PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 4: Receiving internal disclosures

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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4 Receiving internal disclosures

4.1 RECEIVING AN INTERNAL DISCLOSURE FROM A PUBLIC OFFICIAL

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

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

4.1.1 A current or former public official

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

4.1.2 A 'deemed' public official

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

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

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

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

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

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

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

4.1.3 How can an internal public interest disclosure be made?

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

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

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

4.1.3.1 Information disclosed as part of ordinary functions

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

4.1.3.2 Form of disclosure

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

4.1.3.3 Uncertainty about whether the information tends to show disclosable conduct

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

4.1.4 Can a discloser be anonymous or use a pseudonym?

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

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

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

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

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

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

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

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

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

4.2 WHAT INFORMATION SHOULD THE DISCLOSER PROVIDE?

4.2.1 Information about the suspected wrongdoing

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

Agency procedures should:

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

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

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

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

4.2.2 Is the discloser's motive relevant?

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

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

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

4.3 PROTECTION FOR THE DISCLOSER

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

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

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

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

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

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

interest disclosure, not the conduct the disclosure is about.

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

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

4.4 THE DISCLOSER'S OBLIGATIONS

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

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

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