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## **CHAPTER 2: How the public interest disclosure scheme works**

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### **AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013***

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## 2 How the public interest disclosure scheme works

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## 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.

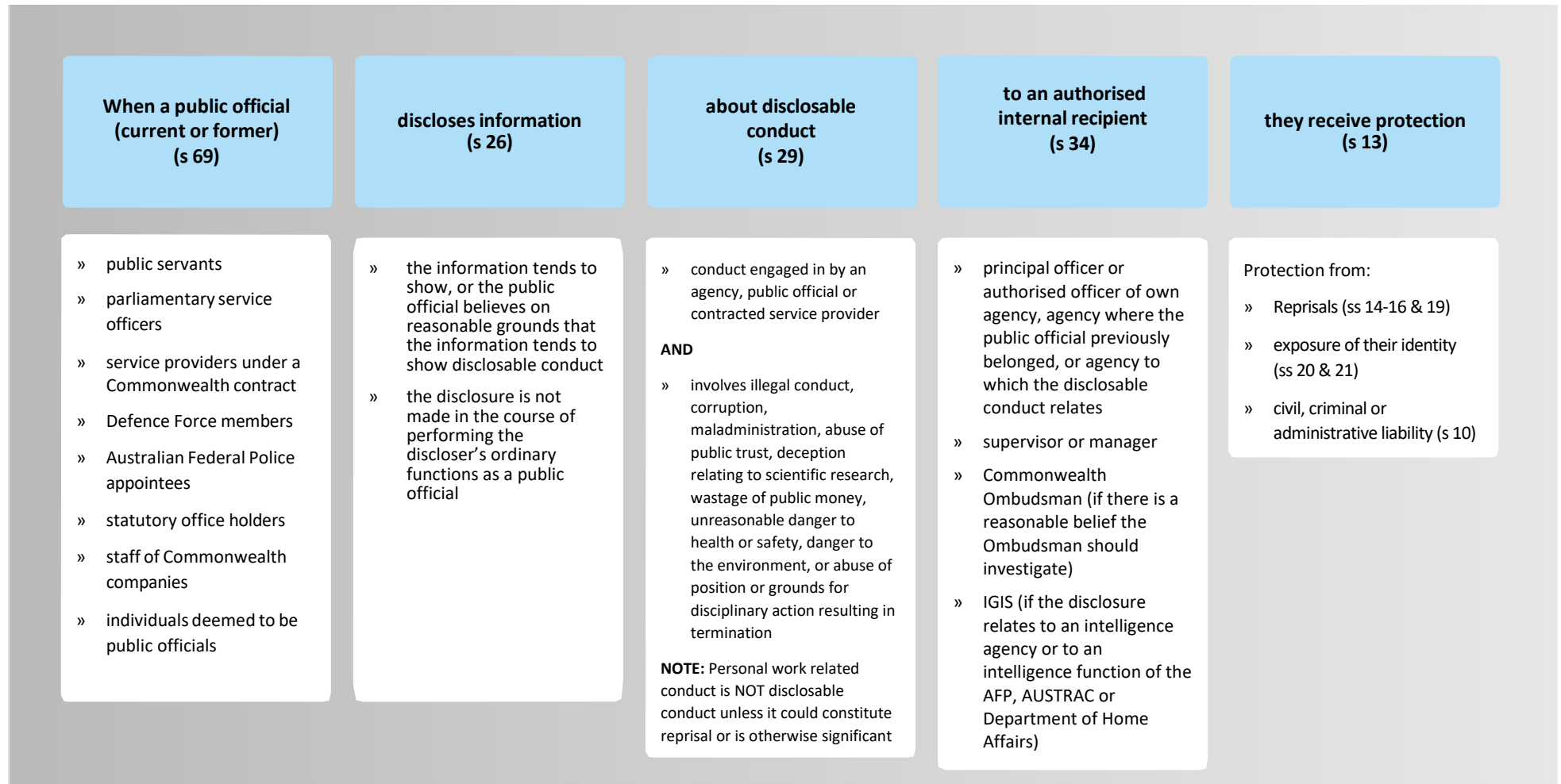
The PID Act provides immunities for current and former public officials who make disclosures in the circumstances set out in ss 26(1) and (1A). If a person makes a disclosure other than in the circumstances defined in ss 26(1) or (1A), the immunities in the PID Act do not apply, meaning that they are 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).

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).<sup>1</sup> 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)

<sup>1</sup> 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.<sup>2</sup> 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 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

<sup>2</sup> 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 to 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<sup>3</sup> 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:

<sup>3</sup> 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](http://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.<sup>4</sup>

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

<sup>4</sup> 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.<sup>5</sup>

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

<sup>5</sup> 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.