should be mindful that a disclosure will not be an internal disclosure if it is made in the course of performing the discloser's ordinary functions (see 4.1.4.1 of this guide).

If an authorised officer is satisfied on reasonable grounds that a disclosure does not conform to all of these grounds, then it will not be allocated or investigated under the PID Act. A disclosure that does not meet the criteria for a public interest disclosure does not enliven immunities under the PID Act; however, this does not affect the applicability of the reprisal protections under the PID Act – these protections are discussed further in Chapter 8 of this guide.

If a disclosure is not allocated on the basis of an authorised officer's view that it is not an internal disclosure, the authorised officer should still consider and advise on any other courses of action that might be available.

5.1.1 Preliminary inquiries

The PID Act gives an authorised officer the power to obtain information and make inquiries for the purposes of making an allocation decision under the PID Act (s 43(10)).

Making preliminary inquiries is not the same as investigating. The authorised officer's task is to quickly assess the disclosed information to ascertain if they need to know anything more before they can make an informed decision about:

- whether the disclosure of information could be considered an internal disclosure under the PID Act
- whether the authorised officer is an authorised internal recipient for that disclosure (see 4.1.3 of this guide)
- who the disclosure should be allocated to for handling (provided that the answers to the two above preceding questions is 'yes').

Preliminary inquiries could include asking the discloser for further information that they could reasonably be expected to have knowledge of. The authorised officer should be careful to explain to the discloser why they are asking for this information and avoid creating the perception that they doubt the discloser's truthfulness. The authorised officer should also be careful that their questions to the discloser do not give the impression that the discloser is required to collect further evidence or investigate the matter themselves. The officer conducting preliminary inquiries should not seek evidence to confirm or contradict the discloser's information or to reach a conclusion about whether the alleged conduct occurred. This is the task of the relevant principal officer to whom the disclosure is allocated for handling under the PID Act, as part of investigating the disclosure. Further, an authorised officer conducting preliminary inquiries should be careful not to express any criticism of the discloser or any person alleged to have committed wrongdoing, as this can give rise to concerns of bias in a subsequent investigation.

If there is evidence of criminal conduct at that early stage, the authorised officer may consider referring that evidence to police in accordance with the agency's usual arrangements. If the conduct disclosed raises a corruption issue that concerns the conduct of a current or former staff member of the agency and that the authorised officer suspects could involve conduct that is serious or systemic, the authorised officer must refer the conduct to the NACC (or to either the NACC or the IGIS, in the case of an authorised officer in an intelligence agency) (see Chapter 10).

Authorised officers should also be mindful that if the disclosure relates to an intelligence agency or the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs, and the discloser claims the disclosure is 'urgent', the authorised officer must provide written notice of the disclosure to the IGIS within 1 business day (s 45A(2)) (see 9.2.1 of this guide).

5.1.2 Who is an 'authorised internal recipient'?

Section 34 of the PID Act sets out who is an authorised internal recipient of an internal disclosure.

For conduct relating to agencies other than intelligence agencies, an internal disclosure can be made to an authorised officer of:

- the agency to which the conduct relates
- the agency to which the discloser belongs, or last belonged

- the Ombudsman, if the discloser believes on reasonable grounds that it would be appropriate for the Ombudsman to investigate the disclosure
- the IGIS, if:
  - the discloser believes on reasonable grounds that the disclosure relates to the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs, and it would be appropriate for the IGIS to investigate the disclosure, or
- a prescribed investigative agency (other than the Ombudsman or the IGIS), if that investigative agency has the power to investigate the disclosure other than under the PID Act.

For conduct relating to an intelligence agency, an internal disclosure can be made to an authorised officer of:

- the intelligence agency
- the IGIS, if the discloser believes on reasonable grounds that it would be appropriate for the IGIS to investigate the disclosure
- a prescribed investigative agency (other than the Ombudsman or the IGIS), if:
  - none of the information is intelligence information, and
  - that investigative agency has the power to investigate the disclosure other than under the PID Act.

A supervisor or manager (s 26) in any agency can also receive disclosures from persons they manage and must provide the information to an authorised officer in their agency as soon as reasonably practicable:

- if the supervisor or manager reasonably believes that the information concerns, or could concern, one or more instances of disclosable conduct, they must give the information to an authorised officer[1] in the agency they belong to as soon as reasonably practicable after the disclosure is made (s 60A(3))
- in such circumstances, the supervisor or manager must also inform the discloser of relevant matters under the PID Act (s 60(A)(2)) (see 2.7.1.2 and 3.3.2 of this guide).

The NACC, where the disclosure relates to corrupt conduct, can receive and investigate a public interest disclosure where it is also a 'NACC disclosure' for the purposes of the PID Act – that is, the disclosure raises a corruption issue under the NACC Act (see Chapter 10 of this guide).

5.1.3 Does the information 'tend to show disclosable conduct'?

An internal disclosure under the PID Act must include information that:

- tends to show disclosable conduct (an objective test), or
- the discloser believes, on reasonable grounds, tends to show disclosable conduct (a subjective test, based on facts sufficient to induce that belief in a reasonable person).

To assist in assessing these criteria, we discuss below the meaning of the terms 'belief on reasonable grounds' and 'tends to show disclosable conduct'. We also explain that personal work-related conduct is excluded from the definition of disclosable conduct, with limited exceptions.

5.1.3.1 'Tends to show'

A mere allegation with no supporting information is not sufficient to 'tend to show' that wrongdoing has occurred or may be occurring: there must be sufficient information to support the allegation. If there is not, the discloser should be asked for additional information.

However, it is important to remember that a discloser does not need to *prove* their allegations. They need only to provide sufficient information to put the agency on notice that disclosable conduct may have occurred or be occurring.

[1] See 2.7.1.1 and 3.3.1 for an explanation of who is an authorised officer for an agency and how they are appointed.

Agencies should make clear that staff should not investigate a matter themselves before or after making a disclosure. Such actions may prejudice an investigation and may involve actions outside the staff member's authority.

5.1.3.2 'Belief on reasonable grounds'

A belief is more than a suspicion or assertion. To believe something, the person reporting the suspected wrongdoing must honestly hold the view that wrongdoing is more likely than not to have occurred. However, it is not sufficient for the discloser to personally hold the belief that wrongdoing has occurred; rather, they must have 'reasonable grounds' for their belief.

Personal prejudice or animosity towards someone would not, on its own, be 'reasonable grounds' for a belief that wrongdoing has occurred. Some tangible support for the belief would be necessary. This could be based on direct observation of wrongdoing; evidence such as documentary records or missing items of value; or corroboration by other people. It does not need to be evidence which would be admissible in a court of law (for example, hearsay could be considered).

The authorised officer will need to consider the disclosed information and decide whether it would lead a reasonable person to believe, in the circumstances, that wrongdoing is likely to have occurred. The discloser's motive for making the disclosure, or their personal opinion of the person(s) involved are unlikely to be relevant considerations.

5.1.3.3 Personal work-related conduct

If a disclosure only contains information about personal work-related conduct, it will not be a public interest disclosure that requires allocation under the PID Act (s 29) **unless** an exception in s 29(2A) applies.

Personal work-related conduct is defined in s 29A of the PID Act – it is where one official engages in conduct that relates to another public official's engagement, appointment or the exercise of their functions or powers and the conduct has personal implications for that second official. Examples listed in the PID Act include bullying and harassment, conduct relating to the terms and conditions or engagement, disciplinary action, and a number of other types of conduct. It is important to note these are illustrative examples and not an exhaustive list of what may constitute personal work-related conduct.

In assessing whether a disclosure solely about personal work-related conduct should be allocated as an internal disclosure under the PID Act, an authorised officer must consider whether the personal work-related conduct tends to show one or more of the exceptions in s 29(2A). The exception in s 29(2A) means that a disclosure of information about personal work-related conduct **will** be about disclosable conduct if the information tends to show conduct that:

- is reprisal action (s 29(2A)(a))
- is of such a significant nature that it would undermine public confidence in an agency (s 29(2A)(b)), or
- has other significant implications for an agency (s 29(2A)(c)).

If the information that has been disclosed tends to show one of these matters, it will be disclosable conduct for the purposes of making an allocation decision. If the disclosure satisfies all requirements for a public interest disclosure (s 26), the authorised officer must allocate it as a public interest disclosure *unless* the conduct disclosed would be better investigated under another law or power (s 43(4)(b)).

The question of whether the disclosure tends to show conduct that is of 'such a significant nature' that it would undermine public confidence in an agency, or have 'other significant implications' for an agency, will depend on the facts of each case.

Authorised officers should have regard to the PID Act's role as an integrity framework for the public service. Public officials occupy a position of trust, and it is essential that they provide the public with confidence in relation to their conduct. Where a public official engages in wrongdoing, their conduct can potentially have broader implications for the confidence the community has in an agency, or in Commonwealth agencies more broadly. Examples of personal work-related conduct that is of such a significant nature that it would undermine public confidence in an agency could include:

- systemic conduct across the agency or across a significant part or function of an agency, such as systemic, discriminatory employment practices or nepotism
- conduct that relates to the management or control of the agency, or involves serious criminal conduct, where even a single instance, or a small number of instances of the conduct may undermine public confidence in the agency, or
- conduct that calls into question the impartiality or independence (where this is relevant to its status) of the agency.

Examples of personal work-related conduct that may have other significant implications for an agency may include, for example:

- conduct that calls into question the eligibility of an officeholder to hold that office, or
- conduct that relates to, and has the potential to substantially adversely affect, the performance of a core function of the agency.

If the authorised officer is satisfied on reasonable grounds that all the conduct disclosed is personal work-related conduct, and none of it falls with one of the exceptions in s 29(2A), then the disclosure does not contain any disclosable conduct. In the absence of any other information that tends to show disclosable conduct, the authorised officer would have no reasonable basis to on which to consider the disclosure is a public interest disclosure under the PID Act and must decide not to allocate it (s 43(4)(a)).

Disclosures that contain both disclosable conduct and personal work-related conduct that meet the requirements in s 26 of the PID Act for allocation should be allocated as a public interest disclosure under the PID Act *unless* the conduct disclosed would be more appropriately investigated under another law or power.

In assessing whether information disclosed, including personal work-related conduct, tends to show disclosable conduct, the authorised officer should err on the side of caution and, if in doubt, refer the information to a principal officer for investigation.

5.2 BEFORE MAKING AN ALLOCATION DECISION

Before making an allocation decision, the authorised officer must consider whether they have satisfied their obligation under s 60(1) of the PID Act. Section 60(1) applies if the authorised officer has reasonable grounds to believe that a disclosure contains, or could contain, disclosable conduct and that the discloser is unaware of the requirements of the PID Act. The authorised officer must explain to the discloser:

- that the disclosure may be treated as an internal disclosure under the PID Act
- what the PID Act requires for a disclosure to be an internal disclosure
- the circumstances in which a disclosure must be referred to an agency, or other person or body, under another law of the Commonwealth, and
- any orders or directions that the authorised officer is aware of that are designated publication restrictions that may affect the disclosure of the information (see authorised officer responsibilities in 3.3.1 of this guide).

If a disclosure was initially made to a supervisor, before being provided to the authorised officer, the discloser should have been provided with much of this information (see manager and supervisor responsibilities in 3.3.2 of this guide). However, this knowledge should not be assumed, and the authorised officer should check with the supervisor what information the discloser has been given about the requirements and operation of the PID Act.

5.3 DECISIONS NOT TO ALLOCATE A DISCLOSURE UNDER THE PID ACT

Once the authorised officer has considered whether the disclosed information meets the criteria for an internal disclosure under s 26 of the PID Act, they must decide whether or not to allocate it to an agency. There are only two circumstances where an authorised officer can decide not to allocate a disclosure to any agency:

- where there is no reasonable basis on which the disclosure could be considered a public interest disclosure (s 43(4)(a) – see 5.3.1 below) or
- where the conduct disclosed would be more appropriately investigated under another law or power (s 43(4)(b) – see 5.3.2 below).

In either case, the authorised officer must be satisfied on reasonable grounds of the circumstances. The authorised officer is required to notify the discloser and the Ombudsman or the IGIS (as appropriate) of a decision not to allocate the disclosure under the PID Act (s 44A – see 5.3.3 below).

The authorised officer is also required to notify the Ombudsman or the IGIS (as appropriate) if a stop action direction issued by the NACC prevents the authorised officer from making a decision about allocating the disclosure (s 44B – see 5.3.4 below).

5.3.1 No reasonable basis on which the disclosure of information could be considered a public interest disclosure

If the authorised officer is not satisfied that that there is a reasonable basis for considering the information to be an internal public interest disclosure, they are not required to allocate it to an agency for handling under the PID Act (s 43(3) – see 5.1 above). Some examples of matters which an authorised officer would not be satisfied are internal disclosures are:

- a disclosure about the conduct of an employee of a state government agency
- a disclosure that amounts only to an individual's disagreement with government policy
- a disclosure that amounts only to an assertion that all officials within a particular team or branch are corrupt
- a disclosure that is comprised only of personal work-related conduct, and that does not tend to show the conduct was reprisal action or meets one of the other criteria in s 29(2A) (see 5.1.3.3 above)
- a disclosure about a grant recipient.

The Public Interest Disclosure Standards Determination 2025 (PID Standard) requires the authorised officer to make a record of the decision not to allocate the disclosure to any agency, including:

- the decision
- the reasons for the decision
- if the authorised officer is satisfied, on reasonable grounds, that the conduct disclosed would be more appropriately investigated under another law or power, details of the other law or power and the action taken or proposed to be taken to refer or facilitate referral of the conduct for investigation under that other law or power (what constitutes reasonable steps is described further in 5.3.2.1 below)
- any advice provided to the discloser about any courses of action that might be available to the discloser under another law or power.[2]

In considering whether information disclosed tends to show disclosable conduct, the authorised officer should, if in doubt, err on the side of caution and refer the information to a principal officer for investigation, including where the information disclosed may contain both disclosable conduct and other conduct, such as personal work-related conduct, or where the information disclosed relates to personal work-related conduct that may fall within the exceptions provided in s 29(2A).

[2] Section 8 of the Public Interest Disclosure Standards Determination 2025

5.3.2 Conduct disclosed would be more appropriately investigated under another law or power

An authorised officer may decide not to allocate an internal disclosure if they are satisfied on reasonable grounds that the conduct disclosed would be more appropriately investigated under another law or power of the Commonwealth (s 43(4)(b)).

However, an authorised officer cannot decide not to allocate on this basis ***only*** because the conduct disclosed raises a corruption issue that must be referred to the NACC (s 43(4A)). As the NACC is not ***required*** to investigate any of the referrals it receives, the authorised officer cannot be certain that a referral will result in investigation of the disclosure. A disclosure that raises a corruption issue must be referred to the NACC but should continue to be handled in accordance with the PID Act unless the NACC Commissioner issues a stop action direction in relation to the disclosure (see 5.3.4 below).

The option to refer a disclosure for investigation under another law or power provides agencies with the flexibility to respond to disclosures in the way that best addresses the concerns raised. A similar discretion is also available to the principal officer and their delegates after a disclosure has been allocated for investigation (see Chapter 6 of this guide). It is important that authorised officers only refer disclosed conduct where investigation under the other law or power would be ***more*** appropriate than investigation under the PID Act. This might, for example, be because powers available under the other law would be better suited to conducting an effective investigation of the disclosure, or the powers available under the other law include the ability to directly impose disciplinary action if the alleged wrongdoing is substantiated.

The PID Standard requires the authorised officer to make a record of the decision not to allocate the disclosure to any agency including the reasons for the decision. This would include the reason that the authorised officer considers the other law or power is more appropriate.

5.3.2.1 Taking 'reasonable steps' to refer the conduct disclosed

If the authorised officer decides not to allocate the conduct disclosed because it would be more appropriately investigated under another law or power, the authorised officer must, as soon as reasonably practicable, take reasonable steps to refer the conduct disclosed, or otherwise facilitate its referral, for investigation under the other law or power (s 44A(2)). Reasonable steps may include:

- arranging the transfer of documents to the relevant agency
- providing the discloser with the contact details for making a complaint under the more appropriate relevant law or power, and
- providing the discloser with any forms or background information necessary to make the complaint under that other law or power.

What constitutes reasonable steps to facilitate a referral will depend on the individual circumstances. There may be circumstances where a complaint under another law or power must be made by the discloser and therefore cannot be directly referred for investigation by the authorised officer.

5.3.3 Notice requirements for a decision not to allocate

If the authorised officer decides not to allocate a disclosure, the authorised officer must give written notice to both the discloser and either the Ombudsman or the IGIS, as appropriate. The authorised officer must provide this notice as soon as reasonably practicable after making the decision not to allocate.

5.3.3.1 Giving notice to the discloser

If it is reasonably practical to contact the discloser, the authorised officer must notify them in writing of:

- the decision not to allocate the disclosure, including whether the decision was made because:
  - there was no reasonable basis on which the disclosure could be considered a public interest disclosure (s 43(4)(a)) or
  - the disclosure could be considered a public interest disclosure but would be more appropriately investigated under another law or power (s 43(4)(b))
- the reasons for the decision

- if the authorised officer has taken, or proposes to take, action to refer the conduct or facilitate its referral for investigation under another law or power – the details of any such action, including:
  - the other law or power
  - the agency, person or body to which the conduct has been, or will be, referred to
  - the steps taken, or proposed to be taken, for the conduct to be referred or to facilitate its referral (s 44A(4))
- if the authorised officer doesn't propose to take action to refer the conduct – any courses of action that might be available to the discloser under another law or power (s 44A(3)(a)).

It is important to give the discloser as full an explanation as possible – for example, they may have a genuine belief that the conduct they reported was improper but not have been aware of surrounding circumstances which justify the conduct. Failing to give a proper explanation increases the likelihood that the person will lose trust in the agency's public interest disclosure process and may lead them to complain unnecessarily to the Ombudsman or IGIS.

Agencies should make sure they advise disclosers of additional important information to ensure that the discloser understands how the agency considers the PID Act will apply to their disclosure following the authorised officer's decision not to allocate:

- where a disclosure is not allocated under s 43(3), the discloser will not have grounds to make an external disclosure under the PID Act.
- where an authorised officer decides not to allocate a disclosure because they are satisfied there is no reasonable basis on which the disclosure could be considered a public interest disclosure, the discloser is at risk of not receiving immunities under the PID Act (as these only apply where a person makes a public interest disclosure).

Agencies cannot definitively advise as to whether a discloser is protected under the PID Act, only of the allocation decision. Agencies should remain mindful of the possibility that a Court could form a different view to the agency of whether a public interest disclosure has been made and whether, as a question of law, the immunities under s 10 of the PID Act apply.

It is also important to understand that a decision not to allocate does not affect the potential applicability of the reprisal protections under the PID Act – these protections are discussed further in Chapter 8 of this guide.

If it is not reasonably practicable to contact the discloser, the authorised officer is not required to notify the discloser of their decision not to allocate the matter. However, the PID Standard requires the authorised officer to make a record of whether the notice of a decision not to allocate a disclosure was given to the discloser, and if not, why not. This record may be important if the Ombudsman or the IGIS needs to investigate the matter at a later date – for example, as a result of a complaint.

5.3.3.2 Giving notice to the Ombudsman or the IGIS

The authorised officer must also give written notice to the Ombudsman or the IGIS (as relevant) of the following details relating to a decision not to allocate a disclosure (s 44A(3)):

- the decision not to allocate
- the reasons for the decision
- whether the authorised officer has taken, or proposes to take, action to refer the conduct or facilitate its referral for investigation under another law or power, and
- details of any such action, including:
  - the other law or power, and
  - the agency, person or body to which the conduct has been, or will be, referred to, and
  - the steps taken, or proposed to be taken, for the conduct to be referred or to facilitate its referral (s 44A(4)).

5.3.4 Notice of a NACC stop action direction that prevents allocation

The NACC Commissioner may direct an agency head (principal officer) to stop taking specified action (a stop action direction) in relation to a public interest disclosure which involves a corruption issue unless the action is permitted by the Commissioner (s 43 of the NACC Act – see Chapter 10 of this guide). A direction could require the agency not to take particular actions set out in the direction, or not to take action of any kind in relation to a corruption issue.

5.3.4.1 Notifying the discloser

A stop action direction may include or extend to preventing an authorised officer from allocating a disclosure under the PID Act or notifying a discloser about a stop action direction which prevents the allocation of their disclosure under the PID Act.

To help maintain trust in the agency's public disclosure processes, a discloser should be kept apprised of the progress of their disclosure throughout the processes under the PID Act. If a stop action prevents allocation of a disclosure, the principal officer should consider whether it is reasonably practicable and appropriate to provide such notice, including whether:

- the stop action direction prevents the authorised officer providing such notice, and
- the discloser is contactable.

Subject to these considerations, it is best practice for an authorised officer to, as soon as reasonably practicable, notify the discloser in writing that they cannot allocate, or reallocate, the disclosure because of a stop action direction under the NACC Act. Subsequently, if that direction is revoked by the Commissioner, the authorised officer must, as soon as reasonably practicable, inform the discloser if they allocate, or reallocate, the disclosure.

If an authorised officer is uncertain whether a stop action direction would prevent notice being given to the discloser, the authorised officer should seek clarification from the principal officer of their agency, who, in turn, should clarify the remit of the direction with the NACC Commissioner.

If a stop action direction specifically prevents them notifying a discloser about the stop action direction, the principal officer may consider whether:

- permission should be sought from the Commissioner under s 43(3) of the NACC Act to provide notice of the direction to the discloser, and
- the provision of notice would meet any of the relevant exceptions under s 44(1) of the NACC Act (see Chapter 10).

In deciding whether to notify a discloser about a stop action direction under the NACC Act, including whether to seek permission from the Commissioner to do so, a principal officer should consider the impact that notifying a discloser about a stop action direction may have on any investigation conducted by the NACC as well as the effect that a lack of notice would have on the discloser.

5.3.4.2 Notifying the Ombudsman or the IGIS

Where a stop action direction prevents allocation of a disclosure, the authorised officer must also give written notice to the Ombudsman or the IGIS (as appropriate) of the following, (s 44B):

- the information that was disclosed
- the conduct disclosed
- the discloser's name and contact details, if they are known, and the discloser consents to that information being provided to the Ombudsman or the IGIS (as appropriate)
- the stop action direction under the NACC Act that prevents allocation of some or all of the disclosure.

5.4 DECISIONS TO ALLOCATE UNDER THE PID ACT

Once the authorised officer is satisfied that the disclosed information is an internal disclosure and it is appropriate to investigate it under the PID Act, they must allocate it for handling under the PID Act (s 43(3)).

5.4.1 Which agency should a disclosure be allocated to?

The authorised officer may allocate the handling of the disclosure to one or more agencies, including their own agency, an agency in the same portfolio as their agency, the Ombudsman, the IGIS or a prescribed investigative agency (s 43(3)(a)).[3]

In most cases, a disclosure should be allocated to the agency to which the conduct disclosed relates. The principal officer for each agency is required to establish procedures for dealing with disclosures relating to that agency (see 3.2.2 of this guide).

The agency the conduct disclosed relates to will generally be apparent from the information the discloser provides. If it is not apparent, the authorised officer might wish to make preliminary inquiries to determine the most appropriate agency for allocation, including by discussing the issue further with the discloser or with an agency.

In making an allocation decision, the authorised officer must have regard to the principles in s 43(5) that an agency should not handle the disclosure unless one or more of the following circumstances apply:

- some or all of the disclosable conduct relates to that agency
- if the agency is the Ombudsman, some or all of the conduct relates to an agency other than an intelligence agency, or the intelligence functions of an agency prescribed by the PID Act (AFP, AUSTRAC or Department of Home Affairs), or the IGIS
- if the agency is the IGIS, some or all of the conduct relates to an intelligence agency or the intelligence functions of an agency prescribed by the PID Act (AFP, AUSTRAC or Department of Home Affairs)
- if the agency is a prescribed investigative agency (other than the Ombudsman or the IGIS), that agency has the power to investigate the disclosure other than under the PID Act.

The authorised officer must also have regard to any other matters they consider relevant, including:

- whether another agency in the same portfolio as the recipient agency would be better able to handle the disclosure, which would permit the authorised officer to allocate the disclosure to that agency under s 43(8)
- any recommendations from the Ombudsman or the IGIS under s 55 about the allocation of the disclosure.

If the authorised officer of an agency, other than an investigative agency, wishes to allocate the disclosure to an agency other than their own, this may only be done with the consent of that other agency (see 5.4.3 below).

5.4.2 Allocation to more than one agency

While a disclosure can be allocated to more than one agency under s 43(3)(a), the authorised officer should be careful that this does not create a situation where parallel investigations are conducted into the same matter. Allocation to more than one agency is unlikely to be appropriate except if a disclosure includes distinct issues that are best investigated by separate agencies. In circumstances where more than one agency is allocated a disclosure, it is likely to be appropriate to inform each agency of the other's involvement.

5.4.3 Who needs to consent to the allocation?

If an authorised officer wishes to allocate a disclosure to another agency, they must first obtain the consent of an authorised officer of that other agency (s 43(9)). It is normally be expected that if the matter relates to their agency's activities, the authorised officer will consent. If they do not consent, the authorised officer making the allocation decision will need to determine whether there is another appropriate agency or whether their own agency should investigate the matter.

The authorised officer making the allocation decision may find it appropriate to contact the other agency early in the decision-making process, particularly if they would like some preliminary information to assist them in determining if the matter should be allocated to that other agency.

[3] There are currently no prescribed investigative agencies under the PID Act.

Agencies that have many authorised officers should consider nominating one officer to coordinate and consent to allocations from other agencies, so as to streamline their processes.

Authorised officers who belong to the Ombudsman or the IGIS are not required to obtain consent before allocating a disclosure to an agency. However, an authorised officer belonging to the Ombudsman or the IGIS must *consult* with an authorised officer of the other agency before allocating the disclosure to the other agency for handling.

5.4.4 Can a disclosure be reallocated?

An authorised officer may, after allocating a disclosure to one or more agencies, decide later to reallocate part or all of the disclosure to another agency (s 45(1)). This may happen if the true nature or extent of a problem only becomes apparent during an investigation (for example, if the investigation reveals that staff in another agency appear to have been involved in wrongdoing). An authorised officer may also reallocate a disclosure following a recommendation from the Ombudsman or the IGIS under s 55 of the PID Act (see Chapter 9 of this guide).

5.4.5 Notice requirements for a decision to allocate a disclosure

Once the authorised officer decides to allocate a disclosure to an agency, they must provide written notice to the principal officer of the agency to which the disclosure is allocated, the Ombudsman or the IGIS (as appropriate), and the discloser (if reasonably practicable).

5.4.5.1 Giving notice to the principal officer

When the authorised officer decides to allocate a disclosure to an agency, they must inform the principal officer of that agency (s 44(3)). The authorised officer must provide written notice of the following matters:

- that the disclosure has been allocated to their agency
- the information that was disclosed
- the conduct disclosed, and
- the discloser's name and contact details, if known to the authorised officer and the discloser consents to their details being provided.

The authorised officer should ensure that they ask the discloser for their consent to pass their contact details to the relevant agencies, including the receiving agency.

If the discloser declines, the authorised officer should advise the receiving agency that the discloser was asked and did not consent. If the discloser does not consent to their identity being revealed, they could be asked if they would like to provide an anonymous means of contact (such as an email address that does not include their name), so they can be notified of the progress of the matter as required by the PID Act. While a discloser's name and contact details cannot be provided where the discloser does not consent, an authorised officer should explain to the discloser that other information provided to the principal officer, or relevant oversight agency, for the purposes of the PID Act may enable the discloser to be identified (s 20(3)(a)) (see 5.6.1 below).

The authorised officer can and should provide other relevant materials to the principal officer to facilitate investigation. In considering whether redactions are necessary to supporting documentation provided by a discloser, the authorised officer should consider whether these would diminish the utility of the information.

If the authorised officer allocates the disclosure to more than one agency, they must provide this information to the principal officer of each agency.

5.4.5.2 Giving notice to the Ombudsman or the IGIS

When an authorised officer allocates a disclosure to any agency for handling under the PID Act, they must also inform the Ombudsman, unless the disclosure is allocated to:

- the Ombudsman
- the IGIS

- an intelligence agency, or the AFP, AUSTRAC or Department of Home Affairs in relation to that agency's intelligence functions.

If the disclosure is allocated to an intelligence agency, or to the AFP, AUSTRAC or Department of Home Affairs in relation to that agency's intelligence functions, the authorised officer must inform the IGIS instead. The authorised officer must provide written notice of the same matters they are obliged to inform the principal officer of the receiving agency (s 44(2)). The discloser's name and contact details should not be provided to the oversight agency unless the discloser expressly consents. If they do not consent, the discloser can consider whether they wish to provide a pseudonym email address to the oversight body to use as a means of contact, if needed.

Authorised officers in agencies required to report to the Ombudsman should use the form published on the Ombudsman's website to provide notice of an allocation decision.[4] The IGIS's website www.igis.gov.au also has information to assist agencies who are required to notify it of an allocation decision.

5.4.5.3 Giving notice to the discloser

The authorised officer must, as soon as practicable, provide the discloser with a copy of the written notice provided under s 44(2) to the principal officer of the agency that has been allocated their disclosure for handling under the PID Act (s 44(4)). The authorised officer should make a written record of their decision to allocate the disclosure and when and how they notified the discloser (see 5.5 below). If the authorised officer has decided to allocate the disclosure to their own agency for handling, they should also inform the discloser about the principal officer's discretion to decide:

- not to investigate the disclosure
- not to investigate the disclosure further
- to investigate the disclosure under a separate investigative power
- to investigate the disclosure under another law or power (see 6.1.1 of this guide, and s 14, PID Standard).

The discloser may be notified of the allocation and investigation decisions in a single document (s 50(4)). However, this should only be done if the two decisions are close in time. The notice requirements for a decision not to investigate a disclosure are explained in 6.5 of this guide, and the notice requirements when the disclosure is to be investigated are explained in 7.1.1 of this guide.

If it is not reasonably practicable to contact the discloser, the authorised officer is not required to notify the discloser of their allocation decision (s 44(4)). However, the authorised officer must still make a record of their decision and the reasons for it, including details of the time, date and method of any attempts to contact the person (see 5.5 below).

5.5 RECORDS OF ALLOCATION DECISIONS

The authorised officer should make a written record of their allocation decision (including a decision not to allocate a disclosure), the reasons for the decision and – if allocated to another agency for handling – the receiving agency's consent to the allocation. Section 8 of the PID Standard provides that this requirement must be included in each agency's PID procedures.

The authorised officer should also make a written record of whether the discloser was able to be notified of the allocation decision and the details of how that happened, or why notification was not able to be provided. Section 9(2) of the PID Standard provides that each agency's PID procedures must require appropriate records of the date, time and means of notification to the discloser. In the case of a notice of a stop-action direction under the NACC Act, the written record must indicate whether the principal officer considers it is reasonably practicable or appropriate for the discloser to be given a copy of the notice.

The authorised officer should also make a written record of their risk assessment and any action taken to protect or support the discloser (see Chapter 5.6 of this guide).

[4] Forms to notify the Ombudsman are available on the Ombudsman's website at https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing.

5.6 CONDUCTING AN INITIAL RISK ASSESSMENT

Agency procedures must include arrangements for assessing the risk that reprisals may be taken against a person who makes a public interest disclosure (s 59(4)(a)). This involves assessing the specific behaviour and circumstances that may result in reprisals, then putting in place appropriate strategies to prevent or contain them.

Importantly, the protections against reprisal action – including the positive duties of the principal officer and authorised officer – may still apply even where the disclosure does not constitute a valid public interest disclosure for the purposes of the PID Act. The protections are designed to ensure that disclosers are protected against reprisal action taken on the basis that a person has or may have made, proposes to make, or could make a public interest disclosure – even if their disclosure does not ultimately meet the criteria in the PID Act. Detailed information about risk assessments is included in this guide from 8.5 onwards.

5.6.1 Protection of the discloser's identity

One aspect of the risk assessment is assessing the likelihood of the discloser's identity becoming known. In circumstances where a discloser has not chosen to remain anonymous (see Chapter 4), they may still be anxious about the prospect of their identity being revealed. The authorised officer should assure the discloser that their identity will be protected as much as possible at all times and advise them of the procedures in place to ensure confidentiality of the investigation process.

This is particularly important in the context of the obligation on principal officers to take reasonable steps to encourage and support:

- public officials who make, or are considering making, a public interest disclosure to the agency (s 59(2)(a)), and
- persons who provide, or are considering providing, assistance in relation to a public interest disclosure (s 59(2)(b)).

Principal officers and authorised officers also have a positive obligation to protect public officials who belong to their agency from reprisals (ss 59(9) and 60(2) – see 3.2 of this guide). The PID Act also makes it an offence for anyone to take or threaten reprisal against a discloser and provides access to a court for remedies. Chapter 8 of this guide contains further information about the legal protections in the PID Act for disclosers and others, including the specific legal protections for the discloser's identity.

However, it is important that authorised officers give a discloser honest and realistic expectations about the agency's capacity to prevent their identity becoming known as the source of the disclosed information. The discloser must be made aware that, during the course of an investigation, their identity may become apparent. For example, if the discloser is one of a very small number of people who have access to the relevant information, or if the information they have disclosed was something they were told privately and in confidence, others may guess they were the source of the information.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 6: Deciding whether to investigate

AGENCY GUIDE TO THE
PUBLIC INTEREST DISCLOSURE ACT 2013

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COMMONWEALTH OMBUDSMAN

6 Deciding whether to investigate under the PID Act

6.1 GENERAL REQUIREMENT TO INVESTIGATE A DISCLOSURE

Once a disclosure had been allocated to an agency under the *Public Interest Disclosure Act 2013* (PID Act), the principal officer of that agency is obliged to investigate it (s 47).

However, the principal officer may decide not to investigate the disclosure, or to stop investigating it, if one of the discretionary grounds in s 48 of the PID Act applies. If this occurs, the discloser continues to have access to the protections and civil remedies provided by the PID Act.

This chapter explains when it may be appropriate for the principal officer to decide not to investigate a disclosure under the PID Act.

The principal officer may delegate any or all of their functions or powers to a public official who belongs to the agency (s 77(1)). References to the principal officer in this chapter include references to their delegates, including an investigator. A person exercising delegated powers or functions of the principal officer must comply with any directions of that principal officer (s 77(2)).

Generally, officials that are delegates of the principal officer should not also be appointed as authorised officers, to maintain separation between the allocation and investigative processes. However, if this is not feasible due to an agency's size, it is best practice that an investigation is not undertaken by the same authorised officer that received and allocated the disclosure.

6.1.1 Advising the discloser about the principal officer's powers

Section 14 of the Public Interest Disclosure Standards Determination 2025 (PID Standard) requires an agency that is allocated a disclosure under the PID Act to inform the discloser about the principal officer's powers to decide:

- not to investigate the disclosure under the PID Act, or to stop a PID investigation that has started (discussed in this chapter) or
- to investigate the disclosure under a separate investigative power, or investigate the disclosure under another law or power (discussed in 7.2.1 of this guide).

If it is reasonably practicable to do so, the discloser must be given this information within 14 days after the disclosure is allocated to the agency under the PID Act.

In practice, where the authorised officer has allocated the disclosure to their own agency, this information can be given to the discloser at the same time as the notice of allocation (see 5.4.5.3 of this guide). Where the disclosure is allocated to a different agency, the receiving agency must provide this information to the discloser.

6.2 WHEN CAN AN AGENCY DECIDE NOT TO INVESTIGATE?

The principal officer may decide not to investigate a disclosure under the PID Act only on a ground set out in s 48, that is, if:

- the discloser is not a current or former public official (see 6.2.1)
- the information does not, to any extent, concern serious disclosable conduct (see 6.2.2)
- the disclosure is frivolous or vexatious (see 6.2.3)

- the information is the same, or substantially the same, as information previously disclosed under the PID Act and the earlier disclosure either has been (or is being) investigated under the PID Act, or was the subject of a previous decision not to investigate under s 48 (see 6.2.4.1)
- the conduct disclosed, or substantially the same conduct, is being investigated under another law or power, and it would be inappropriate to conduct another investigation under the PID Act at the same time (see 6.2.4.2)
- the conduct disclosed, or substantially the same conduct, has already been investigated under another law or power, and there are no matters that warrant further investigation (see 6.2.4.2)
- the conduct disclosed would be more appropriately investigated under another Commonwealth law or power (see 6.2.4.2)
- the principal officer has been informed by the discloser, an authorised officer of the agency or a principal officer or authorised officer of another agency that the discloser does not wish the investigation to be pursued, and there are no matters that warrant further investigation (see 6.2.5)
- it is impracticable to investigate the disclosure because (see 6.2.6):
  - of the age of the information
  - the discloser has not disclosed their name and contact details, or
  - the discloser has failed, or is unable, to give the investigator the information or assistance they requested.

If the investigation has already started, the principal officer may subsequently decide to stop the investigation on one of the grounds set out above.

6.2.1 The discloser is not a public official

In order to make a public interest disclosure, a person must be a current or former public official, or a deemed public official (see 2.3 of this guide). If the principal officer or their delegate identifies that an authorised officer allocated a disclosure in the mistaken belief that the discloser is a public official, the principal officer or their delegate may decide not to conduct an investigation or stop an investigation that has already started (s 48(1)(a)).

Based on the nature of the disclosed information, the principal officer or their delegate may consider it is appropriate to continue the investigation, even though the discloser has never been a public official. If so, they should ask the authorised officer who allocated the disclosure to consider whether it is appropriate to deem the discloser to be a public official (see 2.3.2 and 4.1.2 of this guide).[1] A determination to deem the person a public official would place the investigation on a proper footing and provide the discloser protection under the PID Act.

6.2.2 The disclosed information does not concern serious disclosable conduct

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if the disclosed information does not, to any extent, concern serious disclosable conduct (s 48(1)(c)). This means that in some situations, information about conduct that may constitute disclosable conduct will not be considered serious enough to warrant investigation under the PID Act.

6.2.2.1 What is serious disclosable conduct?

The term 'disclosable conduct' is defined in s 29 of the PID Act and discussed in 2.5.2 of this guide. However, the PID Act does not define '**serious** disclosable conduct'. It is a matter for the principal officer or their delegate to decide whether the alleged conduct is serious.

The principal officer should consider this question based on all the information before them. Factors to consider could include:

[1] Alternatively, if the investigation officer is also an authorised officer, they may consider whether to make a determination under s 70 of the PID Act (see 2.3.2 of this guide).

- whether the wrongdoing, if proven, involves an offence with a significant penalty or could lead to disciplinary action including, but not limited to, the termination of the official's engagement or appointment[2]
- whether the wrongdoing was one of a series of incidents that indicates a course of conduct
- the level of trust, confidence or responsibility placed in the public official who is alleged to have acted wrongly
- the level of risk to others or the Commonwealth
- the harm or potential harm arising from the conduct, including the amount of public money involved
- the benefit or potential benefit derived by the public official or others
- whether the public official acted in concert with others, and the nature of their involvement
- any apparent premeditation or consciousness of wrongdoing
- what the public official ought to have done and how their conduct might reasonably be viewed by their professional peers
- any applicable codes of conduct or other policies
- maladministration that relates to significant failure in the administration of government policy, programs or procedures.

This list is not exhaustive and is provided as a guide to the types of issues that might be considered when determining if disclosable conduct is serious. If an agency's PID procedures include guidance about when a matter might be considered 'serious', they should not be written in a way that could be seen to fetter a delegate's discretion.

It is important to remember that s 48(1)(c) is a discretionary ground. If the principal officer forms the view that the disclosure does not concern serious disclosable conduct, but considers it should still be investigated, they may continue the PID investigation.

In such a situation, it would also be acceptable for the principal officer or their delegate to decide not to investigate on the basis that the information does not, to any extent, concern serious disclosable conduct.

6.2.3 What is meant by frivolous or vexatious?

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if the disclosure is frivolous or vexatious (s 48(1)(d)).

In determining whether a disclosure is vexatious, the principal officer should consider such factors as whether:

- the disclosure was made with the sole intention of annoying or embarrassing another person
- the disclosure was made for another purpose, rather than being made in good faith by a person concerned about stopping or preventing wrongdoing
- the allegations are so obviously untenable or manifestly groundless that they cannot possibly be made out[3]
- the discloser has made repeated disclosures under the PID Act of the same, or substantially the same, information (noting s 48(1)(e) may also apply in this situation)
- the discloser has persistently pursued enquiry into the same, or substantially the same, information through earlier court proceedings or other types of investigations (noting s 48(1)(g) may also apply in this situation).

However, the principal officer should be careful not to dismiss a disclosure merely because there appears to be associated conflict or animosity in the workplace, since it may also involve substantive issues of misconduct or

[2] While the severity of any alleged misconduct will be a relevant factor in determining whether particular disclosable conduct is 'serious', the categories of disclosable conduct in s 29(1) of the PID Act include conduct that may arise from both individual and systemic issues. This is distinct from s 29(2)(b), which provides that without limiting s 29(1), conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action resulting in the termination of the official's engagement or appointment is also disclosable conduct. The limitation in s 29(2)(b) to conduct that could give reasonable grounds for disciplinary action that could result in the termination of the official's engagement or appointment should not be imported into s 29(1).

[3] *Attorney General v Wentworth* (1988) 14 NSWLR 481, 491.

wrongdoing which should be investigated, or the workplace conflict or animosity may, in fact, have arisen because of the alleged misconduct or wrongdoing.

6.2.4 Other investigation or decision relating to the same matter

The PID Act contains several discretionary grounds that allow a principal officer or their delegate to decide not to investigate a disclosure. These include if the information concerns conduct that has already been, or is currently being, investigated, either under the PID Act or another law or power; if a decision was previously made under the PID Act not to investigate it; or where an investigation would be more appropriately conducted under another law or power. If a PID investigation has already commenced, the principal officer may also decide to stop the investigation on these grounds. The requirements are discussed in 6.2.4.1 and 6.2.4.2 below.

6.2.4.1 Investigation or decision under the PID Act

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if the disclosed information is the same, or substantially the same, as information previously disclosed under the PID Act and:

- a decision was made under s 48(1) not to investigate the earlier disclosure, or not to investigate it further, (s 48(1)(e)(i)), or
- the earlier disclosure has been, or is being, investigated under the PID Act (s 48(1)(e)(ii)).

It does not matter if a different public official made the earlier disclosure, as long as the information disclosed is the same or substantially the same.

It may also be appropriate to use this ground to decide not to investigate a second or subsequent disclosure made by the same public official who is dissatisfied with the outcome of the investigation of their earlier disclosure. In such a case, the principal officer should carefully consider whether the official has provided any additional information to suggest that further investigation of the matter is warranted.

6.2.4.2 Investigation under another law or power

Current investigation: The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) under the PID Act if it concerns conduct that is currently being investigated under another Commonwealth law other than the PID Act (including procedures established under such a law) or the Commonwealth's executive power, and the principal officer or their delegate is satisfied on reasonable grounds that it would be inappropriate to conduct a PID investigation at the same time (s 48(1)(f)).

The conduct already under investigation must be the same or substantially the same as the conduct the disclosure was about.

Prior investigation: The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) under the PID Act if it concerns conduct that has already been investigated under another Commonwealth law (including procedures established under such a law) or the Commonwealth's executive power. The principal officer or their delegate must be satisfied on reasonable grounds that there are no further matters concerning the conduct that warrant investigation (s 48(1)(g)).

The conduct previously investigated must be the same or substantially the same as the conduct the disclosure was about.

The prior or current investigation does not need to be in response to information provided by the official who made the disclosure. In most cases, the conduct will have been identified through other means. It is important to note that it is the *conduct* that must be the same as that subject to the other investigation, rather than the discloser or the circumstances in which the conduct has come to light.

Referral for another type of investigation: The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) under the PID Act if they are satisfied on reasonable grounds that the conduct disclosed would be more appropriately investigated under another Commonwealth law (including procedures established under such a law) or the Commonwealth's executive power (s 48(1)(ga)).

If the principal officer or their delegate decides under s 48(1)(ga) not to investigate a disclosure (or to stop investigating it), they must – as soon as reasonably practicable – take reasonable steps to refer the conduct disclosed, or to facilitate its referral, for investigation under the other law or power (s 50AA(2)).

The discretion provided under s 48(1)(ga) to not investigate a disclosure under the PID Act *cannot* be exercised only because the conduct disclosed raises a corruption issue (s 48(1A)). While it is mandatory for a PID officer to refer corruption issues to the NACC if they could involve corrupt conduct that is serious or systemic, this does not mean that the NACC will necessarily commence an investigation. If a disclosure is referred to the NACC, the disclosure must continue to be investigated under the PID Act unless a stop action direction is issued under the NACC Act.

6.2.4.3 What sorts of investigations can be conducted under another law or power?

Below is a non-exhaustive list of other types of investigations (and the relevant Commonwealth law or power) that could provide a basis for a principal officer to exercise their discretion under s 48(1)(f)-(ga) of the PID Act.

- a Code of Conduct investigation under the *Public Service Act 1999*
- a Code of Conduct investigation under the *Parliamentary Service Act 1999*
- a Code of Conduct investigation, or disciplinary or Redress of Grievance process under Defence Force legislation or regulations
- an investigation under the *Fair Work Act 2009*
- an investigation under the *Work Health and Safety Act 2011*
- a Professional Standards investigation under the *Australian Federal Police Act 1979*
- an investigation (known as an inquiry) under the *Inspector-General of Intelligence and Security Act 1986*
- an investigation under the Protective Security Policy Framework.

Whether another type of investigation provides grounds for a decision under s 48 will depend on the unique circumstances of each matter and there may be other laws or powers relevant to the situation for the principal officer or their delegate to consider.

6.2.5 The discloser does not want an investigation

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if they are advised by either the discloser, an authorised officer of the agency, or a principal officer or authorised officer of another agency that the discloser does not wish the investigation to be pursued, **and** the principal officer is satisfied on reasonable grounds that there are no matters concerning the disclosure that warrant investigation (s 48(1)(h)).

One situation in which this ground might apply is if an official unintentionally makes a disclosure. As explained in 4.1.3 of this guide, all that is required to make an internal disclosure is for a public official to convey information about suspected wrongdoing to a person who is able to receive a disclosure under the PID Act (an authorised officer or supervisor).

For example, an official might tell their supervisor something, or say something to a person who is an authorised officer, without realising that the information concerns disclosable conduct and their disclosure will trigger obligations and protections under the PID Act. Once the criteria for an internal disclosure are met, the authorised officer is obliged to allocate the disclosure for handling under the PID Act and must advise the discloser accordingly (unless the authorised officer instead decides the conduct would be more appropriately investigated under another law or power). At this point, the official might ask that the matter is not pursued as a PID investigation.

Even if these circumstances arise, a person who has made a disclosure cannot simply withdraw it. They also do not have to consent to an investigation. While a discloser's preference is a *relevant* consideration, the principal officer or their delegate must also be satisfied there are no matters concerning the disclosure that warrant investigation (s 48(1)(h)(ii)). This will be a matter for the principal officer or their delegate to decide, based on the subject matter of the disclosure and, possibly, whether action is already in train to address it.

Importantly, if the disclosure relates to corrupt conduct that is serious or systemic to the extent that the mandatory referral requirements found in s 35 of the NACC Act apply, it would not be open to the agency to consider the

discloser's wishes. This is because the agency must comply with its obligations under the NACC Act (see Chapter 10 of this guide).

If a public official asks to withdraw their disclosure, the principal officer or their delegate should seek to understand the reasons for that request. It would clearly be inappropriate not to investigate a disclosure if the official who made it was reluctant to cooperate in case their own wrongdoing came to light. On the other hand, if the discloser is concerned about their identity becoming known, or reprisal action being taken, it would be appropriate – and important – to put in place measures to mitigate those risks (or provide reassurance if either has already occurred). Further guidance about how to assess and manage reprisal risks can be found in 5.4 and Chapter 8 of this guide.

6.2.6 Investigation of the disclosure is impracticable

There are three separate grounds on which the principal officer or their delegate can decide not to investigate a disclosure because it would be impracticable.

6.2.6.1 Discloser's name and contact details unknown

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if an investigation is impracticable because the discloser has not disclosed their name and contact details (s 48(1)(i)(i)).

This ground might apply when a disclosure is made anonymously, and the discloser has declined or omitted to provide the authorised officer with any means of contacting them. It might also apply if the discloser has provided the authorised officer with his or her name and contact details but has not consented to that information being provided to the principal officer of the investigating agency. The key consideration is whether the absence of this information meaningfully and practically prevents the agency from proceeding with an investigation.

The PID Act specifically permits disclosures to be made anonymously or using a pseudonym (see 4.1.4 of this guide), and for a discloser to refuse to be identified to the principal officer (see 5.4.5.1 of this guide). The objects of the PID Act include ensuring that disclosures by public officials are properly investigated and dealt with (s 6(d)). Accordingly, before deciding to not investigate, or stop investigating on this ground, the principal officer or their delegate should consider the amount and quality of the information provided and whether the discloser's involvement in the investigation is critical. If other witnesses can be identified, or an investigation can be conducted by examining documents or electronic records, this should occur, so long as that type of investigation is practicable in the circumstances.

It may also be appropriate to consider whether one of the other grounds for not investigating apply, such as whether the disclosure concerns serious disclosable conduct (see 6.2.2) or whether the disclosure is frivolous or vexatious (see 6.2.3).

6.2.6.2 Discloser unable or unwilling to assist in the investigation

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if an investigation is impracticable because the discloser refuses, fails or is unable to give the investigator information or assistance (s 48(1)(i)(ii)). For this ground, with limited exception, the investigator must have requested information or assistance from the discloser, and the lack of that information or assistance must make it impracticable to investigate the disclosure. In some circumstances, it may not be appropriate to contact the discloser with a request for information. For example, where the discloser has provided medical advice advising that it is not safe for the discloser to be contacted about the investigation or the discloser has made this request themselves. Relevantly, agencies have concurrent work, health and safety obligations under the *Work Health and Safety Act 2011*.

The principal officer or delegate should consider whether the discloser's involvement in the investigation can be delayed, whether their involvement is critical, and whether there are other sources of information available to progress the investigation.

All public officials, including the discloser, have an obligation to use their best endeavours to assist in a PID investigation, which includes assisting any other public official to exercise a right, or perform a duty or function under the PID Act (see 4.4 of this guide). However, depending on the circumstances – including the seriousness of the matter, the risk of reprisal, or the discloser's health and safety – there may be circumstances where the discloser does not to wish to assist in the investigation. As discussed above, the principal officer or delegate should consider whether the discloser's involvement in the investigation is critical, and whether there are other sources of information available to progress the investigation.

6.2.6.3 The age of the information

The principal officer or their delegate may decide not to investigate a disclosure (or stop investigating it) if an investigation is impracticable because of the age of the information (s 48(1)(i)(iii)).

There is no time limit for making a disclosure (see 2.4.2 of this guide). However, if the disclosure relates to matters that occurred a long time ago, it may be difficult to locate and interview witnesses and/or relevant records may have been destroyed. Mere difficulty in conducting an investigation would not be sufficient to meet this ground. The principal officer or their delegate should consider what evidence is required for the investigation and whether it is possible or practicable to access it.

6.3 DOES A DECISION NOT TO INVESTIGATE PREVENT OTHER ACTION?

A decision not to investigate a disclosure (or stop investigating it) under the PID Act does not prevent any other type of investigation of the matter (s 48(2)).

Significantly, if the principal officer or their delegate decides under s 48 not to investigate a disclosure, in circumstances where they are also satisfied that the conduct disclosed would be more appropriately investigated under another law or power (other than a separate investigative power), they must take reasonable steps to refer the matter, including the referral of relevant information and documentation (or facilitate its referral) for that other type of investigation (s 50AA – see 6.2.4.2 above). While this referral requirement can arise for any of the decision grounds listed in s 48, it will always apply to a decision made under s 48(1)(ga).

For example, a disclosure might be made about an alleged breach of the Code of Conduct under the Public Service Act. If the requirements for making an internal disclosure were met, the discloser would be given protection under the PID Act.

However, the principal officer or their delegate might determine that one or more grounds in s 48 of the PID Act apply in these circumstances. This could be that the alleged wrongdoing is not 'serious disclosable conduct' (s 48(1)(c)), meaning it is not sufficiently serious to warrant investigation under the PID Act. Nonetheless, the allegation may still warrant investigation under the Code of Conduct procedures in force under the Public Service Act. This would create a positive duty on the principal officer or their delegate to refer the information for a Code of Conduct investigation under the Public Service Act.

It should be noted that in the scenario above, the decision not to investigate could also be made under s 48(1)(ga), as the conduct would be more appropriately investigated under another law or power. However, it could not be made on the grounds set out in s 48(1)(f) or s 48(1)(g) of the PID Act, as there is no current or prior investigation of the disclosure.

If none of the grounds in s 48 apply, it is necessary for the principal officer to complete their investigation under the PID Act.

In 7.3.4 of this guide, we explain how the PID investigation can be integrated with, and complement other investigation processes.

6.4 WHAT RECORDS MUST BE MADE OF A DECISION NOT TO INVESTIGATE?

The principal officer or their delegate must make a written record of their decision not to investigate a disclosure (or stop investigating it) on one of the grounds in s 48 and prepare written reasons for their decision. In practice, the decision and reasons may be recorded as part of the notice given to the Ombudsman or the IGIS.

If the principal officer or their delegate decides during a PID investigation, using one of the grounds in s 48, that it is inappropriate to continue the investigation, they are not obliged to complete the PID investigation and prepare a report under s 51 of the PID Act. However, they must prepare written reasons for their decision under s 48 of the PID Act and notify the discloser, and the Ombudsman or the IGIS (see 6.5 of this guide). This includes explaining why they consider use of the discretion is appropriate.[4]

[4] Notification forms, including a form to notify the Ombudsman of a decision not to investigate a PID, are available on the Ombudsman's website: https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing.

6.5 WHO MUST BE NOTIFIED OF A DECISION NOT TO INVESTIGATE?

Once the principal officer or their delegate decides not to investigate a disclosure (or stop investigating it) under one of the grounds in s 48 of the PID Act, they must notify:

- the discloser, and
- the Ombudsman or the IGIS.

6.5.1 Notifying the discloser

The principal officer or their delegate must notify the discloser of a decision not to investigate their disclosure or to stop investigating it (s 50(1)(b)). This notice must be in writing.

The notice of allocation of the disclosure and the decision not to investigate it may be given to the discloser in a single document (s 50(4)). However, this approach should only be used if the 2 decisions are made close in time (see 5.4.5.3 of this guide).

The notice must contain the reasons for the decision not to investigate the disclosure and, if applicable, details of any referral of the disclosure for investigation under another law or power in accordance with s 50AA (s 50(2)). If the disclosure is subject to referral under s 50AA, the notice must specify:

- the other law or power the conduct would be investigated under
- the agency or person or body to which the conduct has been, or is to be, referred, and
- the steps taken, or proposed to be taken, for the conduct to be referred or to facilitate its referral.

The principal officer or their delegate may delete from the reasons given to the discloser any reasons that would cause the document to (s 50(3)):

- be exempt for the purposes of Part IV of the FOI Act
- have, or be required to have, a national security or other protective security classification, or
- contain intelligence information (see 2.7.51 of this guide).

It is possible that in a single public interest disclosure, there are several allegations of disclosable conduct. The principal officer or their delegate may decide to continue investigating some conduct and not investigate, or cease investigating, other conduct under s 48. It is important that those matters that are not investigated are dealt with in a s 48 notice of a decision to not investigate, while the remaining matters are dealt with in the report on the investigation (s 51).

6.5.1.1 What if the discloser cannot be contacted?

The principal officer or their delegate does not have to notify the discloser of the decision not to investigate their disclosure if it is not reasonably practicable to contact them (s 50(5)). However, the principal officer or their delegate should still make a written record of their decision and the reasons for it (see 6.4 of this guide).

They should also make a written record of the reasons why contacting the discloser was not practicable and the date, time and method of any efforts to contact the discloser.

6.5.2 Notifying the Ombudsman or the IGIS

The principal officer or their delegate must, as soon as reasonably practicable, give written notice to the Ombudsman when they decide to not investigate a disclosure (or to stop investigating it). The notice must include the reasons for that decision (s 50A(1)).

If the agency is an intelligence agency, or it is the AFP, AUSTRAC or Department of Home Affairs and the disclosure relates to the intelligence functions of the agency, the principal officer or their delegate must give the notice to the IGIS, rather than the Ombudsman (s 50A(2)).

A notice given to the Ombudsman or the IGIS in relation to a decision to not investigate a disclosure (or stop investigating it) must include whether the principal officer or their delegate has referred, or intends to refer, the conduct for investigation under another law or power (s 50A(3)(a)). If applicable, the notice must include details about:

- the other law or power
- the agency or person or body to which the conduct has been, or is to be, referred
- the steps taken, or proposed to be taken, for the conduct to be referred or to facilitate its referral (s 50A(3)(b)).

Agencies that are required to report to the Ombudsman must use the form published on the Ombudsman's website.[5] The IGIS's website www.igis.gov.au also has information to assist agencies who are required to notify it of a decision not to investigate.

[5] Notification forms, including a form to notify the Ombudsman of a decision not to investigate a PID are available on the Ombudsman's website: https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 7: Conducting an investigation

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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COMMONWEALTH OMBUDSMAN

7 Conducting an investigation

7.1 GENERAL REQUIREMENT TO INVESTIGATE AN INTERNAL DISCLOSURE

Section 47 of the *Public Interest Disclosure Act 2013* (PID Act) requires the principal officer of an agency, or their delegate, to investigate a disclosure allocated to that agency under the PID Act. This includes when a disclosure has been reallocated to the agency in accordance with s 45 of the PID Act.

There are 2 circumstances in which a principal officer, or their delegate, is not required to investigate such disclosures, being:

- where the principal officer or their delegate decides not to investigate the disclosure in accordance with s 48 of the PID Act. Chapter 6 of this guide explains the circumstances in which a principal officer or their delegate may decide not to investigate a disclosure and the associated notification and referral (if relevant) requirements.
- where the Commissioner of the NACC has issued a stop action direction under the NACC Act, directing that the agency does not commence or continue with the investigation.

This chapter explains the formal procedural requirements for conducting an investigation under the PID Act. It does not explain the actual process for investigating a disclosure, although some of the pitfalls to avoid are highlighted in this Chapter. Part 3 of the Public Interest Disclosure Standards Determination 2025 (PID Standard) includes additional requirements regarding information to be provided to disclosers, conduct of interviews, the standard of proof, and evidence.

The principal officer may delegate, in writing, any of their functions or powers to a public official who belongs to their agency (s 77(1)). This includes delegating the function of investigating a disclosure. References to the principal officer in this chapter include references to their delegates, including an investigator.

7.1.1 Initial advice to the discloser about the investigation

Unless the principal officer has decided not to investigate the disclosure under s 48 (see Chapter 6), they must, as soon as reasonably practicable, notify the discloser in writing that they are required to investigate the disclosure (s 50(1)(a)). The investigator should check whether the discloser has already been informed about the principal officer's powers to not investigate the disclosure (or investigate it under a separate investigative law or power) as required by the PID Standard (see 6.1.1 of this guide). That advice should be provided to the discloser within 14 days after the disclosure is allocated to the agency, if it is reasonably practicable to do so.

The investigator must also advise the discloser of the estimated length of their investigation (s 50(1A)). This is an important part of managing the discloser's expectations. Regardless of the estimation provided, the PID Act requires an investigation to be completed within 90 days of allocation, reallocation, a decision to reinvestigate or, if relevant, when a stop action direction under the NACC Act no longer applies (see 7.3.3.1 of this guide). If a longer time is required, the agency should seek an extension of time from the Ombudsman or the IGIS, as appropriate (see 9.1.4 of this guide).[1]

[1] To enable sufficient time to decide the request, an extension request to the Ombudsman is to be made 10 business days before the current investigation end date.

The notice of the allocation of the disclosure and the requirement to investigate it, along with the estimated length of the investigation, may be given to the discloser in the same document (s 50(4)). However, this will only be possible if the agency allocating the disclosure is the same as the agency that will investigate the disclosure (see 5.4.5.3 of this guide).

7.2 WHAT SORT OF INVESTIGATION IS REQUIRED?

An internal disclosure allocated to an agency under the PID Act may be investigated in one of 2 ways:

- under a separate investigate power
- under the PID Act.

7.2.1 Investigations under a separate investigative power

Investigation under a 'separate investigative power' is only relevant for disclosures allocated to an 'investigative agency' – these are the Ombudsman, the IGIS or a prescribed investigative agency.[2]

7.2.1.1 What is a separate investigative power?

If the disclosure has been allocated to an investigative agency, it may use its own separate investigative powers and framework to investigate a disclosure, rather than investigating under the PID Act (s 49(1)). For example, the Ombudsman has powers to investigate under the *Ombudsman Act 1976* (Ombudsman Act), and the IGIS has powers to inquire under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). The circumstances in which the Ombudsman or the IGIS will investigate, whether under the PID Act or their separate investigative powers, are set out in 9.1.3 and 9.2.1 (respectively) of this guide.

7.2.1.2 Effect of using a separate investigative power

Conducting the investigation under a law other than the PID Act does not alter the protections for the discloser or witnesses (see Chapter 8 of this guide). The confidentiality provisions in the PID Act also continue to apply, as well as any confidentiality provisions in the legislation under which the investigation is conducted.

The time limits and reporting provisions discussed in 7.3.3.1 and 7.3.5 of this guide do not apply to an investigation conducted under a separate investigative power. Rather, the investigation, including any discretion not to investigate further, must be conducted in accordance with the legislation under which the agency is acting.

7.2.1.3 Notifying the discloser of the decision to use a separate investigative power

If the Ombudsman, the IGIS or a prescribed investigative agency decides to investigate a disclosure under a separate investigative power, they must, as soon as reasonably practicable, give written notice to the discloser (s 50). That notice must provide reasons for the decision and should explain that the discloser remains entitled to the PID Act protections, even though the disclosure is being investigated under a different law.

7.3 INVESTIGATIONS UNDER THE PID ACT

7.3.1 What does it mean to 'investigate' under the PID Act?

The purpose of a PID investigation is to establish whether one or more instances of disclosable conduct have occurred (s 47(2)). The starting point of the investigation is the conduct disclosed in the information provided by the discloser. The investigator may also consider whether the information they obtain during the investigation indicates that there are other, or different instances of disclosable conduct. However, these other instances of disclosable conduct should not be investigated under the PID Act if the information is tangential or remote to the disclosure (s 47(2)).

The investigator should also bear in mind that if one or more of the discretionary grounds in s 48 of the PID Act apply, it may be appropriate to discontinue the investigation under the PID Act (see 6.2 for more information about discontinuing a PID investigation). This includes considering whether it is appropriate for the subject matter of the disclosure to be investigated under another Commonwealth law (including procedures under such laws) or the Commonwealth's executive power (see 7.3.4 of this guide).

[2] There are no prescribed investigative agencies at the time of publication.

There are time limits for the investigation (see 7.3.3.1). At the conclusion of the investigation, the investigator must prepare a written report of their investigation (s 51). The investigation is completed when the report is prepared (s 52(2)). Requirements for the PID investigation report are discussed in 7.3.5 of this guide.

7.3.2 Who should investigate?

The principal officer is responsible for conducting investigations and may delegate the investigative function to an officer who belongs to their agency (s 77). The delegate could be a person already employed by the agency, or it could be a person contracted to conduct the particular investigation. Paragraph 7.3.2.1 of this guide explains considerations for principal officers before delegating the PID investigation function to a person who is not ordinarily employed by the agency.

Where possible, the investigator should have experience investigating the type of conduct the disclosure is about.[3] Before commencing the investigation, they should become familiar with the PID Act and the agency's written procedures established under s 59(3). In particular, it is vital they understand and safeguard the confidentiality of investigative processes and give effect to the protections for disclosers and individuals who assist with PID investigations (that is, witnesses).

Investigators must ensure that they do not have an actual or perceived conflict of interest with people or issues that are likely to be involved in the investigation. Unless there are compelling reasons to justify a different approach, the investigator should not be a member of the workgroup where the alleged wrongdoing occurred.

7.3.2.1 Delegating the investigative function to a contractor

Delegating the principal officer's investigative function to a contractor may be appropriate and necessary to ensure a PID matter is handled properly. Circumstances which may warrant delegation to a contractor include:

- when investigation of the disclosure requires al skillset or subject matter expertise beyond that available within the agency's internal pool of investigators
- when the agency is handling a peak in PID investigations and internal investigations staff cannot be mobilised due to existing full caseloads
- where the risk of real or perceived bias or conflict is most appropriately (and effectively) managed by engaging an external contractor.

When engaging a contractor to conduct an investigation, the principal officer should consider confining their delegation of the investigation power in s 53 by specifying terms of reference for the investigation. For example, the delegation could identify the investigator by name and clearly set out the scope of the investigation, including the issues they should cover and whether they will prepare the report under s 51 of the Act. The terms of reference might also specify particular actions to be taken, noting that a delegate must comply with any directions from the principal officer (s 77(2)). This should be supported by the terms of the contract agreed with the contractor.

7.3.3 PID investigation requirements

A PID investigation is conducted as the principal officer, or their delegate, sees fit (s 53), subject to compliance with the PID Standard (s 74). There are also special mandatory requirements for investigations into possible fraud (see 7.3.4.1 of this guide).

7.3.3.1 Time limit for investigations

Investigations under the PID Act must be completed within 90 days of:[4]

- the day after the disclosure was initially allocated (s 52(1)(a)), or
- the day after the disclosure was reallocated (s 52(1)(b)), or
- the day after the principal officer decided to reinvestigate the disclosure (s 52(1)(c)), or

[3] The PID investigation requirements are discussed from 7.3.3 onwards.
[4] The day the event occurs is day zero of the 90 day timeframe for investigation.

- if relevant, the day after the principal officer becomes aware that a stop action direction under the NACC Act no longer applies (s 52(1)(d)).

The effect of s 52(1)(d) is that once a stop action direction under the NACC Act is lifted, the 90-day investigation period restarts for the PID investigation (that is, the investigation 'clock' is reset). This is regardless of any period of investigation that occurred before the stop action direction was made. If, during the period that the stop action direction was in force, the NACC investigated the conduct that is the subject of the disclosure, it may be open to the principal officer to decide to not investigate (or not further investigate) the disclosure, on the basis that the conduct has been investigated under the NACC Act. To do so, the principal officer must be reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation (s 48(1)(d)).

Agencies that investigate public interest disclosures under a separate investigative power (the Ombudsman, the IGIS and prescribed investigative agencies) are not bound by the time limits in the PID Act, but rather by the legislation under which they investigate.

The PID investigation is complete when a report of the investigation is prepared (s 52(2)). For the purposes of meeting time limit requirements, this means the report must be finalised to the point that no substantive changes will be made (that is, it should not be in draft form or remain subject to agency review processes).

If an agency is unable to complete the investigation within the 90-day period, the Ombudsman or the IGIS, as appropriate, may grant one or more extensions of time. The requirements for an extension of time are discussed in 9.1.4 of this guide.

If an extension is not granted, the agency is still required to complete the investigation and prepare a report. An agency's failure to complete an investigation within 90 days (or an approved extended timeframe) does not affect the validity of the investigation (s 52(6)). However, the failure to complete an investigation within the time limit is one of the criteria that, if collectively satisfied, will entitle the discloser to make an external disclosure (see 2.7.7 of this guide).

7.3.3.2 An administrative investigation

An investigation under the PID Act is an administrative investigation. This means that the person conducting the investigation must comply with administrative law principles of general application such as procedural fairness (7.3.3.8 of this guide). However, s 53 of the PID Act provides considerable latitude to an investigator to decide how to conduct the investigation, provided they comply with the PID Standard (7.3.3.3 of this guide) and, if relevant, observe the special requirements relating to fraud investigations (7.3.4.1 of this guide).

The formality of the investigation should be commensurate with the seriousness and nature of the alleged disclosable conduct and the importance of the particular evidence. The investigator's records should contain sufficient detail appropriate to the nature of the investigation.

General guidance for investigators can be found in the *Australian Government Investigation Standards 2022* (AGIS), published by the Australian Federal Police.[5] The AGIS sets out minimum standards that must be followed by non-corporate Commonwealth entities when conducting investigations into programs and legislation they administer. However, it also has useful information on topics such as investigation planning, interviewing witnesses and finalising investigations, which can be applied to investigations more generally.

Investigators may also find it helpful to refer to the Administrative Review Council's Best Practice Guides on aspects of administrative decision-making including natural justice requirements (also known as 'procedural fairness'), assessing evidence, lawful decision making and providing reasons for decisions, available at www.ag.gov.au/legal-system/administrative-law/administrative-review-council-publications.

7.3.3.3 PID Standards for conducting investigations

Part 3 of the PID Standard (ss 12-17) sets out mandatory requirements for PID investigations. These apply to all investigations under the PID Act (s 13, PID Standard). The modified requirements for fraud investigations under the PID Act are discussed in 7.3.4.1 of this guide.

[5] The Australian Government Investigation Standards 2022 is available on the AFP's website at https://www.afp.gov.au/what-we-do/australian-government-investigations-standard.

The requirement to provide information to the discloser about the principal officer's power to decide not to investigate a disclosure, or to investigate a disclosure under a separate investigative power or under another law or power, is described in 7.1.1 of this guide (s 14, PID Standard).

Discussed below are the PID Standard requirements for:

- interviewing witnesses (see 7.3.3.5 of this guide)
- standard of proof (see 7.3.3.6 of this guide)
- the evidence that can be taken into account (see 7.3.3.7 of this guide).

7.3.3.4 What legal power does the investigator have to obtain information?

When investigating a disclosure, the investigator may obtain information from such persons and make such inquiries as they think fit (s 53(2)). All current public officials (including contractors) are obliged to use their best endeavours to assist the principal officer, or their delegate, in a PID investigation (s 61(1)). A public official must also use their best endeavours to assist any other public official to exercise a right, or perform a duty or function, under the PID Act (s 61(4)).

The investigator may wish to draw this obligation to the attention of any public official who is reluctant to provide information or answer questions relevant to the investigation. The PID Act does not give investigators any powers to compel witnesses to attend interviews, answer questions or produce documents. However, a principal officer may be able to rely upon other legislation to obtain the cooperation of staff members (for example, legislation relating to a person's employment responsibilities).

Informing witnesses of the immunities under s 12A the PID Act could also help to alleviate any concerns they may have about providing information to the investigator (see 7.3.3.5 below). Further, a person is not liable to any criminal or civil proceedings, or any disciplinary action (including any action that involves imposing any detriment), for anything done in good faith to assist a principal officer or their delegate to perform functions or exercise powers under the PID Act (s 78(1)(f)).

It is permissible for an investigator, or an official assisting with a PID investigation, to disclose, record or use information in connection with that investigation which would otherwise be protected by secrecy or confidentiality provisions in most Commonwealth laws, unless that would breach a designated publication restriction[6] (s 75(1)) or some other Commonwealth law enacted after 15 January 2014 which expressly prevails over s 75 of the PID Act.

In the case of intelligence information obtained in the course of a disclosure investigation, it is recommended the investigator contacts the relevant intelligence agency and/or the IGIS to discuss how that information should be protected and, if necessary, how it might be further investigated.

In some cases, it will be possible to investigate an internal disclosure by obtaining and examining existing agency records. The investigator may also seek general background information (e.g., advice from a business line about the agency's usual processes, or copies of written procedures). This can be done informally, without following the formal requirements for conducting a PID interview.

However, it will usually be necessary for the investigator to obtain additional information from the discloser and other possible witnesses. This could be done by way of a list of written questions, or in an interview conducted by telephone or in person. Whether they are provided in writing or in person, the PID investigator's requests for specific information from an individual should be regarded as an interview in connection with a PID investigation. These interviews are subject to specific requirements, discussed in 7.3.3.5 of this guide.

7.3.3.5 Interviewing a witness (including the discloser)

As discussed in 7.3.3.4, the PID investigator may obtain information from such persons and make such inquiries as they think fit. This can include seeking further information from the discloser or any other person. If the investigator decides to conduct an interview to seek specific information from a person for the purposes of the PID investigation, they must comply with s 15 of the PID Standard. These requirements apply even if the interview is conducted in a relatively informal way, for example, by telephone or using virtual (video) platforms. They should

[6] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

also be followed when an investigator decides to seek information from a person in the form of written answers to questions, whether those questions are asked orally or in writing.

The person being interviewed must be informed (s 15(1), PID Standard):

- of the name of any person conducting the interview (including anyone who may be present in an assistance or record keeping capacity)
- of the function that each of the people present is performing in the investigation
- that the principal officer is required to investigate a disclosure to establish whether there has been disclosable conduct
- of the legal authority for the investigator to conduct the investigation (for example, where the principal officer's investigative function under the PID Act has been delegated)
- of general information about the process of conducting a PID investigation, including the confidentiality of investigative processes and protection of the discloser's identity.

The person being interviewed should also be advised of the protections they have under Part 2 of the PID Act in relation to the information they provide at the interview (s 15(1)(d), PID Standard). In summary, s 12A provides immunities for giving information or producing a document (or other thing), or answering an investigator's question, if they consider the information or answer they provide to be relevant to an investigation (see 8.3.1 of this guide). Protections against reprisal under the PID Act also apply to witnesses.

All interviews should be conducted in private. The people present at any interview should be limited to those people whose presence is necessary to conduct the interview. Those who are interviewed should be advised that information about the matter is confidential, that release of information may jeopardise an investigation, and that they may be committing an offence if they divulge any information that is likely to identify the discloser. See 7.3.3.10 and 8.1 of this guide for more information about the confidentiality of the investigation.

The investigator should keep written records of the interview. Audio or visual recordings of the interview must not be made without the prior knowledge and consent of the person being interviewed (s 15(2)(a), PID Standard).

At the conclusion of the interview, the investigator should ask the person if they wish to make a final statement or comment or express a position about the matters being investigated (s 15(2)(b), PID Standard). The person's response, and any final statement or comment they make must also be included in the record of interview (s 15(2)(c), PID Standard). Additionally, as soon as reasonably practicable, the witness should be provided with a copy of the interview transcript (if an audio or visual recording was made) or the interviewer's written summary of the evidence provided during interview and given an opportunity to clarify any information or to correct any errors.

7.3.3.6 Standard of proof

The standard of proof in a PID investigation is the civil standard: a fact is only taken to be proved if there is sufficient evidence to prove it 'on the balance of probabilities' (s 16, PID Standard). This means that the principal officer, or their delegate, cannot make a finding that there has been disclosable conduct unless they are satisfied, on the basis of the evidence gathered during the investigation, it is more likely than not that the disclosable conduct occurred.

It is not necessary for the principal officer to positively identify a person or persons responsible for the conduct. It is enough to be satisfied that the conduct was engaged in by an official belonging to the agency, or the agency more broadly. Paragraph 7.3.6 of this guide explains the action that is required if the investigator concludes there is evidence of the commission of a criminal offence.

7.3.3.7 Evidence

The evidence relied upon in a PID investigation must be relevant (s 17(2), PID Standard).

The investigator must not place any weight on information they might obtain during the investigation unless it is of consequence to one of the matters under investigation and tends to make it more or less probable that a relevant fact exists. Any finding of fact in a PID investigation must be based on logically probative evidence (s 17(1), PID Standard).

7.3.3.8 Procedural fairness

In an administrative investigation, the investigator must ensure that a person against whom allegations are made is accorded procedural fairness (also known as 'natural justice'). If adverse information comes to light about others in the course of the investigation, those persons are also entitled to procedural fairness. This could include the discloser.

What procedural fairness requires varies with the circumstances, but essentially it means that the person is entitled to:

- have a decision-maker act fairly and without bias
- if an adverse finding is going to be made about their conduct – know the substance of allegations and evidence against them and have a reasonable opportunity to respond.

A person does not need to be told about allegations made about them that the agency decides are of no substance (for example if the agency decides not to investigate a disclosure, or stop the investigation, on the basis that the disclosure is clearly frivolous or vexatious). However, see 7.4.1 of this guide for information about when it is appropriate to notify a person of the outcome of an investigation about them.

Further, unless there is adverse information relating to the discloser's own conduct, procedural fairness does not require that the discloser is given an opportunity to comment on evidence obtained and considered by the investigator, or their preliminary (draft) views, before the investigator makes findings and prepares the s 51 report.

7.3.3.9 What must the official who is the subject of the disclosure be told?

The PID Act does not require the investigator to give a copy of a public interest disclosure to the person who is the subject of that disclosure or tell them the identity of the person who made the disclosure. The information that the subject of the disclosure is entitled to be told will depend on what is necessary to investigate the allegations in a way that observes procedural fairness.

Given the special protection of the discloser's identity in the PID Act, it is appropriate to protect the discloser's identity as far as possible, unless identifying them is necessary to investigate the disclosure, or the discloser has consented to being identified or acted in a way that is inconsistent with keeping their identity confidential. Protecting the discloser's identity is discussed further in 8.1 of this guide.

Procedural fairness does not mean that a person must be told about any allegations made about them as soon as the disclosure is received, or an investigation is commenced. There may be good reasons to carry out certain investigations before interviewing a person who is suspected of wrongdoing, particularly if there are concerns that they may collude with others or evidence may be destroyed if they are alerted.

A person who is subject to allegations of wrongdoing should be given information about their rights and obligations under the PID Act, and about the agency's investigation procedures and any other relevant matter, such as Code of Conduct proceedings. A key principle to bear in mind is that anyone who is subject to allegations or an investigation is assumed innocent of any wrongdoing unless proven otherwise.

Agencies should consider support for any official who is the subject of an allegation made in a public interest disclosure, noting they are likely to find the experience stressful. Agencies should also ensure the official knows how to access employee assistance programs or other support if they need it.

7.3.3.10 Ensuring confidentiality of the investigation

Agency procedures must provide for confidentiality of investigative processes (s 59(4)(b)).

Disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the discloser and any person who is the subject of the disclosure.

To satisfy these confidentiality requirements, and to minimise the possibility of detrimental action against the discloser and others, including witnesses, agencies should establish a secure record system to deal with internal disclosures. Agencies should ensure that:

- all paper and electronic documents and files, including audio or video files, are secure and only able to be accessed by authorised officers, investigators and other officers involved in managing the disclosure.

- other materials such as interview tapes or external data storage (USB) drives are stored securely with access only by officers involved in handling the disclosure.
- communications and documents relating to the investigation are not sent to an email address to which other staff have access or to a printer or fax machine in an open area.

The identity of a person who is the subject of allegations or an investigation should be protected as much as practicable. Information that identifies them should only be passed to those involved in the investigation or in taking other necessary action under the PID Act (such as action to minimise the risk of reprisal against the discloser, a witness or any other person).

Confidentiality of investigative processes should be maintained when information and documents are shared between agencies under s 65 of the PID Act. Agencies should ensure communications are directed only to relevant personnel in the receiving agency – this can be achieved by contacting the agency to confirm relevant email or mailing addresses before sharing information or documents. See 8.1.2 for more information about authorised information sharing.

7.3.4 Is a different type of investigation appropriate?

After the investigator has commenced investigating the disclosure, they may decide that it would be more appropriate for the matter to be investigated under another Commonwealth law. That investigation, or reinvestigation, may be conducted by another person within the same agency, or by another appropriate body under a Commonwealth law other than the PID Act, (s 47(3)). Some examples of other types of investigations that might be appropriate at the conclusion of a PID investigation are listed in 6.2.4.3 of this guide. Also see 7.3.4.1 for information about investigating alleged fraud.

If another type of investigation is more appropriate, the investigator may stop investigating under the PID Act (s 48(1)(ga)) and refer the conduct for investigation under the other law or power (s 50AA). If the investigator exercises this discretion, they must, as soon as reasonably practicable, take reasonable steps to refer the conduct disclosed or facilitate its referral. They must also notify both the discloser and the Ombudsman or the IGIS (as appropriate) that the PID investigation has stopped and provide details of the referral, including the steps taken or proposed to be taken by the investigator to refer the conduct or facilitate referral (ss 50, 50A – see chapter 6 for more detailed information on the referral and notification requirements).[7]

A principal officer or their delegate could decide a different investigation is appropriate at any point during a PID investigation. If the investigator has gathered sufficient evidence to make findings of fact about whether disclosable conduct has occurred, it would be more appropriate to complete the PID investigation by preparing a s 51 report that includes a recommendation that a different type of investigation should be conducted. Consistent with requirements for s 51 reports, that report should provide details of what action has been taken, or will need to be taken, to refer on the information to be dealt with under another Commonwealth law or power.

It is legally permissible for an agency to conduct the entire investigation under the framework of the PID Act, and this may be convenient and efficient in some cases. However, it is generally preferable for the PID investigation to be stopped or completed, with appropriate steps taken to commence a separate, subsequent investigation, such as a fraud or Code of Conduct investigation. This avoids the confusion of 2 sets of legal requirements applying to a combined investigation. It is also likely that the more formal requirements of a Code of Conduct or fraud investigation will make it difficult to complete the combined investigation within the usual 90-day time frame for a PID investigation (see 7.3.3.1 of this guide). Additionally, if wrongdoing is identified, a PID Act investigation cannot apply disciplinary sanctions. In these circumstances, it may be necessary to recommend that a Code of Conduct or other investigation occurs.

7.3.4.1 Investigation of alleged fraud

The effect of s 21 of the *Public Governance, Performance and Accountability Act 2013* and the Commonwealth Fraud Control Policy is to require all non-corporate Commonwealth entities to report cases of serious or complex fraud to the Australian Federal Police for investigation, or otherwise comply with the Australian Government Investigations Standards (AGIS) when conducting investigations into fraud against them, or relating to the

[7] Forms to notify the Ombudsman are available on the Ombudsman's website at https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing.

programs and legislation they administer.[8] The AGIS sets out minimum case handling standards for fraud investigations, including minimum training requirements for investigators and requirements for conducting interviews and preparing briefs of evidence.

If the principal officer of a non-corporate Commonwealth entity is investigating a disclosure that concerns alleged fraud against the Commonwealth, the PID investigation must also comply with the Commonwealth Fraud Control Policy. The Commonwealth Fraud Control Policy highlights that the Australian Federal Police has primary law enforcement responsibility for investigating serious or complex fraud against the Commonwealth. If there is any inconsistency between the requirements of the Commonwealth Fraud Control Policy and the requirements of the PID Act and PID Standard, the PID requirements must be followed.[9]

Given the complexity of concurrently complying with the requirements of the PID Act and PID Standard, and the Commonwealth Fraud Control Policy, the recommended course of action when investigating a disclosure of alleged fraud is to stop the investigation and refer the disclosure for investigation under another law or power, as discussed in 7.3.4.

The person investigating the disclosure (whether under the PID Act and/or another law or power) should be aware of their obligation to notify the police of information that they suspect on reasonable grounds is evidence of a serious criminal offence (see 7.3.6 of this guide).

7.3.5 PID investigation report

After an internal disclosure has been investigated, the principal officer, or their delegate, must prepare a written report of the investigation (s 51(1)). The PID investigation is only completed when the principal officer has prepared the report (s 52(1)). As noted in 7.3.3.1 of this guide, a report is not considered to have been prepared until it is finalised to the point that no substantive changes will be made (that is, it should not be in draft form or remain subject to agency review processes).

The report is the agency's record of the investigation of the disclosure and the action to address any disclosable conduct that was found to have occurred. Additionally, the investigation report is a record of the agency's response to any claims of reprisal taken against the discloser or any other person (see 7.3.5.1 of this guide).

The PID investigation report must state:

- the matters considered in the investigation (s 51(2)(a)), including (s 47(2)):
  - the disclosable conduct alleged by the discloser
  - any other possible disclosable conduct subsequently identified
- how long the investigation took (s 51(2)(b)), that is, the number of days between allocation (or the date a stop action by the NACC was revoked) and the date the report was prepared (s 52)
- the steps taken to gather evidence (s 19(c), PID Standard)
- a summary of the evidence and how the evidence informed the findings (s 19(d), PID Standard)
- the principal officer's findings, based on that evidence (s 51(2)(c) and s 19(d), PID Standard), including:
  - whether there was any disclosable conduct, and if so, what type (s 19(a), PID Standard)
  - the laws, rules procedures etc to which that disclosable conduct relates (s 19(b), PID Standard)
- any action taken, or currently in train to address those findings (s 51(2)d))
- any recommendations about other action to address those findings (s 51(2)(d))
- any claims of reprisal action taken against the discloser, or any other person, and related evidence (s 51(2)(e))

[8] The Commonwealth Fraud Control Policy is available at https://www.counterfraud.gov.au/library/commonwealth-fraud-control-framework and the AGIS is available on the AFP's website at https://www.afp.gov.au/what-we-do/australian-government-investigations-standard is

[9] When a PID investigation relates to fraud, Part 3 of the PID Standard (which deals with the conduct of interviews for a PID investigation) applies only to the extent that it is not inconsistent with s 10 of the *Public Governance, Performance and Accountability Rule 2014*, also known as the Fraud Rule (s 13(2), PID Standard). The Fraud Rule requires the accountable authority of a Commonwealth entity to take all reasonable measures to prevent, detect and deal with fraud relating to the entity, including by having an appropriate mechanism for investigating or otherwise dealing with incidents of fraud or suspected fraud.

- the agency's response to any claims or evidence relating to reprisal (s 51(2)(f)).

The action to address the findings of the PID investigation could include a different type of investigation (see 7.3.4 above) or referring the matter to the police (see 7.3.6).

If the investigation was inconclusive in any respect, the report should say so and explain why.

7.3.5.1 Reprisal against the discloser or any other person

The PID investigation report must detail whether there were any claims, or evidence, of reprisal taken against the discloser or any other person, and how the agency responded to them (ss 51(2)(e)-(f)).

The PID investigation report must include (s 51(2)(e)-(f)):

- any claims made about reprisal taken against the discloser or any other person
- how the agency responded to those claims (e.g., investigation, support or protection for the discloser)
- whether the agency found any evidence of reprisal against the discloser or any other person (not limited to claims of reprisal made by the discloser or others)
    - Sometimes, an agency may identify evidence of reprisal against a person even though that person has not raised concerns or alleged reprisal. In these situations, the agency should nevertheless examine the evidence, make findings and respond appropriately, in the same way as if a specific claim had been made.
- the action taken or recommended to address any findings of reprisal against the discloser or any other person.

The person preparing the PID investigation report should consult with the authorised officer who allocated the disclosure and any person who was involved in the initial risk assessment for the discloser (see 5.6 of this guide) to ensure that they have all the relevant information to complete this part of the report. If a support person was appointed for the discloser, that support person should also be consulted.

7.3.5.2 Findings of fact

Any finding of fact in the report must be based on relevant evidence, sufficient to satisfy the principal officer or their delegate on the balance of probabilities of the existence of that fact (see 7.3.3.6 and 7.3.3.7 of this guide). Given the purpose of the PID investigation (to discern if there are one or more instances of disclosable conduct – s 47(2)), the primary finding to be made is whether there is one or more instances of disclosable conduct (see 7.3.1 of this guide).

7.3.5.3 Copy for the discloser

The principal officer must give a copy of the PID investigation report to the discloser within a reasonable time of preparing it (provided that contacting the discloser is reasonably practicable) (s 51(4)(a)).

The copy of the report given to the discloser may have some information deleted if it is likely to enable the identification of any person (the discloser or another person, such as someone who is under investigation or a witness), or if including the information would cause the document to:

- be exempt under the *Freedom of Information Act 1982* (exempt material includes commercially valuable information, material obtained in confidence, Cabinet information, personal information whose disclosure would be unreasonable and contrary to the public interest, and information that could prejudice an investigation or affect the effectiveness of agency audit procedures)
- have a national security or protective security classification
- contain intelligence information (including sensitive law enforcement information), or
- contravene a designated publication restriction.[10]

[10] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

7.3.5.4 Copy for the Ombudsman or the IGIS, or another agency

The principal officer must also give a copy of the PID investigation report to the Ombudsman (s 51(4)(b)), or the IGIS in the case of reports prepared by an intelligence agency or relating to the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs (s 51(4)(c)). The principal officer must do this within a reasonable time of preparing the report.

The principal officer may redact information from the copy of the report given to the Ombudsman or the IGIS if it is likely the information would enable the identification of the discloser or any other person, or if including the information would contravene a designated publication restriction (s 51(6)). However, in view of the oversight agencies' review functions under the PID Act (explained further below), agencies are encouraged to provide unredacted reports whenever possible – or to apply minimal redactions – to enable the Ombudsman or the IGIS to effectively assess the adequacy of investigations and the agency's compliance with the PID Act and PID Standard.

Upon receiving written notice[11] of completion of the investigation together with a copy of the report, the Ombudsman or the IGIS may review the agency's handling of the disclosure (s 55(3)). This includes the power to obtain information or documents from any such person, and to make such enquiries, as the Ombudsman or the IGIS thinks fit (s 55(4)).

Following any such review, the Ombudsman or the IGIS can make recommendations to the principal officer of the agency which completed the investigation or the agency to which the disclosure was made (or both) (s 55(5)). See 9.1.6 of this guide for further information about the powers of the Ombudsman and the IGIS to conduct reviews and make recommendations in relation to the handling of disclosures.

The requirement to provide a copy of the s 51 report to the Ombudsman or the IGIS does not limit the circumstances in which the report may be shared. A copy of the s 51 report may also be shared with another agency if the investigation concerns conduct related to that agency. While s 65 of the Act may authorise such sharing, it does not limit the extent to which the sharing may be authorised or permitted under any other law.

7.3.6 Criminal matters

7.3.6.1 Notifying the police

If an investigator suspects that information disclosed as part of an internal disclosure, or obtained during their investigation of a disclosure, is evidence of an offence against a Commonwealth, state or territory law, they may disclose that information to a member of a relevant Australian police force (s 56(2)).

Police notification is mandatory if the suspected offence is punishable by imprisonment for 2 years or more (s 56(3)). However, in limited circumstances, mandatory notification is not required, namely:

- if the investigator believes on reasonably grounds that their own agency has the capacity and appropriate skills and resources needed to investigate the commission of the offence, and to meet the requirements of the Commonwealth Director of Public Prosecutions in gathering evidence and preparing briefs of evidence (s 56(4)(a)), or
- if the investigator suspects on reasonable grounds that the relevant information raises a corruption issue within the meaning of the NACC Act, and it has been referred to the NACC or the IGIS (if the corruption issue concerns an intelligence agency or intelligence functions of an agency) or the NACC or the IGIS is already aware of the issue (s 56(4)(b)).

Notification to the police under s 56 of the Act does not, of itself, mean the PID investigation can or should stop. The police will assess the reported information and decide whether and how to investigate it in accordance with their usual operational priorities. The principal officer or their delegate must still consider whether other administrative or disciplinary action is also appropriate in response to the conduct, consistent with the integrity arrangements for the agency concerned and given the position of the official whose conduct is in question. Dialogue with the police will be important to ensure that whatever action the agency takes does not prejudice a potential criminal investigation or prosecution. In any case, the PID investigation will not be complete until the principal officer prepares their report under s 51 (see 7.3.5 of this guide).

[11] Forms to notify the Ombudsman are available on the Ombudsman's website at https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing.

In many cases, the suspected offence will be a crime under a Commonwealth law. If so, the information should be referred to the Australian Federal Police (AFP). The AFP's website contains information about the procedure for government agencies to make reports, and contact details for initial enquiries or pre-referral advice.[12] However, depending on the particular offence involved, it may be appropriate to refer the information to a police force of an Australian state or territory.

Section 56 also applies where an investigative agency conducts a PID investigation using a 'separate investigative power' (see 7.2.1 of this guide) and in the case of an investigation of a disclosure under an agency's procedures relating to fraud (see 7.3.4.1 of this guide).

7.3.7 What impact can investigations have on the workplace?

If an investigation becomes generally known to staff (as is likely once interviews commence) people's reactions can vary considerably. Some staff may welcome action being taken, while others may not. As a result, workplace tensions may arise.

Managers can help by keeping the channels of communication open, while maintaining confidentiality as far as practicable. If the discloser's identity has already been disclosed or compromised, managers may:

- let staff know that information about disclosable conduct has been provided
- allow staff to air their feelings
- provide information about the PID Act and agency procedures
- explain the protections accorded to both disclosers and witnesses
- highlight that taking a reprisal is a criminal offence
- remind colleagues that public officials must use their best endeavours to assist the principal officer in the conduct of an investigation, and the Ombudsman or the IGIS (as relevant) in the performance of their functions under the PID Act (s 61), and
- indicate when further information is likely to be available.

See 8.5 and 8.6 of this guide for information about supporting and protecting officials.

7.4 AFTER THE INVESTIGATION

7.4.1 What should a person be told if allegations were made against them?

While not a requirement under the PID Act, if the allegations in a disclosure have been investigated and the person who is the subject of them is aware of the allegations or that there has been an investigation, the s 51 report should include a recommendation the person is formally advised of the outcome of the investigation as it relates to them. It should be noted that this is not a procedural fairness requirement, and the person is not entitled to be told who made the disclosure (see 7.3.3.8 of this guide).

Agencies should consider how they will support the subject of a disclosure when allegations, which may have been publicly disclosed, are shown to be wrong or unsubstantiated.

7.4.2 What action does an agency need to take?

What happens at the end of an investigation will vary with the circumstances.

In circumstances where an investigation has been undertaken, in addition to providing a copy of the investigation report to the relevant oversight body and the discloser if reasonably practicable (s 51(4)) (see 7.3.5.4 in this guide), the principal officer must take appropriate action in response to recommendations and other matters contained in the investigation report. Actions might include:

- commencing Code of Conduct proceedings under the Public Service Act or another disciplinary process
- referring the matter to the police or another body that can take further action
- mediating or conciliating a workplace conflict

[12] http://www.afp.gov.au/what-we-do/referrals

- an internal audit or other review of an issue or the operations of a particular unit
- implementing or changing policies, procedures or practices
- conducting training and awareness sessions for staff.

The principal officer must also respond to any recommendations from the Ombudsman or the IGIS (as relevant) following a review of the investigation report. Further information on this requirement is at 9.1.6.2.

During an investigation, including at the end of an investigation, the principal officer must be mindful of the mandatory requirement to refer conduct which raises a serious or systemic corruption issue to the NACC, once they become aware of it (see Chapter 10).

7.4.3 What happens if the disclosure is not substantiated?

There may be a number of reasons why an allegation in a public interest disclosure is not substantiated, including insufficient evidence to find, on the balance of probabilities, that any disclosable conduct occurred. The discloser should be given as much information as possible about the outcome of the investigation, consistent with confidentiality limitations, and be assured that it does not mean that making a disclosure was not worthwhile. The information the discloser provided may be useful in making the agency aware of possible gaps in its policies or procedures, or lead to consideration of how to prevent similar issues in the future.

Regardless of the outcome, the discloser should be assured that, provided the disclosure of information was an internal disclosure for the purposes of the PID Act, they will still be protected under the PID Act for making a disclosure and the agency will continue to support them.

7.4.4 What if the discloser is not satisfied with the agency's action?

A public official who made an internal disclosure may be unhappy with the agency's decision not to investigate a matter. Alternatively, if the disclosure is investigated, they may believe the investigation or the agency's response to the investigation was inadequate. Principal officers should be mindful that a reasonable belief on the part of the discloser that an investigation under the PID Act, or the agency's response to the investigation, was inadequate is one of the conditions for making an external disclosure (see 2.7.7 of this guide).

A discloser who is unhappy with the process or how they have been treated may also complain to the Ombudsman (or the IGIS, in the case of intelligence agencies or in relation to the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs). Therefore, agencies may want to consider review or reconsideration measures to address situations where a discloser is not satisfied with the agency's handling of an internal disclosure.

In order to manage these possibilities well, it is essential that an agency's handling of a public interest disclosure is grounded in reason and effectively communicated to relevant parties. This includes managing the discloser's expectations from the outset. The information provided to the discloser at the time the disclosure is received, on allocation, and during an investigation should be clear that once an official has made an internal disclosure, it is up to the agency to determine how best to resolve matters by identifying problems and taking corrective action.

It is also important that explanations given to the discloser at the end of the investigation are as comprehensive as possible, allowing for privacy and confidentiality considerations, and consistent with the permissible redactions of information in s 51(5) (i.e., information that would identify the discloser or another person, be exempt from release under the Freedom of Information Act, is intelligence information or required to have a security classification, or would contravene a designated publication restriction). The discloser needs to feel the agency values their contribution in bringing the matter to their attention. Disclosers should be encouraged to approach the agency if they wish to discuss concerns about the process or the outcome. Agency procedures and all notices of decision relating to the disclosure should nominate who the discloser can contact in that case.

7.5 SOME ADMINISTRATIVE CONSIDERATIONS

7.5.1 Keeping the discloser informed

A discloser can become concerned or dissatisfied if they feel they are not being updated or nothing is happening. Agencies should seek to manage discloser expectations of notice early on, by informing them of the likely frequency and detail of updates, including that there may be instances in which an agency will not be able to provide detailed information about certain aspects of the investigation. It is important to balance the requirement

to inform the discloser with the need to maintain confidentiality in the investigative process. The authorised officer and investigator need to be careful not to release information if doing so will impact on anyone's safety, the ongoing investigation, or the confidentiality of anyone who is under investigation. It is also important to remind disclosers that they do not 'own' the investigation of their disclosure. It is up to agencies to determine how best to resolve matters by identifying problems and taking corrective action.

The PID Act requires the discloser to be notified at various stages in the process, provided the person's contact details are available. The discloser must be advised:

- when the disclosure is made, that it could be treated as an internal disclosure and what that requires under the PID Act, including that it may be referred to another agency, as well as the protections available under the Act.
- when the disclosure is either allocated for investigation, or not allocated because an authorised officer was satisfied on reasonable grounds it was not an internal disclosure or considered the conduct disclosed would be more appropriately investigated under another law or power.
- of information about the principal officer's discretionary powers to not investigate within 14 days of the disclosure being allocated (s 14 of the PID Standard).
- when the agency is required to investigate and, if the investigation is under the PID Act, the estimated length of the investigation.
- If the agency decides not to investigate, the reasons for the decision and, if relevant, either the steps the agency has taken (or will take) to refer the disclosure for investigation under another law or power, or any action that might be available to the discloser under another law or power.
- if a stop action direction from the NACC Commissioner prevents or stops an investigation, and also when such a direction no longer applies.
- if an investigation is conducted under the PID Act and an extension of time is granted by the Ombudsman or the IGIS, the progress of the investigation.
- written notice of the completion of the investigation, together with a copy of the report within a reasonable time (see 7.3.5 of this guide).

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. Early in the process, an authorised officer should make sure the discloser understands:

- what the agency intends to do
- the likely timeframe for an investigation, including the availability and likelihood of extension requests
- the discloser's responsibilities (such as maintaining confidentiality)
- how they will be updated on progress and outcomes, and
- who to contact if they want further information or are concerned about reprisal.

Any questions or concerns the discloser raises should be addressed honestly and as soon as possible, including being clear when an agency cannot provide certain information and providing reasons for this. If the discloser has not heard anything within a reasonable period, they are entitled to ask for an update.

The agency should also inform the discloser if it becomes apparent during the investigation that it is likely to take longer than originally expected. If an extension of the investigation time is required (see 9.1.4 in this guide), the agency should inform the discloser before applying to the Ombudsman or the IGIS and provide an estimate of the date when the investigation will be completed, explaining the reasons for the extension request.

The discloser can also be referred to:

- the agency's public interest disclosure procedures
- support networks or services
- information on the Ombudsman's website for disclosers and this guide, available at https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing.

7.5.2 Advice to the discloser of a stop action direction under the NACC Act

As provided in Chapter 10, the NACC Commissioner may direct an agency head (principal officer) to stop taking specified action (a stop action direction) in relation to a public interest disclosure which involves a corruption issue, unless the Commissioner permits the action (s 43 of the NACC Act). A direction could require the agency not to take particular actions set out in the direction, or not to take action of any kind in relation to a corruption issue. This may include or extend to preventing a principal officer from investigating, or further investigating a disclosure under the PID Act, or notifying a discloser about a stop action direction which is preventing the investigation of their disclosure under the PID Act.

If the investigation, or further investigation, of a disclosure is subject to a stop action direction under the NACC Act, the principal officer or their delegate must, as soon as reasonably practicable, provide notice to the discloser that they cannot investigate, or further investigate, the disclosure because of a stop action direction under the NACC Act (s 50(1)(c)). If that direction is revoked by the Commissioner, the principal officer or their delegate must, as soon as reasonably practicable, inform the discloser if they investigate, or further investigate, the disclosure (s 50(4A)).

If the principal officer is unclear whether the stop action direction would prevent notice being given to the discloser about the stop action direction under paragraph 50(1)(c), the principal officer should clarify the remit of the direction with the Commissioner.

If a stop action direction prevents notifying a discloser about the stop action direction, the principal officer may consider whether:

- permission should be sought from the Commissioner under ss 43(3) of the NACC Act to provide notice of the direction to the discloser, or
- the provision of notice would meet any of the relevant exceptions under ss 44(1) of the NACC Act (see Chapter 10).

7.5.3 Keeping records

Good records ensure that all action taken regarding the receipt and handling of a disclosure is reviewable (including by the Ombudsman or the IGIS).

Details about how and when a disclosure was made must be recorded and kept in a secure place. If the disclosure was made orally, it should be documented by the recipient and consideration should be given to asking the discloser to sign a record of the disclosure, or otherwise confirm in writing that the record is correct. Subsequent conversations where the disclosure is discussed should also be documented. Each disclosure should be registered and given a unique reference number. Details of the risk assessment of reprisal, allocation, investigation, and notifications to the discloser and others should also be kept. The records should be factual and free from unnecessary statements such as conjecture about the discloser's motives or personal opinion about the person(s) the disclosure concerns.

In addition to the requirement to notify the Ombudsman or the IGIS (as appropriate) of an allocation or investigation decision, and to provide a copy of an investigation report, agencies are required to provide to the Ombudsman certain information about disclosures they have handled for the purposes of the Ombudsman's six-monthly and annual report under the PID Act (PID Act, ss 76 and 76A and PID Standard, s 22). Information from the intelligence agencies for inclusion in the Ombudsman's annual report on the operation of the PID Act is coordinated by the IGIS, who provides the Ombudsman with an aggregated report. See also 7.5.5 of this guide.

7.5.4 Freedom of Information requests

Section 82(2) of the PID Act provides that the PID Act does not detract from any obligations imposed on an agency or a public official by any other law of the Commonwealth. Documents associated with a public interest disclosure do not attract any special exemption from the operation of the *Freedom of Information Act 1982*.

Requests for access to documents under the *Freedom of Information Act 1982* must be considered on a case by case basis. A range of exemptions may apply to certain agencies and to individual documents or parts of documents, particularly in relation to material received in confidence, personal information, operations of agencies, and law enforcement.

The principal officer should ensure that any agency officer handling freedom of information requests is aware of the confidentiality and secrecy provisions of the PID Act as they may apply to them, noting that s 20(3)(d) permits the use and disclosure of identifying information for the purposes of a law of the Commonwealth, such as the *Freedom of Information Act 1982*. The confidentiality provisions of the PID Act (ss 11A, 20, 21, 51, 76 and 76A) are not secrecy provisions for the purposes of s 38 of the *Freedom of Information Act 1982*, but they may be a relevant consideration in applying certain exemptions including the public interest test for conditional exemptions – for example, material that if released, would increase the risk of reprisal to the discloser or another person. If a document originates from another agency including the Ombudsman or the IGIS, the agency should contact that agency to seek their comment prior to deciding access.

7.5.5 Monitoring and evaluation

An agency should put in place an effective system for recording the numbers and types of disclosures received, the number of investigations, the outcomes (including agency action taken in response to investigation report findings and recommendations), and details of any support provided to a discloser and allegations of reprisal. Capturing data about the number of instances where a person has disclosed information to an authorised officer that was assessed not to meet the criteria for a PID, and the number of determinations under s 70 of the PID Act to deem a person to be a public official will also assist agencies to measure the extent of PID activity.

Much of this information will be needed to satisfy the principal officer's obligation to provide information to the Ombudsman for the six-monthly and annual reports on the operation of the PID Act (ss 76 and 76A of the PID Act, and s 22 of the PID Standard). It will also help agencies to evaluate the effectiveness of their procedures and identify any systemic issues.

The agency may wish to monitor the resources (financial and human) allocated to handling public interest disclosures, particularly in complex investigations. Once its procedures have been in place for some time, it may also be useful to survey staff about their awareness of, and trust in, the procedures, and the attitude of managers to the agency's process, so that improvements can be made. Regular and informed review of procedures and resources dedicated to the PID Act will aid principal officers in their obligation to take reasonable steps to provide ongoing training and education to public officials about the Act, and officers (namely authorised officers and supervisors) with duties under the Act (ss 59(7) and (8)). The updating of training, based on outcomes of regular reviews, would assist in demonstrating that 'reasonable steps' have been taken to fulfil this obligation.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 8: Agency obligations

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

June 2026
Version 3.1

8 Support and protection under the PID Act

The *Public Interest Disclosure Act* (PID Act) provides a means for protecting public officials, and former public officials, from adverse consequences of disclosing information that, in the public interest, should be disclosed (s 7(1)). It seeks to protect the identifying information of a discloser in certain circumstances, and provides disclosers and witnesses with immunity from civil, criminal and administrative liability. The PID Act also makes it an offence to take reprisal action, that is, to cause a person detriment because of a belief or suspicion that a person has made, may have made, proposed to make or could make a disclosure. The PID Act also enables victims of reprisals to seek remedies, including compensation, apologies and reinstatement to position (if relevant).

Supporting and protecting disclosers and other staff is an important agency responsibility that is key to successful administration of the scheme. So too is maintaining an appropriate level of confidentiality.

8.1 CONFIDENTIALITY AND SHARING OF INFORMATION UNDER THE PID ACT

8.1.1 Duty to maintain confidentiality

The principal officer of an agency is obliged to establish procedures to provide for the confidentiality of the investigation process (s 59(4)(b)).

If a person improperly discloses information about a PID investigation, including details about a discloser or witnesses, they may be in breach of the duty to maintain confidentiality in relation to official information they have gained in the course of their work. Furthermore, the person may be subject to other civil, criminal or disciplinary action (noting that disclosure of identifying information is an offence under s 20 of the PID Act).

8.1.2 Authorised information sharing

Section 65 of the PID Act sets out when information sharing between agencies is expressly permitted under the PID Act. It authorises agencies, including investigative agencies, to share information and documents where the principal officer of the sharing agency considers the information or documents relevant to the other agency's functions. This includes, but is not limited to, sharing a copy of an investigation report.

The table below sets out the circumstances in which information sharing is expressly permitted under the PID Act:

Agency sharing information	Agency that can receive information
An investigative agency (i.e., the Ombudsman or the IGIS)	» Another investigative agency (i.e., the Ombudsman or the IGIS) » The portfolio Department of the agency to which the conduct relates, or » The agency to which the conduct relates
If the disclosure is allocated within an agency's portfolio under ss 43(8), the agency to which the disclosure is allocated	The agency to which the conduct relates
If the disclosure is allocated within an agency's portfolio under ss 43(8), the agency to which the conduct relates	The agency to which the disclosure is allocated

Section 65 does not provide an exhaustive list of when information sharing is permitted in accordance with the PID Act, nor does it *require* agencies to share information. Information may otherwise be shared between agencies if it can be done consistently with the identifying information offence in the PID Act and any other relevant secrecy provisions under other laws. It is important to be aware that s 65 of the PID Act does not permit the sharing of the discloser's name and contact details if the discloser does not consent to those details being shared (see 8.2.1 of this guide for further information on an agency's obligation to protect a discloser's identifying information).

The agency sharing the information or documents may redact any material from what it provides to another agency, if the sharing agency considers it appropriate to do so.

8.1.2.1 Information sharing and restriction on the application of secrecy provisions

Agencies should also consider how existing s 75 of the PID Act would interact with information sharing under s 65. Section 75 of the PID Act restricts the application of secrecy provisions in other legislation in certain circumstances. It provides that a law of the Commonwealth that otherwise prohibits the disclosure, recording or use of information does not apply to the disclosure, use or recording of information if:

- the disclosure, recording or use is in connection with the conduct of a disclosure investigation
- the disclosure, recording or use is for the purposes of the performance of the functions, or the exercise of the powers, conferred on a person by Part 3 or s 61 or s 65 of the PID Act, or
- the disclosure, recording or use is in connection with giving a person access to information for the purposes of, or in connection with, the performance of the functions, or the exercise of the powers, conferred on the person by Part 3 or s 61 or s 65 of the PID Act and the disclosure, recording or use is not contrary to a designated publication restriction.

Importantly, s 75 will not apply to override a secrecy provision in other legislation if that provision was enacted after the commencement of s 75 of the PID Act and contains the express intention to override s 75.

8.2 PROTECTION FOR THE DISCLOSER

The PID Act provides disclosers with:

- protection of their identity (see 8.2.1 below)
- immunity from civil, criminal or administrative liability (see 8.2.2 below)
- support and protection from reprisal (ss 13, 19 and 59 - see 8.5 and 8.6 below)
- recourse to court for remedies for reprisal action (ss 14 – 16, see 8.7 below)

These protections and immunities apply not only to internal disclosures, but also to external, emergency, legal practitioner and NACC disclosures made in accordance with the PID Act.

Even if the discloser's report of wrongdoing turns out to be incorrect or cannot be substantiated, they are still protected under the PID Act, provided their report meets the criteria for a public interest disclosure in s 26 (see Chapter 5 of this guide), including that they reasonably believe or believed at the time of the disclosure that the information tends to show disclosable conduct.

However, there are some limitations to the discloser's immunity from liability for making a public interest disclosure. An official will still be liable for knowingly making a disclosure of information that is false or misleading (s 11); or knowingly breaching a designated publication restriction without reasonable excuse (s 11A).[1] An official may not receive immunities under the PID Act for actions taken to investigate or otherwise collect evidence to support the making of a disclosure.

It should also be noted that making a public interest disclosure does not exclude a person from being reasonably managed or disciplined for any unsatisfactory performance or disclosable conduct on their part (s 12). However, management or disciplinary action should not be taken against an official for having made a disclosure or having provided assistance in relation to a disclosure. Such action could constitute a reprisal under the PID Act. This is discussed further in 8.5.

In addition to the protections under the PID Act, an agency should ensure that support is provided to the discloser where appropriate (see 8.6 of this guide). Principal officers and authorised officers in an agency should also be mindful of their responsibilities towards anyone against whom an allegation has been made, and others who might be suspected to have made a disclosure. This is discussed further in 8.5 below.

Agencies are also bound by obligations under the *Privacy Act 1988* in relation to storing personal information securely and limiting its use and disclosure.

8.2.1 Protecting the discloser's identity

Agencies need to make every reasonable effort to protect the discloser's identity. The PID Act contains a criminal offence that provides specifically for the protection of a discloser's identity (s 20).

The discloser is entitled to make their disclosure anonymously (s 28(2) – see 4.1.4 and 8.2.1 of this guide). If the discloser's identity is known to the authorised officer, the discloser may choose not to be identified as the source of the disclosed information when the principal officer and the Ombudsman or the IGIS (as relevant) are notified of it (ss 44(2) and (3) – see 5.4.5.2 of this guide).

Section 20 of the PID Act protects any information that could enable others to identify the person as the official who made the disclosure. Unless an exception applies, it is an offence for a person to use or disclose the identifying information of a discloser that they obtained in their capacity as a public official. The general intention of s 20 of the PID Act is to ensure that as far as possible, unless the discloser wishes to be identified as the source of the disclosed information, that fact should only become known to people who have a specific role in dealing with the disclosure. Those people should not directly or indirectly identify the discloser to anyone who does not have a similar need to know.

A public official who has obtained information that is likely to enable the identification of another person as someone who has made a disclosure may only use or disclose that identifying information if:

- it is for the purposes of the PID Act (s 20(3)(a))
- it is in connection with the Ombudsman or the IGIS investigating a disclosure, or a complaint about the handling of a disclosure (s 20(3)(b) and (c))
- it is for the purposes of a law of the Commonwealth or a prescribed law of a State or Territory (s 20(3)(d))
- the discloser has consented to the use or disclosure, or acted in a way that is inconsistent with keeping their identity confidential (s 20(3)(e)); or
- the particular identifying information has already been lawfully published[2] and the prior publication was lawful (s 20(3)(f)).

[1] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the Family Law Act 1975 and the Migration Act 1958), witness protection and law enforcement mechanisms (see the full definition in s 8).
[2] The term "published" is not defined in the PID Act. However, given the specific protections for the discloser's identity in the PID Act, a public official should be cautious before relying upon this particular defence.

It is a criminal offence for a public official to use or disclose any information likely to enable the identification of a person as a discloser in any other circumstance (s 20(1)). A penalty of imprisonment for 6 months or 30 penalty units, or both, applies.

Some examples of circumstances where it may be appropriate or necessary to use or disclose information that is likely to identify the discloser include:

- to investigate the disclosure effectively, for example, if the wrongdoing that was reported was directed solely against the discloser
- to refer the conduct disclosed for investigation under another law or power
- to protect the discloser against reprisals (for example, if there are concerns that it is impossible for them to remain in their current workplace).

In any of these situations, the use or disclosure of identifying information would be for the purposes of the PID Act and covered by the exception in s 20(3)(a).

The PID Act also provides that circumstances in which a person will be disclosing or using identifying information for the purposes of the PID Act include, but are not limited to, where the person does so:

- for the purposes of providing assistance in relation to a public interest disclosure
- for the purposes of providing legal advice or other professional assistance relating to a public interest disclosure in accordance with the PID Act, and
- in the performance or exercise (or purported performance or exercise) of a function or power conferred by the PID Act.

8.2.1.1 Measures to protect the discloser's identity

When receiving a disclosure, authorised officers should emphasise to the discloser that the PID Act does not, and cannot, absolutely protect their identity in all situations. As noted above, there are exceptions in s 20 of the PID Act that would allow identifying information to be used or disclosed. Furthermore, other staff may guess who made the disclosure once an investigation is under way, particularly if the discloser has previously complained about the issue to colleagues or flagged their intention to disclose.

It may be appropriate to seek the discloser's consent to reveal their identity to appropriate people.

A discloser may consent to their identifying information being released to certain other people (such as the Ombudsman, another agency that has been allocated the disclosure, or their workplace). If so, it is good practice to ask them to confirm this in writing. If they do not consent, it may not be practicable to protect their identity, particularly if it is widely known that the person has made the disclosure, or if identifying information needs to be disclosed for the matter to be effectively investigated.

Balancing the need to protect the discloser's identity with protecting them against reprisal and facilitating an investigation can be challenging. To protect a discloser's identity, agencies should:

- limit the number of people who are aware of the discloser's identity or information that would tend to identify them
- remind each person who has the identifying information that they should keep it confidential, and that unauthorised disclosure or use may be a criminal offence
- assess whether anyone who is aware of the discloser's identity may have a motive to take reprisals against them or impede the progress of the investigation, and monitor the situation
- ensure that the discloser can communicate with a support person, the authorised officer or investigator without alerting other staff.

If it is necessary or likely that the discloser's identity will become known during an investigation, the agency should explain this to them before the investigation starts. The agency should also take steps to protect the discloser (and other public officials in their agency) against reprisal (see 8.5). An assessment of the risk of reprisal against the discloser and others, including witnesses, should be conducted as soon as possible after the disclosure is received, and updated as required (see 8.5.3).

8.2.1.2 Can the discloser's identity be revealed to a court or tribunal?

The requirement to protect a discloser's identity remains even where court or tribunal proceedings are involved. A former or current public official is not to be required to disclose to a court or tribunal identifying information that the person has obtained, or produce to a court or tribunal a document containing identifying information, except where necessary to give effect to the PID Act (s 21). This provision may be invoked where a person on trial is seeking information from an official about the identity of the discloser.

However, s 21 does not wholly prohibit disclosure of identifying information to a court or tribunal. If one of the exceptions in s 20(3) of the PID Act applies, an official may provide information to a court or tribunal that would identify the discloser. For example, where identifying information is relevant to a claim for compensation by the discloser, and the discloser consents, s 20(3)(e) permits an official to disclose that information to a court.

8.2.2 Discloser's immunity from liability for making a disclosure

A person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability (including disciplinary action) for disclosing information in accordance with the provisions of the PID Act (s 10(1)(a)). However, if the official also tells that same information to other people, or has previously disclosed that information elsewhere, they are not protected from the consequences of making those other disclosures, unless those other disclosures were also public interest disclosures under the PID Act – that is, an internal disclosure, an external disclosure, an emergency disclosure, a legal practitioner disclosure or a NACC disclosure (see 2.7 of this guide).

This immunity from liability means, for example, that a person would not be committing an offence against the secrecy provisions of the *Criminal Code 1995* for making a disclosure in accordance with the PID Act. The person also has absolute privilege in proceedings for defamation in respect of the information they disclosed when making the public interest disclosure (s 10(2)(a)).

No contractual or other remedy may be enforced, and no contractual or other right may be exercised, against a person on the basis of them having made a public interest disclosure (s 10(1)(b)). A contract to which the discloser is a party cannot be terminated on the grounds of them having disclosed information if that disclosure of information was made in accordance with PID Act and assessed as meeting the requirements in s 26 for a public interest disclosure (s 10(2)(b)).

These immunities do not apply to the extent that the discloser:

- knowingly makes a statement that is false or misleading (s 11(1))
- knowingly provides false or misleading information, or dishonestly produces forged or altered documents (s 11(2))
- makes a disclosure knowing that it contravenes a designated publication restriction[3] and without a reasonable excuse for doing so (s 11A).

The immunities under s 10 apply despite any provision in another Commonwealth law unless that other provision is enacted after 15 January 2014 and is expressed to have effect despite s 10 or Part 2 of the PID Act (s 24).

It is important to note that making a disclosure about matters that include a discloser's own wrongdoing does not protect the discloser from liability for their wrongdoing (see 8.2.2.1).

8.2.2.1 Can immunity from disciplinary action be granted?

Making a public interest disclosure does not protect the person from liability for their own wrongdoing (s 12). However, the discloser or another witness may seek immunity from disciplinary action for providing information about improper conduct in which they are implicated. This is not a right or option under the PID Act but may be something to be taken into account in any disciplinary proceedings or code of conduct investigation. It is up to the person with the power to take disciplinary action in each agency to decide how to exercise the discretion in such circumstances. The nature and seriousness of the person's misconduct will be relevant to that decision.

[3] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

8.2.2.2 What happens if proceedings are commenced?

If civil or criminal proceedings are instituted against someone because they made a disclosure, the discloser can claim immunity under s 10 of the PID Act (s 23). The discloser must be able to point to evidence that suggests a reasonable possibility that their claim is correct (s 23(1)(a)). It is then a matter for the person bringing the proceedings against the discloser to prove the claim is incorrect (s 23(1)(b)). Other evidentiary and procedural matters that apply in such circumstances are also covered in s 23 of the PID Act.

8.3 PROTECTION FOR WITNESSES IN A PID INVESTIGATION

All current and former public officials are obliged to use their best endeavours to assist a principal officer with an investigation, and to assist any other public official to exercise a right, or perform a duty or function, under the PID Act (s 61).

The PID Act also provides protection for any person who provides assistance in relation to a public interest disclosure. These protections are the same as those afforded to disclosers under the PID Act and include immunity from criminal or civil liability (see 8.3.1) and protection from reprisal, including threats of reprisal (see 8.5).

Chapter 8.5 of this guide explains the principal officer's obligation to take reasonable steps to protect officials who belong to their agency against reprisals that have been, or may be taken, in relation to public interest disclosures that have been made, may have been made, are proposed to be made or could be made in their agency. This protection obligation extends to witnesses, and any other public official in their agency who may be suspected to have made disclosures.

8.3.1 Witness's immunity from liability for providing information

Any person (other than the discloser themselves) who provides assistance in relation to a public interest disclosure will have immunity as a witness from any civil, criminal or administrative action for giving information, producing a document or other thing, or answering a question that they consider on reasonable grounds to be relevant to:

- the making of a decision in relation to the allocation of a disclosure
- a disclosure investigation or a proposed disclosure investigation, or
- a review or proposed review by the Ombudsman or the IGIS about the handling of a disclosure (s 12A).

This immunity means that the person may give that information or produce such documents without breaching any secrecy or confidentiality provisions in other laws and giving that information or producing such documents cannot be a criminal offence.

Importantly, an official does not have to be asked to provide such assistance in order to be a witness under the PID Act and receive protections. An official who voluntarily provides assistance will be entitled to the protections as a witness under the PID Act as long as the information they provide meets the criteria in s 12A.

However, the witness's immunity does not apply if the witness:

- knowingly makes a false or misleading statement (s 12B(2))
- contravenes a designated publication restriction[4] (s 12B(4)).

A witness who provides information about their own conduct will not obtain immunity in respect of that conduct (s 12B(5)). Their immunity relates only to the act of providing assistance in relation to a public interest disclosure.

If the principal officer or investigator is interviewing a witness, they must advise that person of their protections under s 12A of the PID Act (see 7.3.3.5 of this guide for more information about conducting interviews).

[4] A 'designated publication restriction' means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

8.3.1.1 What if the witness wants to raise other matters?

Section 12A does not provide immunity for a person who provides assistance where the assistance is not, on reasonable grounds, relevant to:

- the making of a decision in relation to the allocation of a disclosure
- a disclosure investigation or a proposed disclosure investigation, or
- a review or proposed review by the Ombudsman or the IGIS about the handling of a disclosure.

If a witness wishes to provide assistance in relation to conduct unrelated to the investigation, the principal officer or investigator should encourage the person to disclose that information to an authorised officer instead. The authorised officer can assess whether the information tends to show on reasonable grounds one or more instances of disclosable conduct and if so, allocate it for handling under the PID Act (see chapter 5 of this guide).

8.4 OFFICIALS EXERCISING POWERS OR PERFORMING FUNCTIONS UNDER THE PID ACT

Section 78(1) provides that:

- a principal officer or their delegate
- an authorised officer
- a supervisor or manager of a discloser.

are not liable to any criminal or civil proceedings or any disciplinary action for acting in good faith in the exercise of functions and powers under the PID Act:

Furthermore, a person assisting a principal officer or their delegate will also not be liable to any criminal, civil or disciplinary action for actions done in good faith in assisting the principal officer or their delegate in the performance of functions or exercise of powers conferred on them under the PID Act.

This protection does not apply to contravening a designated publication restriction[5] (s 78(2)). It also does not affect a person's rights under the *Administrative Decisions (Judicial Review) Act 1977* to seek review by a court or tribunal of any decision, conduct or failure to make a decision.

8.5 PREVENTING AND PROTECTING AGAINST REPRISAL

The principal officer of each agency must take reasonable steps to protect public officials who belong to their agency against reprisals that have been, or may be, taken in relation to public interest disclosures that:

- have been made
- may have been made
- are proposed to be made, or
- could be made

to an authorised officer or a supervisor belonging to the agency (s 59(9)). This protection obligation extends beyond the officials making disclosures and includes witnesses and other officials in their agency.

The protection obligations also extend to officials in their agency who *could* make a disclosure, but who have not yet and may never do so. These extended protections are intended to ensure that officials who are aware of wrongdoing that could form the basis of a public interest disclosure are not subject to pre-emptive intimidation or other reprisal action that may deter them from making a disclosure or providing assistance to an investigation.

This may include, for example:

- officials who have expressed concerns to their colleagues about conduct that could be the subject of a public interest disclosure, but who have not raised the issue with their supervisor or an authorised officer, or
- officials who have, or likely have, knowledge of a matter that has been the subject of a public interest disclosure, but who have not yet themselves made a disclosure or provided assistance as a witness.

[5] See above

8.5.1 What is reprisal?

Reprisal occurs if someone causes, by an act or omission, any ***detriment*** to another person because they believe or suspect that person, *or anyone else*, has made, may have made, proposes to make, or could make a public interest disclosure (s 13(1)).

A reprisal also includes threats to take a reprisal. This covers conduct that consists of, or results in, a threat to cause detriment that is a reprisal. This means that the PID Act provides protection against both direct and indirect threats. Indirect threats may occur where there is a direction for a threat to be given. For example, a senior staff member in an agency may direct a junior staff member to threaten detriment against a discloser.

8.5.1.1 Detriment

'Detriment' includes, but is not limited to, any of the following:

- dismissing an employee
- injuring an employee in their employment
- altering an employee's position to their disadvantage
- discriminating between an employee and other employees
- harassing or intimidating a person
- harming or injuring a person, including psychological harm
- damaging a person's property
- damaging a person's reputation
- damaging a person's business or financial position, or
- any other damage to a person.

8.5.1.2 What is not a reprisal?

Administrative action that is reasonable to protect the discloser from detriment is not a reprisal (s 13(3)). For example, where a person has made a disclosure in relation to practices in their immediate work area, it may be appropriate to transfer them to another work area to ensure they are not harassed or victimised. It is important to ensure there is no perception that they are being punished for having made a disclosure.

8.5.1.3 Managing the discloser's performance

Agencies should make clear in their PID procedures that making a public interest disclosure does not prevent supervisors and managers from addressing the discloser's unsatisfactory performance in the workplace. Making a disclosure also does not protect a person from the consequences of their own improper conduct if they are implicated in the wrongdoing they have reported.

However, the agency may consider the discloser's admission is a mitigating factor when considering disciplinary or other action against them, for example, if the discloser has brought to light information about serious wrongdoing in which they had minor involvement. This is a matter for the agency's discretion.

Disciplinary or other action against a discloser may be perceived as being taken in retaliation for making the disclosure, rather than reasonable action to address unsatisfactory performance.

If such action is being contemplated, the agency must be able to clearly demonstrate that:

- there are sufficient grounds for the action
- the action is reasonable and proportionate, and
- the action is not being taken because the person made a disclosure.

The agency's usual procedures in relation to performance management and/or disciplinary action should be followed. All actions, conversations, decisions and reasons should be documented thoroughly.

8.5.2 Reprisal protections in the PID Act

The PID Act protects any person, including the discloser, from reprisal in the following ways:

- it is a criminal offence for anyone to cause, or threaten to cause, detriment to a person because it is suspected or believed that they have made, may have made, propose to make or could make a public interest disclosure (see 8.8)
- a person who believes they are suffering or have been threatened with reprisal has the right to apply to court for an injunction to stop or prevent it (see 8.7)
- a person has the right to apply for compensation for loss, damage or injury suffered from a reprisal (see 8.7).

The agency may be open to a claim for damages if it cannot show it took reasonable steps to prevent a reprisal (see 8.7).

8.5.3 Risk assessment procedures

Each agency must establish procedures to assess risks that reprisals may be taken in relation to public interest disclosures that relate to the agency (s 59(4); see 3.2.2 of this guide for information about establishing agency PID procedures). Those procedures must also outline what support will be made available to public officials who make disclosures (s 11 of the Public Interest Disclosure Standards Determination 2025 (PID Standard)).

Given that the obligation to protect officials from detriment extends beyond disclosers to any person, agencies should also ensure their procedures include information about support and assessing risks for others who may be at risk of reprisal and detriment because of a public interest disclosure. This extends to any person, including witnesses and other staff who might be suspected to have made, or could make, disclosures, and any official who is the subject of any allegation.

A risk assessment involves assessing the specific behaviour and circumstances that may result in reprisals. Once those risks, and the likelihood of them occurring, have been assessed, the agency needs to consider appropriate strategies to prevent or contain them. Inappropriate workplace behaviour, including harassment, intimidation, undermining of authority, ostracism, humiliation, questioning of motives and heavier scrutiny of work, can greatly increase stress and can result in serious injury to someone who has made a disclosure. The risk assessment can include not only the risk of direct reprisal against the discloser and other persons, but also the risk of related workplace conflict or difficulties.

An accurate and objective risk assessment allows the agency to put in place suitable strategies to mitigate the risks occurring and defend itself against any allegations of having failed to protect a discloser or another person from reprisal.

8.5.3.1 When should a risk assessment be done?

An initial risk assessment should be completed as soon as possible after a disclosure is received, or after the agency is notified that a disclosure concerning their agency has been received (for example, if the Ombudsman, the IGIS or investigative agency decides to investigate a disclosure made directly to them). This gives the agency the best chance of recognising any risk of reprisals or associated workplace conflict.

The risk of reprisal may increase or change as the PID investigation progresses and more people become aware of the disclosure. Even after the investigation has been completed, the risk of reprisal may persist, or even increase, particularly if action has been recommended to address the investigation findings. Therefore, it is necessary for agencies to reassess the risk assessment when things change and document the updated assessment and any action to be taken.

8.5.3.2 Who should conduct a risk assessment?

The PID Act requires the principal officer to establish procedures for assessing the risk of reprisal in relation to public interest disclosures relating to their agency. Those procedures should clearly identify who is responsible for conducting the risk assessment. Given that the initial risk assessment should be done as soon as possible after a disclosure has been received, the authorised officer should conduct that initial assessment. Similar to principal officers, authorised officers also have an obligation under the PID Act to take reasonable steps to protect public

officials in their agency against reprisals that have been, or may be, taken in relation to disclosures that the authorised officer suspects on reasonable grounds:

- have been made or given to the officer
- may have been made or given to the officer
- are proposed to be made or given to the officer, or
- could be made or given to the officer (ss 60(2)).

If it is not feasible for the authorised officer to conduct the initial assessment, the authorised officer should ensure that, within a reasonable time, the information is passed to another officer with the requisite skills and experience to conduct the risk assessment.

The responsible officer, determined according to an agency's procedures, should conduct their risk assessment based on a checklist of risk factors, and make records of their assessment. See 8.5.4 of this guide for a suggested risk assessment framework.

8.5.3.3 Who should be consulted?

The best sources of information about potential risks are people who are involved in the particular workplace, especially the discloser and their supervisor or manager (provided that person is not involved in the alleged wrongdoing).

Asking the discloser why they are reporting wrongdoing and who they might fear a reprisal from can be helpful in:

- assessing likely perceptions amongst staff as to why the discloser came forward and how colleagues may respond if the discloser's identity becomes known
- managing the discloser's expectations about how other staff might perceive their disclosure
- reducing the potential for future conflict between the discloser and management about whether effective support was provided
- identifying the motives of staff allegedly involved in reprisals if a later investigation becomes necessary.

The supervisor or manager may also be a valuable source of information about these matters.

8.5.3.4 Risk assessments for anonymous disclosers

If an anonymous disclosure is made, it may be difficult for an agency to protect the discloser and other staff from reprisal or workplace conflict. However, a risk assessment should still be conducted where an anonymous disclosure is received, to assess whether the discloser's identity can be readily ascertained or may become apparent during an investigation.

Staff may speculate, correctly or otherwise, about who made the disclosure, and that person may be at risk of reprisal. If the person makes an assumption about the identity of a discloser, the risk of reprisal may escalate and require prevention or mitigation strategies to be implemented, such as:

- raising the issue with staff
- reminding them of the agency's obligations under the PID Act to protect public officials in their agency from reprisal, and
- reminding them that reprisal and threats to cause reprisal are criminal offences, and they may also be liable to civil action as a result of such conduct.

It is important to remember that the principal officer of an agency also has an obligation to take reasonable steps to provide ongoing training and education to officials in their agency about the PID Act, including the protections that are available to persons under the PID Act (s 59(7) (see Chapter 3 of this guide).

8.5.4 Risk assessment framework

Agencies may have their own established processes for assessing risks. However, the following framework is suggested for consideration. It entails 4 steps:

- Identifying – are there reprisals or related workplace conflict problems in the workplace, or are there potential reprisals or the potential for there to be problems?
- Assessing – what is the likelihood and consequence of reprisals or related workplace conflict?
- Controlling – what strategies should be put in place to prevent or contain reprisals or related workplace conflict?
- Monitoring and reviewing – have the strategies been implemented and were they effective?

8.5.4.1 Identifying risks

The agency should develop a list of risk factors that can alert those dealing with the public interest disclosure, and managers, to problems. Table 1 below includes some indicators of a higher risk of reprisals or workplace conflict.

The person doing the risk assessment should clearly define the individual factors affecting the particular discloser or official and the specific workplace when assessing if there are factors that make reprisals or related workplace conflict likely. Table 2 is a risk matrix[6] which lists the types of detriment that might occur in that agency's work environment.

8.5.4.2 Assessing risks

The person assessing the risk should consider:

- the likelihood of reprisals (including threats of reprisal) or related workplace conflict occurring – this may be high if:
  - there have been previous instances where threats were made
  - there is already conflict in the workplace
  - a combination of circumstances and risk factors indicate reprisals or related workplace conflict are likely
- the potential consequences if the risks eventuate, both to the discloser or other official's immediate and long-term wellbeing, and the consequences for the agency.

8.5.4.3 Controlling risks

The agency should plan and implement strategies to control any risks likely to expose a discloser to reprisals or related workplace conflict. The discloser should be consulted about possible strategies. Agencies should take care to ensure that strategies translate to specific assignable actions, and that those actions are recorded and their implementation monitored and documented.

If the risk is assessed as sufficiently high, the agency should prepare a plan to prevent and contain reprisals against the discloser or other officials. If it has been determined that a discloser or other official, such as a witness, will require support, the agency should develop a strategy for providing an appropriate level of support, such as appointing a support person.

If the discloser's identity is likely to be known or become known in their workplace, the agency should adopt a proactive approach, for example, by raising the matter with staff, reiterating the principal officer's obligation to encourage and support public officials who make or are considering making a disclosure relating to the agency, and any other persons who are providing or considering providing assistance in relation to disclosure relating to the agency (s 59(2)). In addition to the training on the PID Act that a principal officer is required to provide to officials in their agency (s 59(7)), it may be necessary to remind staff of the consequences of taking or threatening reprisal, including that such action is a criminal offence.

[6] Developed by one agency.

8.5.4.4 Monitoring and reviewing risks

Problems in the workplace can arise at any point after a disclosure has been made, including during an investigation and afterwards when action is being taken to address any findings. This means the risk assessment should be monitored regularly, and reviewed and updated as necessary, including by checking with the discloser, witnesses and other relevant officials to see if reprisals have been made or threatened. Records should be made of actions taken to implement mitigation strategies, and of analysis and outcomes whenever the risk assessment is reviewed or revised.

Indicators of a higher risk of reprisals or workplace conflict occurring are set out in a table on the next page.

TABLE 1 INDICATORS OF A HIGHER RISK OF REPRISALS OR WORKPLACE CONFLICT[7]

Threats or past experience	» Has a specific threat against the discloser, a witness or another relevant official (including a potential discloser or witness) been made? » Is there a history of conflict between the discloser, witnesses or other relevant officials (including a potential discloser or witness), and the subjects of the disclosure, management, supervisors or colleagues? » Is there a history of reprisals or other conflict in the workplace? » Is it likely that the disclosure will exacerbate this?
Confidentiality unlikely to be maintained	» Who knows that the disclosure has been made, was going to be, or could be made? » Who knows that witnesses or other relevant officials are providing, or could provide assistance in relation to the disclosure? » Has the discloser already raised the substance of the disclosure or revealed their identity in the workplace? » Who in the workplace knows the discloser's identity? Who in the workplace knows the identity of witnesses or other persons providing assistance, or who could provide assistance, in relation to the disclosure? » Is the discloser's immediate work unit small?*[8] » Are there circumstances, such as the discloser's stress level, which will make it difficult for them to not discuss the matter with people in their workplace? » Will the discloser become identified or suspected when the existence or substance of the disclosure is made known or investigated? » Can the disclosure be investigated while maintaining confidentiality?
Significant reported wrongdoing	» Are there allegations about individuals in the disclosure, or in issues raised that could form the basis of a disclosure? » Who are their close professional and social associates within the workplace? » Is there more than one wrongdoer involved in the matter?* » Is the reported wrongdoing serious?* » Is or was the reported wrongdoing occurring frequently?* » Is the disclosure particularly sensitive or embarrassing for any subjects of the disclosure, senior management, the agency or government? » Do these people have the motivation to take reprisals against the discloser, witnesses or potential discloser or witnesses – for example, because they have a lot to lose? » Do these people have the opportunity to take reprisals against the discloser, witnesses or potential discloser or witnesses – for example, because they have power over the discloser?
Vulnerable discloser, witness or other relevant official	» Is or was the reported wrongdoing directed at the discloser?* » Are there multiple subjects of the disclosure? » Is the disclosure about a more senior officer?* » Is the discloser, witness or other relevant official employed part-time or on a casual basis?* » Is the discloser, witness or other relevant official isolated – for example, geographically or because of shift work? » Are the allegations unlikely to be substantiated – for example, because there is a lack of evidence?* » Is the disclosure being investigated outside your organisation?*

[7] Adapted from NSW Ombudsman, *Managing risk of reprisals and conflict*, Public Interest Disclosure Guideline C4.
[8] All asterisked points are risks of poor treatment for reporting wrongdoing identified by research (Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp. 137-164).

TABLE 2 — RISK ASSESSMENT MATRIX FOR DISCLOSERS, WITNESSES AND OTHER RELEVANT OFFICIALS

Example only

(Each agency/workplace has specific features that will create different risks of reprisal/detriment)

	Identified risk event	**Likelihood** High/Medium/Low	**Consequence** Minor/Moderate/Serious	**Action to mitigate** Yes/No – (if yes, describe)
1	Assault			
2	Verbal assault			
3	Stalking			
4	Bullying or harassment, including cyber-bullying			
5	Silent treatment in workplace			
6	Interference to personal items in workplace			
7	Excluded form legitimate access to information			
8	Excluded from promotion			
9	Excluded from workplace sanctioned social events			
10	Unjustified change to duties/hours of work			
11	Dismissal			
12	Unjustified refusal of leave			
13	Onerous/unjustified audit of access to ICT/ Time sheets			
14	Onerous/unjustified audit of expenditure of Commonwealth money / Cab charge use			
15	Other (describe)			

8.6 PRACTICAL SUPPORT AND PROTECTION STRATEGIES

8.6.1 Support for the discloser, witnesses and subject of a disclosure

Section 11 of the PID Standard provides that internal agency procedures must outline any support that will be made available to:

- public officials who make disclosures relating to the agency
- witnesses or other persons who provide assistance in relation to a public interest disclosure
- persons who are the subject of a public interest disclosure.

A discloser who feels supported and sees the agency's procedures as fair is more likely to accept the agency's decision about their disclosure, even if the outcome is not what they wished. The agency should provide active support for the discloser, including:

- acknowledgement for having come forward with a report of wrongdoing
- an offer of support and information about what support options are available
- advising that the principal officer and authorised officer must take reasonable steps to protect them from reprisal.

Although an investigator may be able to provide general information about the investigation process, they are unlikely to be the most appropriate person to support a discloser. Their role is to investigate matters objectively and impartially, and they may sometimes reach a conclusion that the discloser was not expecting, based on the evidence they have.

A principal officer has an obligation to take reasonable steps to encourage and support public officials who make, or are considering making, public interest disclosures in relation to the agency, as well as any other persons who provides, or are considering providing, assistance in relation to those public interest disclosures (s 59(2)). Reasonable steps could include ensuring public officials are aware of the agency's Employee Assistance Program (EAP), authorising additional free EAP sessions for a public official if appropriate in the circumstances, or ensuring a person is aware of, or can contact, a support person within the agency. It is important to be aware that what is reasonable will depend on the circumstances of each case, and what the discloser deems to be reasonable may not be reasonable in all the circumstances.

Relatedly, supervisors also have an obligation under the PID Act to explain certain matters to a discloser (s 60A(2)), including to explain to a discloser the civil and criminal protections the PID Act provides to protect disclosers (and those providing assistance in relation to such disclosures) from reprisals (see Chapter 3 of this guide on agency obligations). Agencies should ensure that supervisors within their organisation understand and are equipped to meet this obligation.

Apart from a supervisor or manager (if appropriate) or an authorised officer, the following sources of support can be very helpful to a discloser who is finding the process stressful:

- peer support officers
- family and friends
- Employee Assistance Programs which provide access to professional counselling services.

Agencies should bear in mind that the discloser may not be the only person requiring support. Witnesses and any official who is the subject of allegations may also find the PID process stressful, and must be advised of the arrangements the agency has in place to support them (s 11(b),(c), PID Standard).

Some agencies may have established networks that can be utilised for support, such as a peer support or harassment contact officer network. Larger agencies may have professional staff such as welfare officers. It is appropriate to seek an official's consent before providing their details to an appropriate support person.

Disclosers and witnesses should be advised that they can discuss their general situation and the process with support people, but they should not provide information that would identify those alleged to have committed wrongdoing or other information that they have a duty to keep confidential.

The discloser (or any other public official) may also disclose information to an Australian legal practitioner for the purposes of seeking legal advice or professional assistance in relation to having made, or proposing to make, a disclosure (other than intelligence information, including sensitive law enforcement information). It may be helpful for agencies to provide disclosers with advice to ensure this disclosure meets the other requirements of a legal practitioner disclosure under the PID Act (see 2.7.8 of this guide).

8.6.2 What are the ongoing support requirements?

It is important that the authorised officer, or other appropriate person involved in handling the disclosure, contacts the discloser periodically to advise them of progress on their disclosure, taking into account the obligation to provide for confidentiality of investigative processes. The authorised officer or other appropriate person should also maintain contact with the discloser, witnesses and other relevant officials in their agency to ensure they are not experiencing any reprisals (including threats to cause detriment).

If a matter is not allocated for investigation or if an investigation is unable to substantiate their allegations, the discloser should be given sufficient information to help them understand the reasons (see Chapter 5 of this guide for further details).

8.6.3 How can an agency protect an official from reprisal?

The principal officer must take reasonable steps to protect public officials who belong to their agency from reprisals that have been, or may be, taken in relation to public interest disclosures that have been, may have been, are proposed to be, or could be made within their agency. Authorised officers also have a similar obligation under the PID Act (see 5.6 of this guide). Assessing the risk of reprisal action and putting in place strategies to mitigate those risks may be examples of reasonable steps that can be taken to fulfil that obligation. The discloser and any witnesses should also be encouraged to report if they believe they are being or may be subject to a reprisal. That report may be made to an authorised officer, their supervisor or manager, or a support person in the agency.

Every allegation of reprisal must be taken seriously, recorded and responded to. It is important to remember that reprisal captures a broad range of detriment, including employment-related detriment, as well as harassment and intimidation, harm or injury (including psychological harm) and damage to property or reputation, among other matters (see 8.5.1 of this guide). All those involved in handling the public interest disclosure and aware of the discloser's identity need to monitor for signs of detriment and, if necessary, take early corrective action. This may include the authorised officer, investigator, supervisor, manager and anyone else to whom the discloser has agreed to reveal their identifying information or who has that information for the purposes of the PID Act. Agencies must also be live to reprisals that are being taken, or may be taken, against witnesses or other public officials in their agency. If harassment or victimisation is ignored, problems are likely to escalate, and the agency may be liable at law if such behaviour constitutes reprisal action (including threatening reprisal).

Responses to alleged reprisals will depend on their seriousness and other circumstances. Actions which may be taken to resolve workplace conflict include holding discussions with staff, providing guidance and support and closer supervision of the workplace for inappropriate workplace behaviours.

Managers should also be conscious of setting an example for staff in their approach to public interest disclosures and support for disclosers. Action under an agency's bullying and harassment policy may be appropriate. In many agencies, conduct amounting to a reprisal will be a breach of the applicable code of conduct and can be dealt with under the agency's disciplinary system. Such action may also be a criminal offence (see 8.8).

If the situation is potentially serious enough to require significant action such as transfer, relocation, a leave of absence, physical protection or an injunction, options should be discussed with the (specialist) area best able to assist in such PID-related matters in the agency.

The agency head's responsibility to take reasonable steps to protect public officials who belong to their agency against reprisals relating to public interest disclosures applies even if the public official has made a disclosure relating to another agency, or if a different agency (such as the Ombudsman or IGIS, or the portfolio department (s 43(8))) is investigating the disclosure.

8.7 ACCESS TO COURT

The PID Act provides access to the Federal Court and Federal Circuit and Family Court (Division 2) for orders to address or prevent reprisal action (see 8.7.1).

The Fair Work Commission can also make some orders relating to a person's right to make a disclosure under the PID Act (see 8.7.2).

8.7.1 Federal Court and Federal Circuit and Family Court (Division 2)

A person who has made a public interest disclosure can apply to the Federal Court or Federal Circuit and Family Court (Division 2) for a range of orders where reprisal against them has been threatened or taken. Multiple orders may be made in relation to the same conduct (s 17). A person has the right to take such action even if a prosecution for a reprisal offence has not been or cannot be brought (s 19A).

8.7.1.1 Injunctions, apologies and other orders

Where the court is satisfied that another person took, threatened, or is taking or threatening, a reprisal, the court may grant an injunction:

- restraining that person from taking a reprisal
- requiring the person to do something, including making an apology
- any other order the court considers appropriate (s 15).

The court may also make orders, including an injunction, against other people who are involved in taking, or conspiring to take, reprisal action (for example, by aiding or abetting the reprisal, inducing the conduct against the person or in any way being knowingly concerned in the conduct) (s 15(2)).

8.7.1.2 Compensation

A person has the right to apply for compensation for loss, damage or injury suffered from a reprisal or threat of reprisal (s 14). A claim can be made against an individual or the agency (or both) for taking reprisal action against a person. Further, if such a claim is made against an individual, a person may also seek compensation from the agency, as the individual's employer, within that same claim if the reprisal is in connection with the individual's position as an employee (s 14(1)) – that is, the agency may be vicariously liable for reprisal action taken by an individual if it is done in connection with their position as an employee. The court may order that the employer is jointly or wholly liable. The employer has a defence if they took reasonable precautions and exercised due diligence to avoid the reprisal or threat (s 14(2)).

8.7.1.3 Reinstatement

The court may order a person to be reinstated to their position, or a position at a comparable level, if satisfied that the person's employment was terminated (or purported to be terminated) wholly or partly as a reprisal for making or proposing to make a public interest disclosure (s 16).

8.7.2 Fair Work Commission

Section 22 of the PID Act provides that making a public interest disclosure is treated as a workplace right under the *Fair Work Act 2009* (Cth) (the Fair Work Act). The Fair Work Act protects employees from any unlawful adverse action based on their workplace rights. The Fair Work Commission may make orders to remedy a breach of an employee's workplace rights.

As a result, if an employee suffers adverse treatment from their employer because they have made a public interest disclosure, they may apply to the Fair Work Commission for a remedy. To avoid duplication, a person cannot apply for an order under the PID Act if they have applied for an order in relation to the same conduct under ss 394 or 539 of the Fair Work Act (s 22A(1)). Similarly, a person who has made an application under the PID Act cannot apply to the court under the Fair Work Act (s 22A(2)). (This restriction does not apply if the other application has been discontinued or failed for want of jurisdiction s 22A(3)).

8.8 REPRISAL IS A CRIME

Causing detriment to a person because of a belief or suspicion that the person has made, may have made, proposes to make, or could make a public interest disclosure (described in 8.5.1 of this guide) is a criminal offence, punishable by imprisonment for 2 years or 120 penalty units or both (s 19(1)). It is not necessary to prove that a

person made or intended to make a public interest disclosure (s 19(5)): what is relevant is the intention and action (or omission) of the person who caused the detriment.

A person also commits an offence if they threaten to cause detriment and either intend the threat to cause fear that the threat would be carried out or are reckless about this occurring (s 19(2)). The threat may be direct or indirect, express or implied, conditional or unconditional (s 19(3)). It is not necessary to prove that the person who was threatened actually feared that the threat would be carried out.

If an agency has evidence that an official employed by the agency has taken or threatened reprisal action, it must refer that information to the Australian Federal Police (AFP). The AFP's website contains information about the procedure for government agencies to make reports, and contact details for initial enquiries or pre-referral advice.[9] The AFP will assess the reported information and decide whether and how to investigate it in accordance with their usual operational priorities. The agency should also consider whether other administrative or disciplinary action is appropriate in response to the conduct, consistent with the integrity arrangements for the agency concerned and given the position of the official whose conduct is in question.

[9] http://www.afp.gov.au/what-we-do/referrals

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 9: The role of key agencies

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

June 2026
Version 3.1

COMMONWEALTH OMBUDSMAN

9 The role of key agencies

9.1 OMBUDSMAN

The Ombudsman and the IGIS have oversight of the public interest disclosure scheme. In addition to handling disclosures made about its own agency or public officials, the Ombudsman has a range of powers and functions under the *Public Interest Disclosure Act 2013* (PID Act):

- determining standards with which agencies must comply (s 74)
- receiving notifications of allocations (and reallocations) by agencies (s 44), including notification of decisions not to allocate a disclosure (s 44A) or where a NACC stop action direction prevents an agency from allocating a disclosure (s 44B)
- receiving notifications from agencies where a decision has been made not to investigate or further investigate a disclosure(s 50A)
- receiving notifications from agencies where a NACC stop action direction prevents an agency from investigating a disclosure (s 50A(4))
- receiving, allocating and investigating disclosures about other agencies (ss 34, 43-44, 47, 49)
- making decisions about extensions of time for agency investigations (s 52)
- receiving reports of investigations completed under the PID Act (s 51)
- reviewing the handling of disclosures (on the basis of a notification or a complaint) and making recommendations to agencies as a result (s 55)
- providing assistance, education and awareness programs (s 62)
- preparing six-monthly and annual reports on the operation of the PID Act (ss 76 and 76A).

In addition, the Ombudsman, as an investigative agency under the PID Act, can use separate powers under the *Ombudsman Act 1976* (Cth) (Ombudsman Act) to:

- investigate a public interest disclosure (s 49 of the PID Act)
- receive and investigate complaints about the handling of disclosures (s 7A of the PID Act).

The Ombudsman may also use own motion powers under the Ombudsman Act to investigate public interest disclosure matters.

9.1.1 Determining standards

The Ombudsman has the power to determine PID standards in relation to particular matters covered by the PID Act, in consultation with the IGIS (s 74). The Public Interest Disclosure Standards Determination 2025 (PID Standard) is a legislative instrument available at www.legislation.gov.au.

Agencies must comply with the PID Standard when:

- preparing procedures for dealing with internal disclosures made under the PID Act
- investigating disclosures under the PID Act
- preparing reports of investigations
- providing information to Ombudsman for the purposes of the Ombudsman's six-monthly and annual reports to Parliament on the operation of the PID Act (ss 76 and 76A) – see 9.1.8 of this guide.

9.1.1.1 The PID Standard

The PID Standard sets out matters that agencies must have regard to when fulfilling certain obligations under the PID Act, including requirements relating to the procedures that must be established by principal officers, the conduct of investigations, reports on investigations, and giving information and assistance to the Ombudsman.

9.1.2 Receiving and allocating disclosures

A public official may make a disclosure directly to the Ombudsman about wrongdoing relating to any agency, except an intelligence agency, if they believe on reasonable grounds that it would be appropriate for the Ombudsman to investigate the matter. If the matter relates to an intelligence agency (or the intelligence function of the AFP, AUSTRAC or Department of Home Affairs) and the person believes on reasonable grounds that it would be appropriate for the IGIS to investigate the matter, the person may make a disclosure directly to the IGIS instead (s 34) (see Chapter 5).

Unless special circumstances exist, the Ombudsman may allocate a disclosure it receives from a public official to another appropriate agency for handling under the PID Act, including the agency the disclosable conduct relates to, the relevant portfolio agency, the agency the public official belongs to, or another oversight agency. This is consistent with a key principle under the PID scheme that an agency should handle disclosures internally and that agencies are generally better placed to manage the risk of reprisals (s 43(5)).

9.1.3 When will the Ombudsman investigate a disclosure?

The Ombudsman may decide to investigate an internal disclosure about another agency that is made to an authorised officer in the Ombudsman's office or allocated (with consent) to the Ombudsman by another agency.

The Ombudsman will consider whether special reasons exist to conduct an investigation, or allocate the matter to the agency where the disclosable conduct is alleged to have occurred or another appropriate agency. In considering whether to investigate a disclosure, the Ombudsman will also consider its investigative remit under both the PID Act and the Ombudsman Act, including whether it has jurisdiction to consider the disclosure.

If the Ombudsman does decide to investigate a disclosure, the investigative powers under the Ombudsman Act may be used rather than the powers under the PID Act (see 7.2.1 of this guide). The broad powers in the Ombudsman Act include requiring the production of documents or other written records, requiring questions to be answered, examining witnesses on oath or affirmation, visiting premises, and inspecting documents.

9.1.4 Making decisions about extensions of time

Agencies have 90 days to complete their investigation of a public interest disclosure, including preparing the investigation report (s 52(1)) (see 7.3.3.1 of this guide). The Ombudsman (or the IGIS in the case of intelligence agencies or disclosures relating to the intelligence functions of an agency identified by the PID Act) can grant extensions of time either on request from a discloser or agency, or, alternatively, on their own initiative. In most cases, an extension is requested by the agency conducting the investigation.

Agencies should lodge an application for an extension of time to investigate **10 business days** before the end of the 90 days where it is likely or known that the investigation will not be completed within the time limit (or 10 business days before a prior extension is about to expire and the agency needs a further extension). The Ombudsman's website https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing includes a form that agencies must use to apply for an extension. Agencies are encouraged to let the discloser know before they apply for an extension and take the opportunity to explain why it is required and the steps that need to be taken to complete the investigation (see 7.5.1 of this guide for more information about keeping the discloser informed).

The Ombudsman will not automatically grant an application for an extension. Each request is considered individually to determine if the additional time requested is reasonably necessary to ensure that the disclosure is properly investigated. The Ombudsman (or the IGIS) will also consider a range of other factors including:

- the availability of witnesses
- the complexity of the investigation
- the action already taken to progress it

- whether there have been any unreasonable or unexplained delays on the part of the agency
- any views expressed by the discloser about the requested extension, and
- any other matter the Ombudsman (or the IGIS) deems appropriate to consider.

If an extension is granted, the Ombudsman (or the IGIS) is required to inform the discloser and give reasons for the extension (s 52(5)(a)). This does not apply if contacting the discloser is not reasonably practicable. In cases where the Ombudsman or the IGIS do not have the discloser's identifying or contact details, the agency handling the disclosure will be asked to notify the discloser if it is practicable to do so. The principal officer of the handling agency must also let the discloser know, as soon as reasonably practicable after the extension is granted, about the progress of the investigation if it is practicable to do so (s 52(5)(b)).

If an extension is not granted, the agency is still required to complete the investigation and prepare a report. An agency's failure to complete an investigation within 90 days (or an approved extended timeframe) does not affect the validity of the investigation (s 52(6)). However, failing to complete an investigation within the time limit is one of the criteria that, if collectively satisfied, will entitle the discloser to make an external disclosure (see 2.7.7 of this guide).

9.1.5 Investigating complaints about disclosures under the Ombudsman Act

As noted above, the Ombudsman may also receive complaints about an agency's handling of a disclosure under the PID Act. This does not include complaints related to the IGIS, intelligence agencies or intelligence functions of agencies identified in the PID Act (AFP, AUSTRAC, Department of Home Affairs) (see 9.2 of this guide). The subject of such complaints to the Ombudsman may include:

- whether the disclosure has been handled reasonably
- the allocation of the disclosure (including any delay or failure to allocate the disclosure)
- the investigation of the disclosure (including any delay or failure to investigate the disclosure)
- compliance with the PID Act by an agency or any of its officers, including its principal officer (including any failure to comply with the PID Act), and
- any other matter relating to the handling of the disclosure (s 7A).

9.1.6 Reviewing the handling of disclosures and making recommendations

The Ombudsman (and the IGIS) may review the handling of disclosures and make recommendations to the principal officer of the agency to which the disclosure was made or allocated (s 55). The Ombudsman (or the IGIS) may decide to review the handling of the disclosure and make recommendations if it:

- is notified of a decision not to allocate (s 44A(3))
- is notified of a public interest disclosure allocated to an agency (s 44(2))
- is notified by the principal officer of a decision not to investigate or not to investigate further (s 51(4))
- is notified of the completion of the PID investigation report (s 51(4)), or
- receives a complaint about the handling of a disclosure under the Ombudsman Act or the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act).

9.1.6.1 Reviewing public interest disclosures

The Ombudsman (or the IGIS) may review the handling of disclosures by a supervisor, an authorised officer, a principal officer or any other public official involved in handling the disclosure (s 55(3)). The Ombudsman and the IGIS have discretion whether to review the handling of a disclosure and are not required to undertake such a review.

In conducting a review of the handling of a disclosure, the Ombudsman (or the IGIS) may obtain any information and documents and make any inquiries as they see fit (s 51(4)). It is important that agencies keep comprehensive records of their handling of a disclosure to support effective oversight, including facilitating review.

If the review into an agency's handling of a disclosure is initiated in response to a complaint received under the Ombudsman Act or the IGIS Act, it does not affect any duty, power or function the Ombudsman or the IGIS have under the relevant act (s 55(2)).

9.1.6.2 Making recommendations

The Ombudsman and the IGIS have broad discretion to make recommendations following a review of an agency's handling of a public interest disclosure. However, they are not required to make any such recommendations.

Following a review, the Ombudsman (or the IGIS) may provide written recommendations to the principal officer of the agency where the disclosure was made, the agency to which it was allocated, or both agencies, if relevant (s 55(5)). There is no limitation on what recommendations the Ombudsman (or the IGIS) can make as a result of a review, however the PID Act provides that the Ombudsman (or the IGIS) can recommend that:

- the disclosure should be allocated to an agency or reallocated to a different agency (s 55(6)(a) and (b))
- the disclosure should be investigated, or be reinvestigated by the same or a different an agency (s 55(6)(c) and (d))
- any other action be taken in relation to:
  - the disclosure or its handling
  - the discloser
  - any supervisor of the discloser
  - any authorised officer of an agency
  - any public official belonging to any agency (s 55(6)(e)).

In response to a recommendation from the Ombudsman or the IGIS, a principal officer may take any action they think fit (s 55(7)(c)), including but not limited to:

- directing the allocation, or reallocation, of a disclosure (s 55(7)(a))
- investigating, or reinvestigating, the disclosure (s 55(7)(b))
- any other action in relation to the handling of a disclosure (s 55(7)(c)).

A principal officer of an agency does not have to action the recommendation of the Ombudsman (or the IGIS). However, where a recommendation has been made, the principal officer must, as soon as reasonably practicable, provide written notice to the Ombudsman or the IGIS of either:

- any action taken, or proposed to be taken, in response to the recommendation (s 55(8)(a)), or
- if no action is proposed to be taken in response to the recommendation, the reason no action will be taken (s 55(8)(b)).

In considering whether to take action in response to a recommendation of the Ombudsman (or the IGIS), the principal officer should carefully consider the reasons why the recommendation has been made, the intended outcome of the recommendation, and the impact of the recommendation on both the discloser and the agency's public interest disclosure process more generally. This should include considering the impacts if the recommendation was **not** implemented. Importantly, principal officers should remember that if a recommendation is not implemented, they will have to explain their decision to the Ombudsman (or the IGIS).

9.1.7 Providing assistance, education and awareness programs

The Ombudsman's functions include assisting principal officers, authorised officers and public officials in relation to the PID Act and conducting education and awareness programs (s 62).

The Ombudsman does not provide legal advice to agencies or disclosers. However, the Ombudsman has published a range of guidance materials that give general information about the operation of the PID Act and best practice administration of the PID scheme (including this guide). See the Ombudsman's PID website https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing.

Agencies and disclosers (both potential and actual) are also able to contact the Ombudsman's office by email (pid@ombudsman.gov.au) or phone 1300 362 072 with any queries regarding the operation of the PID Act.

9.1.8 Preparing reports to Parliament

The Ombudsman is required to prepare six-monthly and annual reports to Parliament on the operation of the PID Act (ss 76 and 76A). The Ombudsman must prepare a six-monthly report at the end of each calendar year covering the period from 1 July to 31 December, and an annual report after the end of each financial year that is inclusive of that entire period.

Both reports must include the following information from agencies for the relevant period (ss 76(2) and 76A(2)):

- the number of public interest disclosures received by authorised officers of the agency
- the types of disclosable conduct to which those disclosures relate
- the number of disclosure investigations the agency conducted
- the actions the agency took in response to recommendations in reports relating to those disclosure investigations
- the number and nature of the complaints made to the Ombudsman about the conduct of agencies in relation to public interest disclosures
- information about the Ombudsman's performance of its functions under s 62 and the IGIS's performance of its functions under s 63.

Each year, the Ombudsman surveys every agency covered by the PID scheme to collect the information needed to prepare this report. Input from intelligence agencies is coordinated through IGIS.

The principal officer of an agency must provide information requested by the Ombudsman for the purposes of preparing the Ombudsman's reports under the PID Act (ss 76(3) and 76A(3)). Agencies need to have regard to the PID Standard when providing this information. In preparing information to provide to the Ombudsman, an agency may delete any information that:

- is likely to enable the identification of any person
- would result in the document being exempt under the FOI Act, or
- would result in it having a national security or other protective security classification (s 76(4)).

9.1.9 Assisting the Ombudsman

Public officials are required to use their best endeavours to assist the Ombudsman in the performance of the Ombudsman's functions under the PID Act (s 61(2)). This includes assistance with the Ombudsman's role in:

- receiving notifications of allocation decisions of public interest disclosures (including decisions not to allocate)
- assessing requests for extensions of time for investigations, and
- receiving notification and reasons from agencies where discretion not to investigate or not investigate further have been exercised
- receiving notification of the conclusion of a disclosure investigation and a copy of the investigation report
- receiving notification of NACC stop directions.

Similar requirements apply to public officials assisting the IGIS under the PID Act (s 61(3)).

9.2 INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

The IGIS performs a similar role to the Ombudsman and is an authorised internal recipient in respect to the 10 agencies that make up the National Intelligence Community (NIC). For the following NIC agencies, IGIS handles disclosures about those agencies in their totality:

- Australian Criminal Intelligence Commission (ACIC)
- Australian Geospatial-Intelligence Organisation (AGO)
- Australian Secret Intelligence Service (ASIS)

- Australian Security Intelligence Organisation (ASIO)
- Australian Signals Directorate (ASD)
- Defence Intelligence Organisation (DIO)
- Office of National Intelligence (ONI)

For the following NIC agencies, IGIS handles disclosures about their intelligence functions only:

- Australian Federal Police (AFP)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Department of Home Affairs.

These functions generally include the collection, correlation, analysis, production and dissemination of intelligence. In addition to the roles outlined above, the role of the IGIS in respect of these agencies and functions includes:

- receiving notifications of disclosures about intelligence agencies or the intelligence functions of identified agencies (s 45A).
- receiving notifications of allocations by or to intelligence agencies or identified agencies if the disclosures relates to their intelligence functions (s 44), including notification of decisions not to allocate a disclosure (s 44A) or where a NACC stop action direction prevents an agency from allocating a disclosure (s 44B).
- receiving notifications from intelligence agencies (or identified agencies if the disclosures relates to their intelligence functions) where a decision has been made not to investigate or further investigate a disclosure (s 50A), including where a NACC stop action direction prevents an agency from investigating a disclosure (s 50A(4)).
- receiving, allocating and investigating disclosures about intelligence agencies or identified agencies if the disclosures relates to their intelligence functions (ss 34, 43-44, 47, 49).
- making decisions about extensions of time for investigations conducted by intelligence agencies or identified agencies if the disclosures relates to their intelligence functions (s 52).
- receiving reports of investigations completed under the PID Act by intelligence agencies or identified agencies if the disclosures relates to their intelligence functions (s 51).
- reviewing the handling of disclosures and making recommendations to agencies (s 55).
- providing assistance, education and awareness programs (s 63), and
- assisting the Ombudsman in relation to the performance of the Ombudsman's functions under the PID Act.

The IGIS, as an investigative agency under the PID Act, can use separate powers available under the IGIS Act to:

- investigate a public interest disclosure using the inquiry powers available under the IGIS Act (s 49 of the PID Act), and
- receive and investigate complaints about the handling of public interest disclosures by an intelligence agency, or an identified agency if the disclosure relates to that agency's intelligence functions (s 7B of the PID Act).

The IGIS can also make inquiries of intelligence agencies of their own motion (s 14 of the IGIS Act).

9.2.1 IGIS: receiving, allocating and investigating

A public official may make a disclosure directly to the IGIS about wrongdoing relating to an intelligence agency, or the intelligence function of an agency as identified by the PID Act (such as the AFP, AUSTRAC or Department of Home Affairs) if they believe on reasonable grounds that it would be appropriate for the IGIS to investigate the matter.

The IGIS will become involved in an investigation in similar circumstances to those of the Ombudsman, but in respect to matters relating to intelligence agencies or the intelligence functions of one of the identified agencies.

The IGIS may decide to investigate an internal disclosure that relates to an intelligence agency (or the intelligence function of an agency identified by the PID Act) where it is made directly to an IGIS authorised officer or that is

allocated (with consent) to the IGIS by another agency. The IGIS will consider if there are specific reasons to conduct an investigation rather than allocating the disclosure to the relevant agency. In most instances, it will be appropriate for the agency to which the conduct relates to conduct the investigation (s 43(5)).

More information about the role and functions of the IGIS are at www.igis.gov.au.

9.2.2 Notifications about disclosures, including urgent disclosures

An authorised officer of an intelligence agency is required to provide written notice of a disclosure to the IGIS as soon as reasonably practicable and in any case, within 1 business day if the discloser declares the disclosure to be 'urgent'. They must provide such written notice to the IGIS within 14 days for non-urgent disclosures (s 45A). The requirement to provide written notice within one business day comes about from the discloser's declaration of urgency. It is not the role of the authorised officer to verify the 'urgency' of the disclosure.

Notices to the IGIS must include the following information:

- the making of the disclosure
- the agency to which the authorised officer belongs
- if applicable, that the discloser has declared that the disclosure is 'urgent'
- the information and conduct that was disclosed, and
- if known and the discloser has consented, the discloser's name and contact details.

In all cases, the principal officer of an agency is also required to keep the IGIS informed of the investigation progress, including expected timeframes and the likelihood of extension requests (s 45A(4)).

9.2.3 Investigating complaints about disclosures under the IGIS Act

The IGIS may also receive complaints about an agency's handling of a disclosure under the PID Act. The IGIS can receive complaints about the handling of disclosures by an intelligence agency or an agency identified in the PID Act if the disclosure relates to the agency's intelligence functions. The subject of a PID complaint to the IGIS may include:

- whether the disclosure has been handled reasonably
- the allocation of the disclosure (including any delay or failure to allocate the disclosure)
- the investigation of the disclosure (including any delay or failure to investigate the disclosure)
- compliance with the PID Act by an agency or any of its officers, including its principal officer (including any failure to comply with the PID Act), and
- any other matter relating to the handling of the disclosure (s 7B).

A complaint to the IGIS under the IGIS Act may also be a PID under the PID Act and can enliven the various responsibilities and protections under that Act. It will be for the IGIS to determine the most appropriate framework under which to consider the disclosure. Provided the disclosure is a public interest disclosure, a discloser will still receive protections under the PID Act, even if the IGIS decides to investigate the complaint under the IGIS Act.

9.2.4 Assisting the Ombudsman prepare reports

The IGIS coordinates input from the intelligence agencies to support the Ombudsman prepare its six-monthly and annual reports to Parliament on the operation of the PID Act (ss 76 and 76A) (see 9.1.8).

The IGIS also includes information on its public interest disclosure function in its annual report prepared in accordance with section 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

9.3 PRESCRIBED INVESTIGATIVE AGENCIES

Investigative agencies are those agencies listed in the PID rules, as well as the Ombudsman and IGIS (s 8). They are statutory agencies that have special powers to investigate matters within a particular jurisdiction. However, at the time of publication, there are no prescribed investigative agencies.

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Investigative agencies can use their investigative powers under their own legislation when dealing with a disclosure under the PID Act (s 49). An investigative agency should consider whether it would be more appropriate to use powers available under its own legislation to investigate a public interest disclosure than using the PID Act. Relevant factors may include the investigative powers afforded to the investigative agency and the outcomes that may be available under its own legislation.

A person may make a disclosure directly to an investigative agency. An agency may also allocate a disclosure to an investigative agency that has appropriate jurisdiction to consider the matter if the investigative agency consents.

PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 10: Interaction between the National Anti-Corruption Commission and the PID framework

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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COMMONWEALTH OMBUDSMAN

10 Interaction between the National Anti-Corruption Commission and the PID framework

10.1 OVERVIEW OF THE NATIONAL ANTI-CORRUPTION COMMISSION

The National Anti-Corruption Commission (NACC) is an independent Commonwealth agency responsible for detecting, preventing, investigating and reporting on serious or systemic corrupt conduct in the Commonwealth public sector. It is also responsible for educating the public sector, and the public, about corruption risks, corruption vulnerabilities and measures to prevent corruption.

The National Anti-Corruption Commissioner (Commissioner) has broad jurisdiction to investigate allegations of serious or systemic corrupt conduct concerning:

- Commonwealth Ministers and parliamentarians
- persons employed or engaged under the Members of Parliament (Staff) Act 1984
- Commonwealth agency heads, employees and secondees of Commonwealth agencies
- contractors providing goods or services under a Commonwealth contract or providing services, exercising powers or performing functions on behalf of the Commonwealth
- officers and directors of Commonwealth companies
- Commonwealth statutory office holders and appointees
- persons or bodies providing services, exercising powers or performing functions on behalf of the Commonwealth, and
- any person whose conduct adversely affects, or could adversely affect, the honest or impartial exercise or performance of a public official's powers, functions or duties.

The Commissioner will be able to investigate serious or systemic corrupt conduct, including criminal and non-criminal conduct, and conduct that occurred before the NACC was established.

10.2 KEY CONCEPTS USED IN THIS CHAPTER

10.2.1 Who can make a referral to the NACC?

Any person (including members of the public and public officials) can voluntarily refer a corruption issue, or provide information about a corruption issue, to the NACC. A public official under the *Public Interest Disclosure Act 2013* (PID Act) who makes a referral to the NACC that also constitutes a public interest disclosure may be entitled to the whistleblower protections under the PID Act and the NACC Act (see 10.6.3 of this guide).

Some people must refer certain matters to the NACC – these are called 'mandatory referrals'. Sections 33 to 35 of the NACC Act requires the following people to disclose conduct that they suspect involves serious or systemic corrupt conduct to the NACC:

- the head of a Commonwealth agency (or their delegate);
- the head of an intelligence agency (or their delegate); and

- authorised officers or principal officers (PID officers performing or exercising powers under Part 3 of the PID Act (see 10.3 of this guide).

10.2.2 Who is a PID officer under the NACC Act?

For the purposes of the NACC Act, a PID officer is a staff member of a Commonwealth agency who performs or exercises functions or powers under the Division 1 or 2 of Part 3 of PID Act. This means that a PID officer includes:

- **authorised officers** performing or exercising functions and powers in relation to the allocation of internal disclosures under Division 1 of Part 3 of the PID Act, and
- **principal officers** (or their **delegate**) performing or exercising functions and powers in relation to investigating internal disclosures under Division 2 of Part 3 of the PID Act.

10.2.2.1 Delegations

Section 277 of the NACC Act permits the head of an agency to delegate their duties and functions under the NACC Act to appropriate officers within their agency. This includes an agency head's mandatory referral obligation contained in ss 33 and 34 of the NACC Act. In addition, an agency head, who is also a principal officer (and therefore an authorised officer) of the agency under the PID Act, would be able to delegate their mandatory referral obligation under s 35 of the NACC Act. These mandatory referral obligations may be delegated to:

- an SES or acting SES employee of the agency, or
- if the agency does not have SES employees—an individual involved in the management of the agency that is comparable to an SES officer.

For example, the head of an agency may decide to delegate their mandatory referral obligation under the NACC Act to an SES employee with responsibility for conducting internal investigations. The delegate would be responsible for discharging the agency head's mandatory referral obligation in relation to suspected serious or systemic corruption issues that they become aware of. The delegate must also comply with any directions given to the delegate by the agency head when the agency head makes the delegation.

In practice, such a delegation may also be supported by a delegation under s 77 of the PID Act, which permits a principal officer of an agency to delegate their functions or powers under the PID Act to a public official that belongs to the agency.

10.2.3 What is a corruption issue?

Section 9 of the NACC Act defines a corruption issue as an issue of whether a person:

- has already, at some time in the past, engaged in corrupt conduct
- is currently engaging in corrupt conduct, or
- will engage in corrupt conduct in the future.

Any person can refer a corruption issue to the NACC.

10.2.4 What is corrupt conduct?

The Commissioner may decide to investigate any person who has potentially done something that involves serious or systemic corrupt conduct under the NACC Act.

There are four types of corrupt conduct under s 8 of the NACC Act. A person engages in corrupt conduct if they:

1. are a public official and they breach public trust
2. are a public official and they abuse their office as a public official
3. are a public official or former public official and they misuse information they have gained in their capacity as a public official, or
4. do something that could cause a public official to behave dishonestly or in a biased way when they carry out their official duties—any person can engage in this type of corrupt conduct, even if they are not a public official.

A person also engages in corrupt conduct if they attempt or conspire to engage in any of the conduct outlined above, even if they do not go through with the attempt or are unsuccessful in doing so.

A disclosure can be made under the PID Act about conduct that is engaged in for the purpose of perverting the course of justice, abuse of position as a public official, or involves corruption of any other kind. It is important to remember that there may be internal disclosures made under the PID Act that involve corruption, but do not meet the threshold of serious or systemic corrupt conduct that would require a referral to the NACC. You will need to continue to handle such disclosures in accordance with the PID Act.

10.2.5 What is 'serious' or 'systemic' corrupt conduct?

The Commissioner is only able to investigate an allegation of corrupt conduct if the Commissioner is of the opinion that the conduct is *serious* or *systemic*.

The mandatory referral obligations on PID officers and agency heads under the NACC Act requires referral of matters that the person suspects could involve serious or systemic corrupt conduct.

The terms 'serious' and 'systemic' are not defined in the NACC Act and will take their ordinary meaning. "Serious" requires something that is significant; it involves something more than "negligible" or "trivial", but it does not have to be "severe" or "grave". "Systemic" means something that is more than an isolated case; it involves a pattern of behaviour, or something that affects or is embedded in a system. Whether something is 'serious' or 'systemic' is a subjective test.

The Commissioner may issue written guidelines to assist PID officers to determine what conduct should be referred to the NACC. The Commissioner may also make a determination in writing that certain corruption issues do not need to be referred to the NACC.

The NACC has published its Assessment of Corruption Issues Policy which provides information about how staff members of the NACC assess referrals that the NACC receives, including further guidance on the meaning of serious or systemic.

Agencies may wish to develop their own guidelines about what must be referred to the NACC to ensure clear and consistent referral practices that take into consideration the context and operating environment of their individual agency.

10.2.6 Who is an agency head under the NACC Act?

The NACC Act sets out the Commonwealth entities covered by the NACC's jurisdiction. It also defines the 'heads' of those agencies for the purpose of mandatory referrals (s 11 of the NACC Act).

For example, the following people are agency heads under the NACC Act:

- Members and Senators of the Australian Parliament – including ministers
- accountable authorities of departments of state and parliamentary departments – such as the Secretary of the Attorney-General's Department or the Secretary of the Department of Parliamentary Services
- accountable authorities of other Commonwealth entities prescribed under the *Public Governance, Performance and Accountability Act 2013* – such as the Commissioner of Taxation (for the Australian Taxation Office) or the Commissioner of the Australian Federal Police
- the chief executive officer (or other head as prescribed by regulation) of bodies corporate established under Commonwealth legislation (such as the Commonwealth Science and Industrial Research Organisation or land councils) and of Commonwealth companies (such as NBN Co) and their subsidiaries, and
- the Chief Executive and Principal Registrar of the federal courts and High Court (judges of the federal courts and High Court are not within jurisdiction).

The definition of agency head under the NACC Act is different to the definition of principal officer under the PID Act. You should be aware that your agency's principal officer under the PID Act may be different to the agency head under the NACC Act[1] – the exercise or performance of any powers or functions, as well as any delegations relating to those powers and functions, must accord with the definition that applies in the relevant Act.

10.2.7 Who is a public official under the NACC Act?

The NACC has jurisdiction to investigate serious or systemic corrupt conduct that involves a Commonwealth public official in some way. Most people who work for, exercise the powers of, or perform functions for the Australian Government or the Australian Parliament are likely to be public officials under the NACC Act.

For the purposes of the NACC, section 10 of the NACC Act defines a public official as:

- Commonwealth Ministers and parliamentarians
- staff members of Commonwealth agencies, including employees of:
  - Commonwealth government departments
  - other Commonwealth entities prescribed under the PGPA Act
  - Commonwealth companies and their subsidiaries
  - statutory bodies
  - the High Court (excluding judges)
  - Commonwealth Ministers and parliamentarians (as parliamentary offices are considered to be a Commonwealth agency under the NACC Act)
  - contracted service providers providing goods or services under a Commonwealth contract, or providing services, exercising powers or performing functions on behalf of the Commonwealth (including consultants, independent contractors, labour-hire contractors, subcontractors),
- staff members of the NACC.

10.2.7.1 Staff members of Commonwealth agencies

Most people who do work for a Commonwealth agency will be staff members of the agency for the purposes of the NACC's jurisdiction. Staff members of Commonwealth agencies include:

- Commonwealth agency heads, employees and secondees of Commonwealth departments, Commonwealth companies and other statutory bodies
- people who are responsible for delivering goods or services to a Commonwealth agency under a Commonwealth contract (known as contracted service providers)
- persons employed or engaged under the *Members of Parliament (Staff) Act 1984* (MoP(S) Act staff) (as the parliamentary office is considered a Commonwealth agency under the NACC Act)
- officers and employees of federal courts and the High Court, excluding judges
- people who exercise powers or perform functions under certain Commonwealth laws.

10.2.7.2 Who is not a public official under the NACC Act?

The following are not public officials subject to the NACC's jurisdiction:

- a judge of a State, Territory or federal court, including a Justice of the High Court
- the Governor-General and Deputy Governor-General
- a member of a Royal Commission
- the Inspector of the NACC, or a person assisting the Inspector
- foreign governments, including where a foreign government would otherwise be considered a contracted service provider.

It is important to remember that the definition of public official for the purposes of the NACC's jurisdiction is not the same as that definition under the PID Act. A NACC disclosure will only also be a public interest disclosure if it is about a person who is a public official for the purposes of both the NACC Act and the PID Act. For example, a

[1] In a small number of agencies, the chief executive officer is not the accountable authority under the PGPA Act (and therefore the agency head under the NACC Act), however the chief executive officer is the principal officer under the PID Act (s 73 PID Act).

referral to the NACC that alleges corrupt conduct by a MoP(S) Act staff member will not constitute a public interest disclosure, as MoP(S) Act staff are expressly excluded from the scope of the PID Act.

It is important to be aware of the differences between the two schemes, as the whistleblower protections that apply to a disclosure of information will be different depending on whether it is only a NACC disclosure, a public interest disclosure or both a NACC disclosure *and* a public interest disclosure (see 10.6 of the guide).

10.2.8 What is a NACC disclosure?

A person makes a NACC disclosure if they refer, or provide information about, a corruption issue to the Commissioner, the IGIS or the Inspector of the NACC. A person also makes a NACC disclosure if they give evidence or information, or produce a document or thing to the Commissioner, the IGIS or the Inspector in relation to:

- a corruption issue (as defined in s 9 of the NACC Act)
- a NACC Act process (as defined in s 7 of the NACC Act)
- a NACC corruption issue (as defined in s 201 of the NACC Act), and
- a complaint made in relation to the conduct or activities of a NACC staff member.

The above definition of NACC disclosure is defined at s 23 of the NACC Act. Section 8 of the PID Act defines a NACC disclosure as having the same meaning as in the NACC Act.

In practice, the definition of a NACC disclosure would apply to a broad range of disclosures to the Commissioner or the IGIS, including:

- a voluntary referral of a corruption issue under s 32 of the NACC Act
- a mandatory referral by the head of a Commonwealth agency or the head of an intelligence agency under ss 33 and 34 of the NACC Act
- a mandatory referral by a staff member of a Commonwealth agency with responsibilities under Part 3 of the PID Act under s 35 of the NACC Act, and
- a person who provides evidence during a corruption investigation or public inquiry.

A person who makes a NACC disclosure will receive protections under the NACC Act. These protections are similar to the protections contained in the PID Act, and include immunity from criminal, civil and administrative liability and protection from reprisal action.

10.3 MANDATORY REFERRALS TO THE NACC: PUBLIC INTEREST DISCLOSURE OFFICERS

Part 5 of the NACC Act creates voluntary and mandatory pathways for the referral of corruption issues to the Commissioner and, in the case of an intelligence agency, to the IGIS.

Importantly, s 35 of the NACC Act creates a mandatory referral obligation for staff members of Commonwealth agencies with certain responsibilities under the PID Act, known as PID officers.

10.3.1 How to make a referral to the NACC

A PID officer is able to make a referral to the NACC via the National Anti-Corruption Commission website (www.nacc.gov.au). Further information about how to refer a corruption issue to the NACC can be found on the NACC website at: www.nacc.gov.au/reporting-and-investigating-corruption/how-to-make-report.

A PID officer from an intelligence agency is also able to make a referral to the IGIS. PID officers in the intelligence agencies can email PID@igis.gov.au to request further information about how to make a mandatory referral under the NACC Act.

10.3.2 What is the mandatory referral obligation for PID officers?

Section 35 of the NACC Act creates a mandatory referral obligation for PID officers exercising powers or functions under Divisions 1 or 2 of Part 3 of the PID Act.

If a PID officer receives an internal disclosure under the PID Act that raises a corruption issue under the NACC Act, the PID officer **must** refer the corruption issue to the NACC if **all of the following apply:**

- the PID officer became aware of the corruption issue in the course of exercising their powers or functions under Division 1 (allocating disclosures) or Division 2 (investigating disclosures) of Part 3 of the PID Act
- the corruption issue concerns the conduct of a person who is, or was, a staff member of the Commonwealth agency at the time the conduct occurred, and
- the PID officer suspects the issue could involve **serious** or **systemic** corrupt conduct.

A PID officer must refer a corruption issue to the NACC or the IGIS (as appropriate) **as soon as reasonably practicable** after becoming aware of the issue, or within such later time as is allowed by the Commissioner.

In practice, the mandatory referral obligation means that authorised officers will need to consider whether an internal disclosure received under the PID Act contains allegations of serious or systemic corrupt conduct. Similarly, principal officers will need to consider, in the course of deciding whether to investigate, or investigating, an internal disclosure under the PID Act, whether there is evidence of serious or systemic corrupt conduct.

The threshold that a PID officer suspects that an issue could involve serious or systemic corrupt conduct is intended to operate as a low threshold. A PID officer does not need to be satisfied that the conduct has actually occurred as this is a matter for the Commissioner to consider, and possibly investigate. It will be enough if the PID officer holds a genuine suspicion that the corrupt conduct could be serious or systemic.

Guidance on what may constitute 'serious' or 'systemic' corrupt conduct is outlined above at section 10.2.5 of this guide.

For corruption issues that do not meet that threshold to trigger a mandatory referral obligation, a PID officer may choose to voluntarily refer the issue to the NACC.

10.3.3 Additional steps for PID officers in intelligence agencies

If an internal disclosure raises a corruption issue that relates to an intelligence agency, and the PID officer suspects the disclosure could involve serious or systemic corrupt conduct, they **must** refer it to either the Commissioner *or* the IGIS.

If the PID officer refers the issue to the Commissioner, the PID officer must notify the IGIS of the referral as soon as practicable. This will provide the IGIS with visibility of allegations of corruption in relation to the intelligence agencies, or staff members of intelligence agencies, that it oversees, allowing the IGIS to effectively perform their oversight role.

If the PID officer refers the issue to the IGIS, and the IGIS is **satisfied** that the issue **likely** involves corrupt conduct that is serious or systemic, the IGIS **must** refer the issue to the Commissioner. This will ensure that all issues involving serious or systemic corruption make their way to the Commissioner, who may then decide how to deal with the issue.

10.3.3.1 Definition of an intelligence agency under the NACC Act

The following agencies are intelligence agencies for the purposes of the NACC Act:

- the Australian Geospatial-Intelligence Organisation (AGO)
- the Australian Secret Intelligence Service (ASIS)
- the Australian Security Intelligence Organisation (ASIO)
- the Australian Signals Directorate (ASD)

- the Defence Intelligence Organisation (DIO)
- the Office of National Intelligence (ONI), and
- the Australian Criminal Intelligence Commission (ACIC).

These agencies are also intelligence agencies, and overseen by the IGIS, for the purposes of the PID Act. Under the PID Act, disclosures relating to the intelligence functions of certain agencies (that is, AFP, AUSTRAC and Department of Home Affairs) are also overseen by the IGIS. However, NACC referrals relating to the intelligence functions of these agencies can only be made to the NACC Commissioner, and not to the IGIS. The PID Act requirements to notify the IGIS continue to apply to an internal disclosure that concerns the intelligence functions of these agencies where the disclosure, or part of the disclosure, has been referred to the NACC. For example, the AFP, AUSTRAC or Department of Home Affairs must notify the IGIS where a NACC stop action direction (see 10.5 of this guide) prevents allocation or investigation of a disclosure that relates to those agencies' intelligence functions.

10.3.4 Does the mandatory referral obligation apply to historical conduct?

A PID officer's mandatory referral obligation applies regardless of when the conduct occurred, including if the conduct occurred before the NACC commenced or before the PID officer joined the agency. A PID officer is required to refer serious or systemic corrupt conduct, including historical conduct, if they become aware of the conduct on or after the commencement of the NACC on 1 July 2023.

The same requirements for a mandatory referral would apply to corrupt conduct that occurred before the NACC commenced. The PID officer must:

- become aware of the conduct in the course of performing their functions under the PID Act after the NACC commences
- the corruption issue must concern a person who is or was a staff member of the PID officer's agency at the time the conduct occurred, and
- the PID officer must suspect the conduct is serious or systemic corrupt conduct.

A PID officer will not be required to refer conduct that they were already aware of before the NACC commenced. This is intended to ensure that PID officers are not required to refer issues to the Commissioner that may have already been dealt with. Although there is no obligation to refer corruption issues that a PID officer was aware of before the NACC commenced, a PID officer may still voluntarily refer the corruption issue to the NACC under s 32 of the NACC Act.

10.3.5 Exceptions to making a mandatory referral

There are two exceptions to a PID officer's mandatory referral obligation under the NACC Act:

1. The PID officer believes on reasonable grounds that Commissioner or the IGIS (as appropriate) is already aware of the issue.
2. The Commissioner has made a written determination that a referral is not required.

10.3.5.1 Where the Commissioner or IGIS is already aware of an issue

A PID officer is **not required** to refer a corruption issue to the NACC or the IGIS if they believe on reasonable grounds that the Commissioner or the IGIS is already aware of the issue. This exception ensures that mandatory referral obligations do not result in duplication by requiring multiple people to refer the same corruption issue to the Commissioner or the IGIS. For example, the obligation to refer a single corruption issue may apply to both the head of a Commonwealth agency (or intelligence agency) and a PID officer of that agency.

Once one person has made a referral, any person who believes on reasonable grounds that the Commissioner or the IGIS is already aware of the issue is relieved of their mandatory referral obligation. For example, an authorised officer under the PID Act would not be required to refer a corruption issue to the NACC or the IGIS if they believe on reasonable grounds that their agency head, or another PID officer, had already referred the corruption issue to the Commissioner or the IGIS.

10.3.5.2 Commissioner's determination

A PID officer is also **not required** to refer a corruption issue to the NACC or the IGIS if the Commissioner makes a determination that a referral is not required.

The Commissioner may make a written determination under s 37(1)(b) of the NACC Act that a referral is not required because of the kind of corruption issue involved, or the circumstances in which the corruption issue arose. A determination may provide that a specific corruption issue or class of corruption issues does not need to be referred to the NACC. The determination would relieve the PID officer of their mandatory referral obligation in relation to conduct covered by the determination.

10.3.6 What information must be included when making a referral to the NACC

A PID officer is required to provide all information relevant to the corruption issue that is in their possession or control at the time they make a mandatory referral to the NACC or the IGIS. This may include, but is not limited to:

- the names of any public officials who the PID officer suspects has engaged in serious or systemic corrupt conduct
- the names of any private individual or entities involved
- a description of the conduct that raises a corruption issue
- the dates and timeframes of when the alleged corrupt conduct occurred, or may occur
- how and when the PID officer became aware of the issue
- any supporting documents or evidence, and
- any other information that may be relevant to the corruption issue.

If a PID officer becomes aware of new information relating to the corruption issue after making a referral to the NACC or the IGIS, they must provide it to the NACC or the IGIS as soon as reasonably practicable.

A PID officer may also provide the reasons why they suspect the issue could involve serious or systemic corrupt conduct when making a referral to the NACC or the IGIS. This will assist the Commissioner and the IGIS to determine whether the corrupt conduct being referred is likely to meet the Commissioner's threshold for commencing a corruption investigation under the NACC Act.

10.3.6.1 Does a discloser need to consent to their name and contact details being shared with the NACC?

Under the NACC Act a discloser does not need to provide consent before their personal information, including their name or contact details, can be shared with the NACC or the IGIS.

A PID officer who is required to refer a corruption issue to the NACC or the IGIS must include all information that is relevant to issue that and in their possession or control at the time a referral is made. This means that a PID officer will be required to disclose the identity of the discloser to the NACC or the IGIS if that information is known and is relevant to the corruption issue being referred. This obligation would apply regardless of whether the discloser consents to their personal information being shared with the NACC or the IGIS. Whether identifying information is relevant to a corruption issue that is being referred will depend on the circumstances.

Part 11 of the NACC Act imposes confidentiality and information-sharing obligations on staff members of the NACC (including the Commissioner, Inspector and persons assisting the Inspector) who receive and deal with sensitive information to ensure such information is securely handled. Sensitive information includes information that could reveal, or enable a person to ascertain, the existence or identity of a confidential source of information.

It is an offence for a staff member or former staff member of the NACC to make a record or unauthorised disclosure of any information that they obtained in the course of performing their duties under the NACC Act.

Obligations under the *Privacy Act 1988,* including the Australian Privacy Principles, do not apply to the NACC (see items 152, 154 and 155 of the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022*). This exemption allows entities to disclose personal information to the NACC if the provision of the information is necessary for or directly related to the Commissioner or Inspector's functions.

10.3.6.2 What if sharing the information would breach a secrecy obligation?

A PID officer who is required to refer a corruption issue to the NACC or the IGIS must include all information that is relevant to the issue and in their possession at the time a referral is made. This requirement applies even if providing the information to the NACC or the IGIS would breach a secrecy provision in another law.

Section 36 of the NACC Act overrides the operation of most secrecy provisions to ensure that the Commissioner or the IGIS receive as much information as possible about a corruption issue, including where the information is covered by a secrecy provision. The operation of s 36 of the NACC Act means that it is not an offence for a PID officer to provide information that is covered by a secrecy provision to the NACC or the IGIS.

An exception to this rule is where the disclosure of information to the NACC or the IGIS would breach an exempt secrecy provision, as defined under s 7 of the NACC Act. This exception is explained further below.

10.3.7 Exceptions to information requirements

A PID officer is not required to provide information about a corruption issue if any of the following apply:

1. the PID officer believes on reasonable grounds that the Commissioner or the IGIS is already aware of the information
2. the Commissioner or the IGIS has advised that the information is not required
3. the information is subject to an exempt secrecy provision, or
4. the Attorney-General has certified under s 236 of the NACC Act that disclosing the information would be contrary to the public interest because it would harm Australia's international relations.

These exceptions limit the information that must be included with a mandatory referral of a corruption issue under the NACC Act. They **do not** operate to override a PID officer's mandatory referral obligation under s 35 of the NACC Act. A PID officer would still be required to refer all information relevant to the corruption issue that is not covered by an exception.

10.3.7.1 Exempt secrecy provisions

A PID officer is generally required to comply with their mandatory referral obligation, even if doing so would breach a secrecy provision under another law. However, a PID officer is **not required** to provide information to the NACC or the IGIS if that information is covered by an 'exempt secrecy provision' as defined under s 7 of the NACC Act.

As at 1 July 2023, an exempt secrecy provision includes:

- Part 11 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*
- s 34 of the *Inspector-General of Intelligence and Security 1986*
- secrecy provisions under the *My Health Records Act 2012*
- a secrecy provision in Part VIIA of the *Privacy Act 1988*
- ss 45 and 45B of the *Surveillance Devices Act 2004*
- ss 63 and 133 of the *Telecommunications (Interception and Access) Act 1979*
- a secrecy provision that is a provision of taxation law, and
- a secrecy provision of another law that says it still applies despite the NACC Act.

Importantly, the exception to the mandatory referral obligation will only apply where one of the above-listed exempt secrecy provisions actually prohibits the disclosure of particular information to the NACC. For example, subsection 45(5) of the *Surveillance Devices Act 2004* permits the communication of protected information for (among other purposes) the purpose of an investigation of a complaint against, or into the conduct of, a public officer within the meaning of that Act. As such, it will be necessary for PID officers to consider whether the above-listed provisions permit the disclosure of relevant information to the NACC.

Although information covered by an exempt secrecy provision does not need to be referred to the NACC or the IGIS, all other information relevant to the corruption issue must still be referred. The existence of information

covered by an exempt secrecy provision does not provide an exception to a PID officer's mandatory referral obligation, but rather limits the information that must be disclosed. A PID officer must still make a mandatory referral to the NACC or the IGIS without the protected information.

10.3.7.2 Attorney-General's certificate in relation to international relations

A PID officer is **not required** to provide information about a corruption issue to the NACC if the information is covered by an international relations certificate issued by the Attorney-General under s 236 of the NACC Act.

An international relations certificate would provide that certain information or documents communicated in confidence by a foreign government or international organisation, under a legally-binding agreement, cannot be disclosed to the Commissioner or the Inspector of the NACC because it would be contrary to the public interest to do so.

The Attorney-General must issue an international relations certificate in writing, and provide a copy of the certificate to all of the following:

- the Commissioner,
- the Inspector of the NACC
- the head of a Commonwealth agency which is in possession of the information, and
- a person who is possession of the information.

A PID officer should consult with their agency head if they are unsure whether information that may form part of a referral to the NACC is covered by international relations certificate issued under s 236 of the NACC Act.

It is important to note that although information covered by an international relations certificate cannot be referred to the NACC, all other information relevant to the corruption issue must still be referred to the NACC in accordance with a PID officer's mandatory referral obligation. An international relations certificate does not provide a blanket exception to a PID officer's mandatory referral obligation, but rather limits the information that must be disclosed.

10.4 WHAT HAPPENS AFTER MAKING A REFERRAL TO THE NACC

10.4.1 Notification requirements

A PID officer is required to notify a discloser that their internal disclosure under the PID Act has been referred to the NACC or the IGIS under s 35 of the NACC Act. The PID officer must notify the discloser of such a referral as soon as reasonably practicable after making the referral (s 35(5) of the NACC Act). This obligation is consistent with a PID officer's obligation to keep a discloser informed of how their internal disclosure is being dealt with under s 44(4) (notice of a decision to allocate) and s 50 (notice in relation to an investigation) of the PID Act.

The obligation to notify the discloser when a referral has been made does not create a requirement for the PID officer to stop dealing with the disclosure under the PID Act, nor does it create a requirement for the Commissioner or the IGIS to deal with issue.

As outlined above, if a PID officer refers a corruption issue that relates to an intelligence agency to the Commissioner, they must notify the IGIS of the referral as soon as reasonably practicable.

A PID officer may also notify the Commonwealth Ombudsman that they have referred an internal disclosure that raises a corruption issue to the NACC, however, there is no legislative requirement to do so. Similarly, where the referral concerns a disclosure that relates to the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs, a PID officer in that agency may wish to notify the IGIS. An exception to this is if the Commissioner issues a stop action direction in relation to the disclosure, and that direction prevents the PID officer from giving notice that an issue has been referred to the NACC. In this case, it may be appropriate for the head of the relevant Commonwealth agency to seek permission from the Commissioner to notify the Commonwealth Ombudsman of the referral to the NACC, for example, to assist the Ombudsman to effectively perform their oversight function.

10.4.2 Requirements under the PID Act after referring a corruption issue to the NACC

Referring a corruption issue to the NACC or the IGIS **does not** prevent a PID officer from continuing to take action in relation the disclosure under the PID Act. A PID officer is still required to handle or deal with the internal disclosure in accordance with the PID Act, unless the Commissioner has issued a stop action direction (see ss 39 and 43 of the NACC Act). This means processes under the PID Act can be conducted concurrently with any process undertaken under the NACC Act, unless a stop action direction applies.

This is appropriate because the Commissioner and the IGIS are not required to consider or deal with issues that are referred to them under the NACC Act, and ensures that PID officers continue to meet their obligations under the PID Act in a timely manner.

10.4.2.1 Interaction with 'another law or power' provisions in the PID Act

Section 8 of the PID Act defines the phrase 'another law or power' to mean a law of the Commonwealth (including procedures under such a law), or the executive power of the Commonwealth. This includes the NACC Act.

Section 44A of the PID Act permits an authorised officer to decide not to allocate an internal disclosure to a relevant agency under the PID Act if they are satisfied on reasonable grounds that the disclosure would be more appropriately investigated under another law or power. However, an authorised officer cannot make a decision not to allocate a disclosure only because the conduct disclosed raises a corruption issue (see s 43(4A) of the PID Act).

Similarly, s 48(1A) would prevent a principal officer from making a decision under s 48(1)(ga) to not investigate or further investigate a disclosure only because the conduct disclosed raises a corruption issue.

The operation of these sections means that an authorised officer or principal officer who receives a disclosure under the PID Act which raises a corruption issue (as defined in the NACC Act) cannot make a decision not to allocate or investigate (as the case may be) merely because the disclosure has been referred to the NACC or the IGIS. This accords with the operation of s 39 of the NACC Act, which requires a PID officer to continue to handle an internal disclosure under Part 3 the PID Act, even where a referral of a corruption issue has been made to the NACC or the IGIS.

10.4.3 How the Commissioner may deal with a corruption issue

If the Commissioner is satisfied that a referral raises a serious or systemic corruption issue, they may deal with it under s 41 of the NACC Act by:

- investigating the issue
- investigating the issue jointly with a Commonwealth agency or a State or Territory entity
- referring the issue to a Commonwealth agency for investigation
- referring the issue to a Commonwealth agency or a State or Territory entity for consideration
- deciding to take no action.

It is important to note that the Commissioner is under no duty to consider whether to deal with a corruption issue that is referred to the NACC. The Commissioner may also reconsider how to deal with a corruption issue at any time.

10.4.3.1 Referring the issue to a Commonwealth agency for investigation

Section 26 of the PID Act enables public officials (within the meaning of s 69 of the PID Act) to make a PID directly to the NACC without needing to make an internal disclosure to their agency first. If a person makes a PID directly to the NACC without making an internal disclosure to their agency, and the Commissioner refers the issue back to the relevant agency for investigation under s 41(1)(c) of the NACC, the agency is not able to investigate the matter under the PID Act as no internal disclosure was made.

If no internal disclosure has been made to an authorised officer (or supervisor) of an agency, the relevant

investigation processes under Part 3 of the PID Act are not triggered. If a public official wants their disclosure to be dealt with by their agency under the PID Act, they will need to make an internal disclosure to their agency.

If the NACC refers an issue to an agency for investigation, and there has not been an internal disclosure to the agency under the PID Act in relation to that issue, the agency may be able to investigate the issue under other processes including Code of Conduct investigations. Under ss 50 and 51 of the NACC Act, the NACC may oversee and issue directions in relation to corruption investigations undertaken by a Commonwealth agency.

10.5 STOP ACTION DIRECTIONS

10.5.1 What is a stop action direction?

Section 43 of the NACC Act enables the Commissioner to direct the head of a Commonwealth agency to stop taking action in relation to a corruption issue that concerns the agency. This is called a stop action direction.

A stop action direction overrides the operation of any other Commonwealth law and can prevent an agency from taking particular action in relation to the corruption issue, or from taking any action at all.

The Commissioner may only issue a stop action direction if all of the circumstances below apply:

- the direction is required to ensure the effectiveness of any action that the Commissioner has taken, or may take, in relation the corruption issue—for example, to stop the agency from inadvertently prejudicing a corruption investigation under the NACC Act
- the corruption issue concerns the agency—for example, where there is an issue of whether a staff member of the relevant agency has engaged in corrupt conduct
- the Commissioner has consulted with the head of the relevant Commonwealth agency about the stop action direction.

10.5.1.1 Permission to take action

If a stop action direction is in place, an agency head is able to seek permission from the Commissioner to undertake action in relation to a corruption issue where the action would otherwise be prohibited by the stop action direction.

Certain actions may also be taken where a stop action direction is in place without seeking permission from the Commissioner. Section 44 of the NACC Act provides that the following actions can be taken without permission:

- actions to prevent or lessen an imminent risk to the safety of the person, or to protect a person's life
- actions in the interests of the security, defence or international relations of Australia
- actions to prevent loss to the Commonwealth of an amount, greater than the amount (if any), prescribed in regulations made under the NACC Act
- actions for which it would be unreasonable in the circumstances to wait for the Commissioner's permission.

10.5.2 How may a stop action direction impact the PID Act process?

A stop action direction issued by the Commissioner overrides the operation of any other law of the Commonwealth, including the PID Act. If a stop action direction conflicts with a requirement in another Commonwealth law, the stop action direction prevails.

A stop action direction may prevent an authorised officer and principal officer from allocating or investigating a disclosure under the PID Act, or from notifying a discloser that a particular matter has been referred to the NACC. If a stop action direction specifies that a PID officer cannot allocate or investigate a disclosure under the PID Act, the PID officer is relieved of their obligation under the PID Act for as long as the stop action direction remains in place. For example, if a principal officer refers an internal disclosure to the NACC because it raises a serious or systemic corruption issue, and the Commissioner directs the principal officer to stop investigating the issue under the PID Act, the principal officer would be required to cease their investigation under the stop action direction is

revoked.

It is important for agencies to consider the scope of a stop action direction to ensure that they are aware of what action they can and cannot take in relation to a disclosure while a stop action direction is in place.

10.5.3 Notification requirements

Authorised officers and principal officers have certain notice requirements under the PID Act if a stop action direction prevents them from allocating or investigating a disclosure under the PID Act.

10.5.3.1 Notice requirements for principal officers

If a stop action direction prevents a principal officer from investigating an internal disclosure under the PID Act, the principal officer is required to give written notice of the stop action direction to:

- the Commonwealth Ombudsman; or
- the IGIS—if the disclosure concerns conduct that relates to:
  - an intelligence agency
  - the IGIS; or
  - the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs.

A principal officer is also required to notify the person who made the disclosure that they cannot investigate, or further investigate, the disclosure because of a stop action direction under the NACC Act (see s 50(1)(c) of the PID Act).

10.5.3.2 Notice requirements for authorised officers

If a stop action direction prevents an authorised officer from allocating an internal disclosure under Division 1 of Part 3 of the PID Act, the authorised officer is required to give written notice of the stop action direction to:

- the Commonwealth Ombudsman; or
- the IGIS—if the disclosure concerns conduct that relates to:
  - an intelligence agency
  - the IGIS; or
  - the intelligence functions of the AFP, AUSTRAC or Department of Home Affairs.

An authorised officer *may* notify a discloser that their disclosure cannot be allocated because of a stop action direction under the NACC Act, but they are not obliged to do so. However, Public Interest Disclosure Standards Determination 2025 provides that procedures established by the principal officer under s 59(3) of the PID Act must require an authorised officer to keep a written record of the following matters regarding a notice of a stop action direction under the NACC Act that prevents an authorised officer from allocating some or all of a disclosure:

- whether the discloser was informed of the decision, and if not the reasons why
- if a copy of the notice was given to the discloser:
  - the day and time the discloser was notified
  - the means by which the discloser was notified and
  - the content of the notification, and
- whether the relevant principal officer considered notice to the discloser of the stop action direction reasonably practicable or appropriate.

10.5.3.3 What information must be provided when giving notice of a stop action direction

Authorised officers and principal officers are required to give written notice of the stop action direction.

Section 279 of the NACC Act permits the Commissioner to issue guidance about the information that may be disclosed when giving notice about a stop action direction.

It may also be appropriate for the head of an agency that is subject to a stop action direction to seek permission from the Commissioner to disclose certain information about the stop action direction to the discloser, the Ombudsman or the IGIS, as appropriate.

10.5.4 What happens once a stop action direction is revoked?

A stop action direction must be revoked by the Commissioner when it is no longer required.

Once a stop action direction is revoked, a PID officer will be required to continue to handle the disclosure in accordance with the PID Act. However, the statutory timeframes for a PID officer to allocate or investigate a disclosure under ss 43(11) and 52(1) of the PID Act will start again from the day the PID officer becomes aware that the stop action direction no longer applies.

This means that an authorised officer will be required to use their best endeavours to allocate a disclosure within 14 days of becoming aware that a stop action direction no longer applies in relation to the disclosure (see s 43(11)(a) of the PID Act). Similarly, a principal officer will be required to complete an investigation of the disclosure under Part 3 of the PID Act within 90 days of becoming aware that a stop action direction no longer applies (see s 52(1)(d) of the PID Act) – that is, the 90-day investigation period restarts for the PID investigation. This is regardless of any period of investigation that occurred before the stop action direction was made.

If the NACC has investigated the conduct that is the subject of the disclosure during the period that the stop action direction was in force, it may be open to the principal officer to decide to not investigate (or not further investigate) the disclosure, on the basis that the conduct has been investigated under the NACC Act, provided the principal officer is reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation (s 48(1)(d)) (see section 7.3.3 of this guide).

10.6 WHISTLEBLOWER PROTECTIONS

Part 4 of the NACC Act provides a range of protections to any person who provide information or evidence about a corruption issue to the NACC, known as a NACC disclosure.

10.6.1 Protection from liability

A person who makes a NACC disclosure will receive the following protections:

- immunity from civil liability, criminal liability and administrative liability (including disciplinary action)
- protection from the enforcement of contractual or other remedies or rights on the basis of making a disclosure
- privilege in defamation proceedings
- protection from contract termination for breach of contract in making a disclosure.

These protections align with the protections provided to a public official or witness under s 10 of the PID Act.

10.6.2 Protections from reprisal

Section 30 of the NACC Act creates criminal offences for anyone taking, or threatening to take, a reprisal in relation to a NACC disclosure. A reprisal is when a person causes another person detriment because they believe or suspect that the other person has made, may have made, proposes to make or could make a NACC disclosure.

Under the NACC Act, detriment includes:

- dismissal of an employee
- injury of an employee
- alteration of an employee's position to their disadvantage
- discrimination between an employee and other employees of the employer
- harassment or intimidation of a person
- harm or injury to a person, including psychological harm

- damage to a person's property, reputation, business or financial position, and
- any other damage to a person.

The maximum penalty under the NACC Act for taking or threatening to take a reprisal against a person who made a NACC disclosure is imprisonment for two years.

Reasonable administrative action to protect a discloser from detriment is not a reprisal. For example, if a person makes a NACC disclosure about practices in their immediate work area, it may be appropriate to transfer them to another area so that they do not experience detriment.

These protections align with the protections provided to public officials under s 19 of the PID Act. However, the NACC Act does not provide civil remedies for reprisal.

10.6.3 Protections for public official

A public official (within the meaning of s 69 of the PID Act) may make a PID that involves a corruption issue directly to the NACC without needing to make an internal disclosure to their agency first.

A public official who makes a PID that involves a corruption issue directly to the NACC may be able to access protections under both the NACC Act and the PID Act (see chapter 8 of this guide). The public official will be entitled under the protections under the NACC Act as their disclosure would constitute a NACC disclosure for the purposes of the NACC Act. However, a public official will also be able to access the protections under the PID Act if their NACC disclosure also meets the threshold for disclosable conduct under s 29 of the PID Act.

A public official who makes an internal disclosure which raises a corruption issue to their agency, and that disclosure is referred by a PID officer to the NACC, will only receive protections under the PID Act.

10.6.4 Protections for PID officers who refer an internal disclosure to the NACC

A mandatory referral or voluntary referral under Part 5 of NACC Act is a NACC disclosure for the purposes of the NACC Act. This means that a PID officer who refers an internal disclosure to the NACC or the IGIS because it raises a corruption issue will receive protection from liability and reprisal under the NACC Act.