



**PUBLIC
INTEREST
DISCLOSURE
SCHEME**

CHAPTER 9: The role of key agencies

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

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

July 2023
Version 3



9 The role of key agencies

9.4 Ombudsman

9.5 Inspector General of Intelligence and Security

9.6 Prescribed investigative agencies

9.1 OMBUDSMAN

The Ombudsman and the IGIS have oversight of the public interest disclosure scheme. In addition to handling disclosures made about its own agency or public officials, the Ombudsman has a range of powers and functions under the PID Act:

- » determining standards with which agencies must comply (s 74)
- » receiving notifications of allocations (and reallocations) by agencies (s 44), including notification of decisions not to allocate a disclosure (s 44A) or where a NACC stop action direction prevents an agency from allocating a disclosure (s 44B)
- » receiving notifications from agencies where a decision has been made not to investigate or further investigate a disclosure(s 50A)
- » receiving notifications from agencies where a NACC stop action direction prevents an agency from investigating a disclosure (s 50A(4))
- » receiving, allocating and investigating disclosures about other agencies (ss 34, 43-44, 47, 49)
- » making decisions about extensions of time for agency investigations (s 52)
- » receiving reports of investigations completed under the PID Act (s 51)
- » reviewing the handling of disclosures (on the basis of a notification or a complaint) and making recommendations to agencies as a result (s 55)
- » providing assistance, education and awareness programs (s 62)
- » preparing six-monthly and annual reports on the operation of the PID Act (ss 76 and 76A).

In addition, the Ombudsman, as an investigative agency under the PID Act, can use separate powers under the *Ombudsman Act 1976* (Cth) (Ombudsman Act) to:

- » investigate a public interest disclosure (s 49 of the PID Act)
- » receive and investigate complaints about the handling of disclosures (s 7A of the PID Act).

The Ombudsman may also use own motion powers under the Ombudsman Act to investigate public interest disclosure matters.

9.1.1 Determining standards

The Ombudsman has the power to determine PID standards in relation to particular matters covered by the PID Act, in consultation with the IGIS (s 74). The PID Standard is a legislative instrument available at www.legislation.gov.au.

Agencies must comply with the PID Standard when:

- » preparing procedures for dealing with internal disclosures made under the PID Act
- » investigating disclosures under the PID Act
- » preparing reports of investigations
- » providing information to Ombudsman for the purposes of the Ombudsman's six-monthly and annual reports to Parliament on the operation of the PID Act (ss 76 and 76A) – see 9.1.8 of this guide.

9.1.1.1 The PID Standard

The PID Standard sets out matters that agencies must have regard to when fulfilling certain obligations under the PID Act, including requirements relating to the procedures that must be established by principal officers, the conduct of investigations, reports on investigations, and giving information and assistance to the Ombudsman.

9.1.2 Receiving and allocating disclosures

A public official may make a disclosure directly to the Ombudsman about wrongdoing relating to any agency, except an intelligence agency, if they believe on reasonable grounds that it would be appropriate for the Ombudsman to investigate the matter. If the matter relates to an intelligence agency (or the intelligence function of an agency identified by the PID Act, such as the AFP) and the person believes on reasonable grounds that it would be appropriate for the IGIS to investigate the matter, the person may make a disclosure directly to the IGIS instead (s 34) (see Chapter 5).

Unless special circumstances exist, the Ombudsman may allocate a disclosure it receives from a public official to another appropriate agency for handling under the PID Act, including the agency the disclosable conduct relates to, the relevant portfolio agency, the agency the public official belongs to, or another oversight agency. This is consistent with a key principle under the PID scheme that an agency should handle disclosures internally and that agencies are generally better placed to manage the risk of reprisals (s 43(5)).

9.1.3 When will the Ombudsman investigate a disclosure?

The Ombudsman may decide to investigate an internal disclosure about another agency that is made to an authorised officer in the Ombudsman's office or allocated (with consent) to the Ombudsman by another agency.

The Ombudsman will consider whether special reasons exist to conduct an investigation, or allocate the matter to the agency where the disclosable conduct is alleged to have occurred or another appropriate agency. In considering whether to investigate a disclosure, the Ombudsman will also consider its investigative remit under both the PID Act and the Ombudsman Act, including whether it has jurisdiction to consider the disclosure.

If the Ombudsman does decide to investigate a disclosure, the investigative powers under the Ombudsman Act may be used rather than the powers under the PID Act (see 7.2.1 of this guide). The broad powers in the Ombudsman Act include requiring the production of documents or other written records, requiring questions to be answered, examining witnesses on oath or affirmation, visiting premises, and inspecting documents.

9.1.4 Making decisions about extensions of time

Agencies have 90 days to complete their investigation of a public interest disclosure, including preparing the investigation report (s 52(1)) (see 7.3.3.1 of this guide). The Ombudsman (or the IGIS in the case of intelligence agencies or disclosures relating to the intelligence functions of an agency identified by the PID Act) can grant extensions of time either on request from a discloser or agency, or, alternatively, on their own initiative. In most cases, an extension is requested by the agency conducting the investigation.

Agencies should lodge an application for an extension of time to investigate 10 business days before the end of the 90 days where it is likely or known that the investigation will not be completed within the time limit (or 10 business days before a prior extension is about to expire and the agency needs a further extension). The Ombudsman's website <https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing> includes a form that agencies must use to apply for an extension. Agencies are encouraged to let the discloser know before they apply for an extension and take the opportunity to explain why it is required and the steps that need to be taken to complete the investigation (see 7.5.1 of this guide for more information about keeping the discloser informed).

The Ombudsman will not automatically grant an application for an extension. Each request is considered individually to determine if the additional time requested is reasonably necessary to ensure that the disclosure is properly investigated. The Ombudsman (or the IGIS) will also consider a range of other factors including:

- » the availability of witnesses
- » the complexity of the investigation
- » the action already taken to progress it
- » whether there have been any unreasonable or unexplained delays on the part of the agency

- » any views expressed by the discloser about the requested extension, and
- » any other matter the Ombudsman (or the IGIS) deems appropriate to consider.

If an extension is granted, the Ombudsman (or the IGIS) is required to inform the discloser and give reasons for the extension (s 52(5)(a)). This does not apply if contacting the discloser is not reasonably practicable. In cases where the Ombudsman or the IGIS do not have the discloser's identifying or contact details, the agency handling the disclosure will be asked to notify the discloser if it is practicable to do so. The principal officer of the handling agency must also let the discloser know, as soon as reasonably practicable after the extension is granted, about the progress of the investigation if it is practicable to do so (s 52(5)(b)).

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

9.1.5 Investigating complaints about disclosures under the Ombudsman Act

As noted above, the Ombudsman may also receive complaints about an agency's handling of a disclosure under the PID Act. This does not include complaints related to the IGIS, intelligence agencies or intelligence functions of agencies identified in the PID Act (such as the AFP) (see 9.2 of this guide). The subject of such complaints to the Ombudsman may include:

- » whether the disclosure has been handled reasonably
- » the allocation of the disclosure (including any delay or failure to allocate the disclosure)
- » the investigation of the disclosure (including any delay or failure to investigate the disclosure)
- » compliance with the PID Act by an agency or any of its officers, including its principal officer (including any failure to comply with the PID Act), and
- » any other matter relating to the handling of the disclosure (s 7A).

9.1.6 Reviewing the handling of disclosures and making recommendations

The Ombudsman (and the IGIS) may review the handling of disclosures and make recommendations to the principal officer of the agency to which the disclosure was made or allocated (s 55). The Ombudsman (or the IGIS) may decide to review the handling of the disclosure and make recommendations if it:

- » is notified of a decision not to allocate (s 44A(3))
- » is notified of a public interest disclosure allocated to an agency (s 44(2))
- » is notified by the principal officer of a decision not to investigate or not to investigate further (s 51(4))
- » is notified of the completion of the PID investigation report (s 51(4)), or
- » receives a complaint about the handling of a disclosure under the Ombudsman Act or the *Inspector-General of Intelligence and Security Act 1986* (Cth) (IGIS Act).

9.1.6.1 Reviewing public interest disclosures

The Ombudsman (or the IGIS) may review the handling of disclosures by a supervisor, an authorised officer, a principal officer or any other public official involved in handling the disclosure (s 55(3)). The Ombudsman and the IGIS have discretion whether to review the handling of a disclosure and are not required to undertake such a review.

In conducting a review of the handling of a disclosure, the Ombudsman (or the IGIS) may obtain any information and documents and make any inquiries as they see fit (s 51(4)). It is important that agencies keep comprehensive records of their handling of a disclosure to support effective oversight, including facilitating review.

If the review into an agency's handling of a disclosure is initiated in response to a complaint received under the Ombudsman Act or the IGIS Act, it does not affect any duty, power or function the Ombudsman or the IGIS have under the relevant act (s 55(2)).

9.1.6.2 Making recommendations

The Ombudsman and the IGIS have broad discretion to make recommendations following a review of an agency's handling of a public interest disclosure. However, they are not required to make any such recommendations.

Following a review, the Ombudsman (or the IGIS) may provide written recommendations to the principal officer of the agency where the disclosure was made, the agency to which it was allocated, or both agencies, if relevant (s 55(5)). There is no limitation on what recommendations the Ombudsman (or the IGIS) can make as a result of a review, however the PID Act provides that the Ombudsman (or the IGIS) can recommend that:

- » the disclosure should be allocated to an agency or reallocated to a different agency (s 55(6)(a) and (b))
- » the disclosure should be investigated, or be reinvestigated by the same or a different an agency (s 55(6)(c) and (d))
- » any other action be taken in relation to:
 - the disclosure or its handling
 - the discloser
 - any supervisor of the discloser
 - any authorised officer of an agency
 - any public official belonging to any agency (s 55(6)(e)).

In response to a recommendation from the Ombudsman or the IGIS, a principal officer may take any action they think fit (s 55(7)(c)), including but not limited to:

- » directing the allocation, or reallocation, of a disclosure (s 55(7)(a))
- » investigating, or reinvestigating, the disclosure (s 55(7)(b))
- » any other action in relation to the handling of a disclosure (s 55(7)(c)).

A principal officer of an agency does not have to action the recommendation of the Ombudsman (or the IGIS). However, where a recommendation has been made, the principal officer must, as soon as reasonably practicable, provide written notice to the Ombudsman or the IGIS of either:

- » any action taken, or proposed to be taken, in response to the recommendation (s 55(8)(a)), or
- » if no action is proposed to be taken in response to the recommendation, the reason no action will be taken (s 55(8)(b)).

In considering whether to take action in response to a recommendation of the Ombudsman (or the IGIS), the principal officer should carefully consider the reasons why the recommendation has been made, the intended outcome of the recommendation, and the impact of the recommendation on both the discloser and the agency's public interest disclosure process more generally. This should include considering the impacts if the recommendation was **not** implemented. Importantly, principal officers should remember that if a recommendation is not implemented, they will have to explain their decision to the Ombudsman (or the IGIS).

9.1.7 Providing assistance, education and awareness programs

The Ombudsman's functions include assisting principal officers, authorised officers and public officials in relation to the PID Act and conducting education and awareness programs (s 62).

The Ombudsman does not provide legal advice to agencies or disclosers. However, the Ombudsman has published a range of guidance materials that give general information about the operation of the PID Act and best practice administration of the PID scheme (including this guide). See the Ombudsman's PID website <https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing>.

Agencies and disclosers (both potential and actual) are also able to contact the Ombudsman's office by email (pid@ombudsman.gov.au) or phone 1300 362 072 with any queries regarding the operation of the PID Act.

9.1.8 Preparing reports to Parliament

The Ombudsman is required to prepare six-monthly and annual reports to Parliament on the operation of the PID Act (ss 76 and 76A). The Ombudsman must prepare a six-monthly report at the end of each calendar year covering the period from 1 July to 31 December, and an annual report after the end of each financial year that is inclusive of that entire period.

Both reports must include the following information from agencies for the relevant period (ss 76(2) and 76A(2)):

- » the number of public interest disclosures received by authorised officers of the agency
- » the types of disclosable conduct to which those disclosures relate
- » the number of disclosure investigations the agency conducted
- » the actions the agency took in response to recommendations in reports relating to those disclosure investigations
- » the number and nature of the complaints made to the Ombudsman about the conduct of agencies in relation to public interest disclosures
- » information about the Ombudsman's performance of its functions under s 62 and the IGIS's performance of its functions under s 63.

Each year, the Ombudsman surveys every agency covered by the PID scheme to collect the information needed to prepare this report. Input from intelligence agencies is coordinated through IGIS.

The principal officer of an agency must provide information requested by the Ombudsman for the purposes of preparing the Ombudsman's reports under the PID Act (ss 76(3) and 76A(3)). Agencies need to have regard to the PID Standard when providing this information. In preparing information to provide to the Ombudsman, an agency may delete any information that:

- » is likely to enable the identification of any person
- » would result in the document being exempt under the FOI Act, or
- » would result in it having a national security or other protective security classification (s 76(4)).

9.1.9 Assisting the Ombudsman

Public officials are required to use their best endeavours to assist the Ombudsman in the performance of the Ombudsman's functions under the PID Act (s 61(2)). This includes assistance with the Ombudsman's role in:

- » receiving notifications of allocation decisions of public interest disclosures (including decisions not to allocate)
- » assessing requests for extensions of time for investigations, and
- » receiving notification and reasons from agencies where discretion not to investigate or not investigate further have been exercised
- » receiving notification of the conclusion of a disclosure investigation and a copy of the investigation report
- » receiving notification of NACC stop directions.

Similar requirements apply to public officials assisting the IGIS under the PID Act (s 61(3)).

9.2 INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

The IGIS performs a similar role to the Ombudsman and is an authorised internal recipient in respect to the 6 intelligence agencies: the Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Office of National Intelligence, Australian Geospatial-Intelligence Organisation, Defence Intelligence Organisation and Australian Signals Directorate. A disclosure can also be made to the IGIS if the disclosure relates to the intelligence functions of an identified agency. In addition to the roles outlined above, the role of the IGIS in respect of these agencies and functions includes:

- » receiving notifications of disclosures about intelligence agencies or the intelligence functions of identified agencies (s 45A).

- » receiving notifications of allocations by or to intelligence agencies or identified agencies if the disclosure relates to their intelligence functions (s 44), including notification of decisions not to allocate a disclosure (s 44A) or where a NACC stop action direction prevents an agency from allocating a disclosure (s 44B).
- » receiving notifications from intelligence agencies (or identified agencies if the disclosure relates to their intelligence functions) where a decision has been made not to investigate or further investigate a disclosure (s 50A), including where a NACC stop action direction prevents an agency from investigating a disclosure (s 50A(4)).
- » receiving, allocating and investigating disclosures about intelligence agencies or identified agencies if the disclosure relates to their intelligence functions (ss 34, 43-44, 47, 49).
- » making decisions about extensions of time for investigations conducted by intelligence agencies or identified agencies if the disclosure relates to their intelligence functions (s 52).
- » receiving reports of investigations completed under the PID Act by intelligence agencies or identified agencies if the disclosure relates to their intelligence functions (s 51).
- » reviewing the handling of disclosures and making recommendations to agencies (s 55).
- » providing assistance, education and awareness programs (s 63), and
- » assisting the Ombudsman in relation to the performance of the Ombudsman's functions under the PID Act.

The IGIS, as an investigative agency under the PID Act, can use separate powers available under the IGIS Act to:

- » investigate a public interest disclosure using the inquiry powers available under the IGIS Act (s 49 of the PID Act), and
- » receive and investigate complaints about the handling of public interest disclosures by an intelligence agency, or an identified agency if the disclosure relates to that agency's intelligence functions (s 7B of the PID Act).

The IGIS can also make inquiries of intelligence agencies of their own motion (s 14 of the IGIS Act).

9.2.1 IGIS: receiving, allocating and investigating

A public official may make a disclosure directly to the IGIS about wrongdoing relating to an intelligence agency, or the intelligence function of an agency as identified by the PID Act (such as the ACIC and AFP) if they believe on reasonable grounds that it would be appropriate for the IGIS to investigate the matter.

The IGIS will become involved in an investigation in similar circumstances to those of the Ombudsman, but in respect to matters relating to intelligence agencies or the intelligence functions of one of the identified agencies.

The IGIS may decide to investigate an internal disclosure that relates to an intelligence agency (or the intelligence function of an agency identified by the PID Act) where it is made directly to an IGIS authorised officer or that is allocated (with consent) to the IGIS by another agency. The IGIS will consider if there are specific reasons to conduct an investigation rather than allocating the disclosure to the relevant agency. In most instances, it will be appropriate for the agency to which the conduct relates to conduct the investigation (s 43(5)).

More information about the role and functions of the IGIS are at www.igis.gov.au.

9.2.2 Notifications about disclosures, including urgent disclosures

An authorised officer of an intelligence agency is required to provide written notice of a disclosure to the IGIS as soon as reasonably practicable and in any case, within 1 business day if the discloser declares the disclosure to be 'urgent'. They must provide such written notice to the IGIS within 14 days for non-urgent disclosures (s 45A). The requirement to provide written notice within one business day comes about from the discloser's declaration of urgency. It is not the role of the authorised officer to verify the 'urgency' of the disclosure.

Notices to the IGIS must include the following information:

- » the making of the disclosure
- » the agency to which the authorised officer belongs
- » if applicable, that the discloser has declared that the disclosure is 'urgent'

- » the information and conduct that was disclosed, and
- » if known and the discloser has consented, the discloser's name and contact details.

In all cases, the principal officer of an agency is also required to keep the IGIS informed of the investigation progress, including expected timeframes and the likelihood of extension requests (s 45A(4)).

9.2.3 Investigating complaints about disclosures under the IGIS Act

The IGIS may also receive complaints about an agency's handling of a disclosure under the PID Act. The IGIS can receive complaints about the handling of disclosures by an intelligence agency or an agency identified in the PID Act if the disclosure relates to the agency's intelligence functions. The subject of a PID complaint to the IGIS may include:

- » whether the disclosure has been handled reasonably
- » the allocation of the disclosure (including any delay or failure to allocate the disclosure)
- » the investigation of the disclosure (including any delay or failure to investigate the disclosure)
- » compliance with the PID Act by an agency or any of its officers, including its principal officer (including any failure to comply with the PID Act), and
- » any other matter relating to the handling of the disclosure (s 7B).

A complaint to the IGIS under the IGIS Act may also be a PID under the PID Act and can enliven the various responsibilities and protections under that Act. It will be for the IGIS to determine the most appropriate framework under which to consider the disclosure. Provided the disclosure is a public interest disclosure, a discloser will still receive protections under the PID Act, even if the IGIS decides to investigate the complaint under the IGIS Act.

9.2.4 Assisting the Ombudsman prepare reports

The IGIS coordinates input from the intelligence agencies to support the Ombudsman prepare its six-monthly and annual reports to Parliament on the operation of the PID Act (ss 76 and 76A) (see 9.1.8).

The IGIS also includes information on its public interest disclosure function in its annual report prepared in accordance with section 46 of the *Public Governance, Performance and Accountability Act 2013* (Cth).

9.3 PRESCRIBED INVESTIGATIVE AGENCIES

Investigative agencies are those agencies listed in the PID rules, as well as the Ombudsman and IGIS (s 8). They are statutory agencies that have special powers to investigate matters within a particular jurisdiction. However, at the time of publication, there are no prescribed investigative agencies.

Investigative agencies can use their investigative powers under their own legislation when dealing with a disclosure under the PID Act (s 49). An investigative agency should consider whether it would be more appropriate to use powers available under its own legislation to investigate a public interest disclosure than using the PID Act. Relevant factors may include the investigative powers afforded to the investigative agency and the outcomes that may be available under its own legislation.

A person may make a disclosure directly to an investigative agency. An agency may also allocate a disclosure to an investigative agency that has appropriate jurisdiction to consider the matter if the investigative agency consents.

Appendix 1 – Further information

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

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