



CHAPTER 8: Agency obligations

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AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

July 2023
Version 3



8 Support and protection under the PID Act

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The 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)	<ul style="list-style-type: none"> » 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 published² 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 restriction³ 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 restriction⁴ (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 restriction⁵ (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 7 of the 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 matrix⁶ 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 CONFLICT⁷

<p>Threats or past experience</p>	<ul style="list-style-type: none"> » 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?
<p>Confidentiality unlikely to be maintained</p>	<ul style="list-style-type: none"> » 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?
<p>Significant reported wrongdoing</p>	<ul style="list-style-type: none"> » 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?
<p>Vulnerable discloser, witness or other relevant official</p>	<ul style="list-style-type: none"> » 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 from 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 and witnesses

Section 7 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.

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. They should also be advised of the arrangements the agency has in place to support them, if required.

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>