

Procedures for facilitating and dealing with public interest disclosures relating to the Office of the Commonwealth Ombudsman

I, Michael Manthorpe, Commonwealth Ombudsman make the following procedures under section 59 of the *Public Interest Disclosure Act 2013* (the PID Act).

These procedures support the Office of the Commonwealth Ombudsman's commitment to:

- the highest standards of ethical and accountable conduct
- encouraging and investigating public interest disclosures, and
- supporting and protecting persons who make public interest disclosures.

These procedures commence on 8 November 2020.



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INTRODUCTION

Purpose

The Office of the Commonwealth Ombudsman (the Office) is committed to a culture that encourages reporting of inefficiency and wrongdoing. We are also committed to the highest standards of ethical and accountable conduct and support for officials who report wrongdoing.

The purpose of these procedures is to provide information to the Office's employees (and contractors) about the *Public Interest Disclosure Act 2013* (PID Act) and to guide them on how to make a public interest disclosure about the Office (as an agency) or its own public officials, or another Commonwealth agency.

Internal disclosures made about the Office are the focus of these procedures.

These procedures cover:

1. The legislative framework for public interest disclosures.
2. What a public interest disclosure is.
3. How current and former employees (and contractors) can make a public interest disclosure.
4. The public interest disclosure assessment, allocation and investigation processes.
5. The protections available to disclosers and supports during the PID process.

THE LEGISLATIVE FRAMEWORK FOR PUBLIC INTEREST DISCLOSURE

Public Interest Disclosure Act 2013 (PID Act)

The PID Act establishes a scheme which promotes the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the disclosure of information by public officials about suspected wrongdoing in the public sector
- ensuring that public officials who make public interest disclosures are supported and protected from adverse consequences, and
- ensuring that agencies take action and properly investigate public interest disclosures.

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

The Ombudsman's functions and roles¹

The Ombudsman and the Inspector General of Intelligence and Security (IGIS)² have oversight of the public interest disclosure scheme. This means that in addition to handling public interest disclosures made about the Office or its own public officials, the Ombudsman has the following powers and functions under the PID Act:

- determining standards with which agencies must comply
- receiving notifications of allocations by agencies
- receiving notifications from agencies where the discretion has been exercised not to investigate or not investigate further
- receiving, allocating and investigating disclosures about other agencies
- making decisions about extensions of time for agency investigations
- providing assistance, education and awareness programs, and
- preparing annual reports on the operation of the PID Act.

PID handling complaints

Aside from the functions above, under the *Ombudsman Act 1976* the Ombudsman is able to receive and investigate complaints about the way Commonwealth agencies have handled public interest disclosures. The Ombudsman may also use the own motion powers under the *Ombudsman Act 1976* to investigate public interest disclosure matters.

¹ Given the Ombudsman has dual roles as both the Principal Officer of the Office, and as the external oversight agency for the PID scheme, these procedures use the term 'Principal Officer' when referring to the principal officer role and 'the Ombudsman' when referring to the external role.

² The IGIS's functions under the PID Act relate to disclosures which specifically concern conduct within an intelligence agency, as defined in section 8 of the PID Act.

WHAT IS A PUBLIC INTEREST DISCLOSURE?

A public interest disclosure is a disclosure by a current or former public official of suspected wrongdoing in the Commonwealth public sector.

The four different types of public interest disclosures sanctioned by the PID Act are: internal, external, emergency and legal practitioner disclosures. For more information about other types of disclosures permitted under the PID Act – external, emergency and legal practitioner disclosures – please see the summary of essential requirements at [Attachment A](#).

An internal disclosure is the most common type of disclosure under the PID Act. An internal public disclosure is made when:

- a person who is or has been a **public official**
- makes a disclosure to their supervisor or manager, or an **Authorised Officer** of the Office, and
- the discloser believes the information tends to show one or more instances of **disclosable conduct**.

It is important to note that a public interest disclosure:

- can be made anonymously
- can be made verbally or in writing
- can report a wrongdoing which does not need to be described as a PID by the discloser, and
- must relate to conduct by a Commonwealth agency or the conduct of one of its employees (or contractors) in connection with their position (or contract).

Who is a Public Official?

To make a public interest disclosure a person must be a current or former 'public official'. This broad term includes Australian Government public servants³, statutory office holders and staff of Commonwealth contracted service providers.

An Authorised Officer can also deem an individual to be a public official if they reasonably believe the individual has information about wrongdoing.

Usually information from the general public will not be a public interest disclosure.

Who is an Authorised Officer?

For the purposes of these procedures, an Authorised Officer in the Office is:

- the Ombudsman (as a **Principal Officer** under the PID Act), or
- an employee of the Office appointed by the Principal Officer, in writing, as an **Authorised Officer** for the purposes of the PID Act.

³ Which includes employees of the Office who exercise functions of the ACT Ombudsman.

The names of the Authorised Officers within the Office can be found on the Office's intranet: <https://objective.ombudsman.gov.au/id:A1760362/document/versions/published>

Where a public official does not have access to the Office's intranet – to view either the delegation instrument or the staff directory – the PID Team can be contacted for further information by way of PID@ombudsman.gov.au or by telephone on 1300 362 072.

If sending a disclosure relating to the Office by post (GPO Box 442, Canberra ACT 2601), any envelopes or external covers should be clearly marked 'Confidential – Ombudsman PID'.

What is disclosable conduct?

The full definition of disclosable conduct is set out in section 29 of the PID Act.

In summary, disclosable conduct is conduct by an agency or by a public official that:

- 1) contravenes a law of the Commonwealth, a State or a Territory, or
- 2) occurs in a foreign country and contravenes a law in force in that country that applies to the agency or public official and that corresponds to a law in force in the Australian Capital Territory, or
- 3) perverts, or attempts to pervert, the course of justice or involves corruption of any other kind, or
- 4) constitutes maladministration, including conduct that is negligent, based on improper motives, or unreasonable, unjust or oppressive, or
- 5) is an abuse of public trust, or
- 6) is fabrication, falsification, plagiarism or deception in relation to scientific research, or misconduct in relation to scientific work, or
- 7) results in the wastage of public money or public property, or
- 8) unreasonably results in a danger (or increased risk of danger) to the health and safety of one or more persons, or
- 9) results in a danger (or increased risk of danger) to the environment, or
- 10) is engaged in by a public official that involves abuse of the public official's position, or
- 11) could, if proved, give reasonable grounds for disciplinary action against the public official.

There are no time limits for making a disclosure. It does not matter whether disclosable conduct occurred before or after the PID Act commenced on 15 January 2014.

It also does not matter whether the public official who is the subject of a disclosure has ceased to be a public official since the time the conduct is alleged to have occurred. It is necessary, however, that they carried out the conduct in connection with their position as a public official.

HOW CAN A PUBLIC INTEREST DISCLOSURE BE MADE?

Who can disclosures be made to?

Individuals can make a disclosure to any of the following people:

- an Authorised Officer
- their supervisor or manager, or
- the Principal Officer.

Where possible, the Office encourages its employees (and contractors) to make disclosures directly **to an Authorised Officer**. This is because Authorised Officers have particular expertise in receiving disclosures, and are also well equipped to provide information to disclosers about the PID Act protections and what they can expect from the process.

It is important to be aware that Authorised Officers and supervisors have mandatory obligations to act on disclosures that they receive. Accordingly, employees of the Office (and its contractors) are encouraged to access information on the range of options and remedies available to them before committing to the PID Act process and the type of investigation this usually involves.

People considering making a disclosure and wanting to know more about the complaint options available to them are therefore encouraged to review the information published on the Office's intranet. Before making a report, people may also wish to find out more about the relative merits of different processes by contacting:

- Human Resources
- a Health and Safety Representative
- a Harassment Contact Officer
- the Australian Public Service Commission's Ethics Advisory Service, or
- our Office's PID Team.

The types of issues that can be considered as a disclosure are very broad, however an investigation under the PID Act will not always result in the outcome a person is seeking. If the matter relates to a personal grievance, for example, there may be other remedies available to address the issue (e.g. alternative dispute resolution processes), either in addition to or as an alternative to making a disclosure.

Employees and contractors of the Office can make a disclosure relating to the Office or any other Commonwealth agency.

What information do you provide?

Once a person has decided to make a disclosure, they should cover as many of the following matters as possible in their disclosure so as to help the Office to determine how to proceed:

- their name and contact details (unless there are reasons to prefer anonymity)
- the nature of the wrongdoing
- who they think committed the wrongdoing

- when and where the wrongdoing occurred
- relevant events surrounding the issue
- if they did anything in response to the wrongdoing
- others who know about the wrongdoing and have allowed it to continue
- the reasons why they believe the information tends to show disclosable conduct (*if they are intentionally making their disclosure under the auspices of the PID Act*), and
- if they are concerned about possible reprisal as a result of making a disclosure.

When making a disclosure, the information provided should be clear and factual, and should, as far as possible, avoid speculation, personal attacks and emotive language. It should contain supporting evidence where that is available to the discloser and should, where possible, identify any witnesses to the disclosable conduct.

However, a potential discloser should **not** attempt to investigate a matter themselves before making a disclosure.

A supervisor, manager or Authorised Officer who receives a disclosure from a public official must deal with the disclosure in accordance with the *Public Interest Disclosure Standard 2013* and these procedures.

Can you withdraw your disclosure?

Once a public interest disclosure has been made, it cannot be withdrawn. Nevertheless, a discloser may state that they do not wish the disclosure to be investigated and they may refuse to consent to their name and contact details being provided to the Principal Officer and/or delegate. If the discloser requests that a matter not be investigated, this would be taken into account in determining whether to exercise discretion not to investigate or not investigate further. It should be noted, however, that the Office may continue to investigate.

Anonymous disclosures

Anybody who is eligible to make a disclosure under the PID Act can do so anonymously if they prefer to do it this way.

A disclosure is anonymous if the discloser does not provide their name or contact details. It is also anonymous if the discloser does not disclose their name but does provide de-identified contact details, such as a pseudonym email address.

The fact that a report is made anonymously does not mean that it cannot be treated as a disclosure for the purposes of the PID Act. The obligations for Authorised Officers, supervisors or managers upon receiving an anonymous disclosure apply in the same way. For supervisors or managers in particular, this means they must refer it to an Authorised Officer as soon as is reasonably practicable.

Why would you consider disclosing your identity?

Reasons why a discloser might consider identifying themselves to an Authorised Officer, or at the very least providing a means of contact, include:

- The PID Act requires agencies to keep a discloser's identity confidential, subject to limited exceptions including the discloser's consent. 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 Office should ideally discuss the implications with (or provide information to) the discloser.
- It can be difficult to ensure protection from reprisal if the Office does not know the discloser's identity.
- The Authorised Officer who receives an anonymous report must have reasonable grounds to suspect the disclosable conduct has occurred in order to allocate the matter for investigation. If they cannot contact the person to seek necessary further information, the matter may not proceed.
- It may also be difficult to conduct an investigation if the discloser cannot be contacted for further information. An investigator has the discretion not to investigate, or investigate further, if the discloser does not provide their name and contact details or is unable to give the investigator further information or assistance if needed.
- 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.

A person who has made an anonymous disclosure may come forward at a later stage to disclose their identity and seek the protections of the PID Act.

The discloser's obligations

The discloser should not discuss the details of their disclosure with anyone who does not need to know about it. Discussion with people who are not performing a function under the PID Act would not be covered by the protections in the PID Act (unless the discussion meets the criteria for an external disclosure, emergency disclosure or legal practitioner disclosure).

Deemed public officials

Where an Authorised Officer receives a disclosure, and the information received does not, on first impressions, satisfy them of the discloser's status as a public official, they must consider whether to exercise the power in section 70 of the PID Act to determine that the person is to be regarded as a public official. This can be done either at the request of the discloser or on the Authorised Officer's own initiative.

If a discloser specifically requests a section 70 determination, the Authorised Officer is required to make a decision on this request and must inform the discloser of their decision accordingly. This must include the reasons for their decision if they decline the request. To the extent that the Authorised Officer makes a determination under section 70 on their own initiative, and where the discloser's contact details are known to the Authorised Officer, a written notice of the determination should similarly be provided to the discloser.

It is anticipated that an Authorised Officer would make their decision having regard to the nature of the information reported and whether it is in the public interest to have the matter dealt with as a

disclosure under the PID Act. For example, an Authorised Officer might exercise this discretion where a discloser appears to have 'inside information' relating to serious wrongdoing in the Office.

In circumstances where an Authorised Officer is considering a determination under section 70, they may also wish to seek guidance on the technical requirements from the Legal area or the PID Team.

THE PUBLIC INTEREST DISCLOSURE ASSESSMENT, ALLOCATION AND INVESTIGATION PROCESSES

Procedures for supervisors and managers

Where a public official in the Office discloses information to their supervisor or manager and that supervisor or manager has reasonable grounds to believe that the information concerns, or could concern, disclosable conduct, the supervisor or manager must, as soon as practical, give the information to an Authorised Officer in the Office.

At the outset, where the discloser's identity is known, the supervisor or manager should also:

- explain their obligation to give the information to an Authorised Officer
- draw the discloser's attention to these procedures and the protections under the PID Act
- check the discloser's views on whether there is any reason why a particular Authorised Officer should, or should not, be provided the information, and
- seek the discloser's consent to identify them as the source of the information.

Broadly speaking, a public official's supervisor or manager is someone in their 'chain of command', and this may extend beyond a daily and direct form of supervision. For example, it might also include a person who supervises or manages the public official in relation to a specific activity or period of time; or a person who has a leadership role in a particular office or site, especially where there are a number of different teams or work groups located together.

Where a verbal disclosure is made to a supervisor or manager, they must make a written record of the substance of the disclosure and of the date and time it was made. They must then ask the discloser to endorse the written record of the disclosure⁴, where this is practical.

Upon providing the information to an Authorised Officer, the supervisor or manager:

- must inform the discloser that they have given the information to an Authorised Officer in the Office and advise the discloser of the name and contact details of that Authorised Officer (where the discloser can be contacted)
- must not name the source of the information if the discloser has not consented to their identity being made known to an Authorised Officer
- must give the Authorised Officer their written assessment of any risks that reprisal action might be taken against the person who disclosed the information, and
- must remove any electronic records of the disclosure from their personal office email account and appropriately dispose of any hardcopy documents (once certain all necessary information has been given to the Authorised Officer).

In circumstances where a supervisor or manager receives allegations about wrongdoing which are, on first impression, insufficient to establish reasonable grounds for a belief that the information concerns disclosable conduct, it may nevertheless be appropriate for them to encourage the

⁴ For example, by signing the written record or providing an email to confirm the written record is an accurate account of their disclosure.

discloser to raise their concerns directly with an Authorised Officer in the Office, and to provide them with the relevant contact details to do this.

Procedures for Authorised Officers

The Authorised Officer must advise disclosers and potential disclosers about the PID Act where:

- a person discloses, or is proposing to disclose, information to an Authorised Officer which the Authorised Officer has reasonable grounds to believe may be disclosable conduct
- the Authorised Officer has reasonable grounds to believe that the person may be unaware of what the PID Act requires for the disclosure to be an internal disclosure, and
- the Authorised Officer is aware of the contact details of the person.

In these circumstances, the Authorised Officer must:

- inform the person that the disclosure could be treated as an internal disclosure for the PID Act
- explain to the person what the PID Act requires for a disclosure to be an internal disclosure, and
- advise the person of any orders or directions relating to designated publication restrictions⁵ that may affect disclosure of the information.

As detailed in the previous section relating to supervisors and managers, where the disclosure is made verbally to an Authorised Officer, they must make a written record of the substance of the disclosure and of the date and time it was made. They must then ask the discloser to endorse the written record of the disclosure (for example, by signing the written record or providing an email to confirm the written record is an accurate account of their disclosure), where this is practicable.

Determining if the information is an internal disclosure

Where a disclosure has been given to or made to an Authorised Officer, the Authorised Officer must assess if the disclosure meets the threshold for an internal public interest disclosure.

The Authorised Officer will consider the following when deciding whether the information could reasonably be considered an internal disclosure:

- (i) whether the disclosure made by a current or former public official
- (ii) whether the person made the disclosure to either an Authorised Officer, their supervisor or the Principal Officer, and
- (iii) whether the discloser believes on reasonable grounds the information shows one or more instances of disclosable conduct.

Disclosers should be aware that ordinarily, disclosures made to the Principal Officer will be referred by them to another Authorised Officer for action, unless there are circumstances which indicate only the Principal Officer should conduct an initial assessment. In these

⁵ This term generally refers to certain restrictions which protect the identity of people, by means such as a court or tribunal order that information not be published, witness protection and law enforcement mechanisms (see section 8 of the PID Act for the specific details).

circumstances, it would nevertheless remain open to the Principal Officer to seek such assistance as they require from a delegate under the PID Act.

Where an Authorised Officer receives a disclosure, the Authorised Officer may obtain information and may make such inquiries as they think fit, for the purposes of deciding the allocation of the disclosure, including for the purposes of deciding whether the disclosure is an internal disclosure or not.

Allocating the internal disclosure

If the information is assessed as being a public interest disclosure, the Authorised Officer must then decide on the allocation of the disclosure. If the disclosure relates to the Office the matter is likely to be allocated to the Office. However, if the disclosure relates directly to the Ombudsman's conduct, as distinct from conduct of the Office (as an agency) and its public officials or contracted service providers, the Authorised Officer may consider allocation of the matter to the Australian Public Service Commission for handling. If it relates to another Commonwealth agency, it is likely to be allocated to the agency about which the disclosure relates.

The Authorised Officer must use their best endeavours to complete the assessment and allocation process within **14 days** of receiving the disclosure.

Decision to not allocate the disclosure

The Authorised Officer may not allocate the handling of the disclosure if they are satisfied that there is no reasonable basis on which the disclosure could be considered an internal disclosure.

In these circumstances, where an Authorised Officer decides that a disclosure is not to be allocated, they must, where the discloser's contact details are known to the Authorised Officer, advise the discloser in writing of:

- the reasons why the disclosure is not to be allocated, and
- any other courses of action that might be available to the discloser under other laws of the Commonwealth.

The Authorised Officer should also advise the discloser that they may seek an internal review where a disclosure is not allocated to an agency, within **7 days** of being notified of the decision. If the discloser seeks review, they should do so in writing, giving the reasons why they believe the decision is incorrect and providing any further relevant supporting information. A discloser has one opportunity for internal review, which will be undertaken by a different Authorised Officer to the first Authorised Officer who assessed the disclosure.

Alternatively, where the Authorised Officer decides to allocate a disclosure, and where they are aware of the discloser's contact details, they must, as soon as practicable after reaching a decision, ask the discloser whether they consent to the Authorised Officer giving their name and contact details to the Principal Officer (and delegates). It is preferable for the discloser to provide their response in writing if practicable.

Where no response is received within **7 days** the discloser is taken not to have consented to the disclosure of their name and contact details to the Principal Officer and their delegates.

Where the Authorised Officer allocates an internal disclosure

In most cases, the handling of a disclosure should be allocated to the agency to which the disclosure relates. This means that generally, where a disclosure relates to the Office it would be appropriate for an Authorised Officer to allocate it to the Office for handling.

However, where an Authorised Officer decides that allocation to another agency is more appropriate, they must first obtain the consent of an Authorised Officer in that agency before they can allocate an internal disclosure to the other agency.

In either case, where an Authorised Officer in the Office allocates a disclosure to an agency (including to the Office) they must inform the Principal Officer of the receiving agency of:

- the allocation to the agency
- the information that was disclosed to the Authorised Officer
- the suspected disclosable conduct, and
- if the discloser's name and contact details are known to the Authorised Officer, and the discloser consents to the Principal Officer being informed – the discloser's name and contact details.

Where the Authorised Officer is aware of the discloser's contact details the Authorised Officer must inform the discloser, in writing, of the allocation to the relevant agency.

Record of allocating the handling of a disclosure

When an Authorised Officer allocates the handling of a disclosure to one or more agencies, they must keep an appropriate record of:

- the decision (including the name of each agency to which the disclosure is to be allocated)
- the reasons for the decision, and
- the consent provided by the Authorised Officer of the agency to which the allocation is made (if allocated to an agency other than the Office).

The Authorised Officer must also keep appropriate records of whether the discloser was informed of the allocation decision and, if so, of:

- the day and time the discloser was notified
- the means by which the discloser was notified, and
- the content of the notification.

These records should be kept confidential.

Risk assessment

Where an Authorised Officer in the Office undertakes an assessment and is considering allocating a disclosure relating to the Office, they must conduct an initial risk assessment on whether reprisals may be taken against the discloser based on a checklist of risk factors, and having regard to any assessment of risk provided under these procedures by the discloser's supervisor or manager.

Where a disclosure is allocated to the Office, the investigator (delegate) who takes carriage of the matter should thereafter regularly review the risk assessment, noting that the risk of reprisal may increase or change as a PID investigation progresses once more people become aware of the disclosure.

To ensure optimal safeguards and coordination within the Office, it may also be necessary for others to be consulted on, and to have a copy of, the risk assessment. These individuals might include the discloser's supervisor, a senior HR manager, or other appropriately senior managers⁶ in the Office – provided these people were not involved in the alleged wrongdoing – given their capacity to monitor the workplace and implement strategies to guard against reprisal. If this happens, the investigator will inform the discloser of who has received a copy and the reasons why.

In conducting (or reviewing) the risk assessment Authorised Officers (or investigators) will adopt the following framework which entails four steps:

- **Identifying** – are reprisals or related workplace conflict problems in the workplace, or do they have the potential 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?

The table at [Attachment B](#) provides a summary of the risk factors that should be considered when assessing the risk of any reprisal against the discloser.

The Ombudsman's '[Agency Guide to the Public Interest Disclosure Act 2013](#)' provides detailed information on how to carry out a risk assessment.

Deciding whether or not to investigate

As a starting point, once the handling of a disclosure is allocated to the Office by an Authorised Officer, the Principal Officer (or their nominated delegate) must investigate the matter. However, section 48 of the PID Act does allow the Principal Officer or delegate some discretion in particular circumstances.

Where an Authorised Officer allocates an internal disclosure to the Principal Officer or nominated delegate and the Principal Officer or delegate has been given the discloser's contact details, the Principal Officer or delegate must, **within 14 days** of the allocation, inform the discloser in writing about their powers:

- not to investigate the disclosure, or
- not to investigate the disclosure further.

The consideration by the Principal Officer or delegate of whether to exercise these powers under section 48 of the PID Act should occur as soon as practicable after receiving the allocation (whether from within or outside of the Office).

⁶ In the context of this risk assessment, a senior manager who may receive a copy would include the relevant Director or Senior Assistant Ombudsman (or both), depending on the circumstances.

In broad terms, the Principal Officer or delegate may decide not to investigate (or may decide to discontinue an investigation already begun) if:

- the discloser is not a current or former public official (and a determination has not been made under section 70 of the PID Act), or
- the information does not to any extent concern **serious** disclosable conduct, or
- the disclosure is frivolous or vexatious, or
- the disclosure is substantially the same as a disclosure that has been, or is being, investigated under the PID Act, or
- the disclosure is substantially the same as a disclosure that has already been investigated, or is currently being investigated, under another law of the Commonwealth, and
 - it would be inappropriate to conduct another investigation at the same time, or
 - the Principal Officer or delegate is reasonably satisfied that there are no matters that warrant further investigation, or
- the discloser has informed the Principal Officer or delegate that they do not wish the disclosure to be pursued and the Principal Officer or delegate is reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation, or
- it is impracticable to investigate the disclosure because:
 - the discloser has not revealed their name and contact details, or
 - the discloser has refused or has failed or is unable to give the investigator the information they requested, or
 - of the age of the information.

Guidance on factors that might go towards the exercise of the power in section 48 is provided in the Ombudsman's ['Agency Guide to the Public Interest Disclosure Act 2013'](#).

Decision not to investigate

Where the Principal Officer or delegate decides under section 48 of the PID Act not to investigate a disclosure, and where they have been given the discloser's name and contact details, the Principal Officer or delegate must, as soon as reasonably practicable, inform the discloser of that decision, of the reasons for that decision and of other courses of action that may be available to the discloser under other laws of the Commonwealth.

If the Principal Officer or delegate makes such a decision, they will also inform the PID Team pursuant to notification requirements under the PID Act and the Office's oversight role.

Where the disclosure is to be investigated

If the Principal Officer or delegate has not decided at the outset to use their power under section 48, and where they have been given the discloser's name and contact details, the Principal Officer or delegate must inform the discloser that they are required to investigate the disclosure. At the same time, they must also inform the discloser of the estimated length of the investigation.

If, however, following the commencement of an investigation the Principal Officer or delegate later decides not to investigate the disclosure further under section 48, the Principal Officer or delegate must inform the discloser of that decision, of the reasons for the decision and of other courses of action that might be available to the discloser under other laws of the Commonwealth.

Procedures for investigators

Where the Principal Officer or delegate has decided to commence an investigation into an internal disclosure, they may conduct the investigation as they think fit. This includes obtaining information from relevant people and making appropriate inquiries.

The Principal Officer or delegate must be independent and unbiased. They must ensure that they do not have an actual or perceived conflict of interest.

When conducting an investigation the Principal Officer or delegate (which includes the investigator) must also ensure that:

- any finding of fact is based on logically-probative evidence
- the evidence that is relied on in an investigation is relevant – in broad terms, evidence is relevant to an investigation if it is of consequence to the matter under investigation and makes the existence of a fact more probably or less probable than it would be without the evidence, and
- any decision is based on evidence that is sufficient to prove a fact on the balance of probabilities.

The Principal Officer or delegate (which includes the investigator) must comply with:

- the Ombudsman's Standard, and
- to the extent they are relevant to the investigation:
 - the Commonwealth Fraud Control Guidelines
 - these procedures, and
 - the procedures established under section 15(3) of the *Public Service Act 1999*.

Engaging with witnesses

When engaging with witnesses as a part of an investigation, the investigator must assess at the outset, for each witness they intend to approach for assistance, the risk of reprisal for that witness as a result of participation in the investigation. The investigator should consider the same risk factors and framework as outlined with respect to disclosers (see section titled [Risk assessment](#)).

Conducting interviews

Subject to any restrictions imposed by a law of the Commonwealth other than the PID Act, the investigator must ensure that, if a person is interviewed as part of the investigation of an internal disclosure, that person is informed of:

- the identity and function of each person conducting the interview
- the process of conducting an investigation

- the authority of the investigator under the PID Act to conduct an investigation, and
- the protections provided to the person by section 57 of the PID Act.

An investigator should also inform the person of their duty:

- if they are a public official – to use their best endeavours to assist the investigator in the conduct of an investigation under the PID Act (subject to the privilege against incriminating themselves or exposing themselves to a penalty)
- not to take or threaten to take reprisal action against the discloser
- not to do or say anything to others which would undermine the confidentiality of the investigation, and
- subject to the PID Act, not to disclose the identity of the person who made the disclosure.

Where the investigator conducts an interview as part of an investigation, at the end of the interview, the interviewee must be given an opportunity to make a final statement or comment or to express a position. The investigator must include any final statement, comment or position in the record of the interview.

Where the investigator is aware of the discloser's identity and considers that it is necessary to reveal the discloser's identity to a witness, the investigator must consult with the discloser, where practicable, before proceeding.

Procedural fairness

The requirement to provide a person with an opportunity to respond to an allegation about them only arises at the point where it is likely that an adverse finding is to be made about their conduct. As such, procedural fairness does not require that they be advised as soon as the disclosure is received or as soon as an investigation is commenced.

Procedural fairness may require that the discloser's identity be revealed to the person who is the subject of the disclosure. The information that they are entitled to be told will depend upon what is necessary to investigate the disclosure and for them to know the substance of allegations and evidence against them.

Where the investigator in preparing the report of their investigation proposes to:

- make a finding of fact, or
- express an opinion that is adverse to the discloser, to a public official who is the subject of the disclosure or to another person,

the investigator or delegate must give the person who is the subject of that proposed finding or opinion a copy of the evidence that is relevant to that proposed finding or opinion and must give the person a reasonable opportunity to comment on it.

Note: The above paragraph will not apply where the investigation does not make substantive findings or express adverse opinions but instead simply recommends or decides that further investigation action should or should not be taken or will or will not be taken.

Before commencing a process to provide the subject of the allegations with procedural fairness, the investigator should inform the discloser that this will occur. At this stage, the investigator should also remind the discloser to raise any concerns immediately in the event they believe that reprisal has

occurred or is occurring.

Time limits

The investigator has 90 days from the date the disclosure was allocated in which to complete the investigation.

It is possible to seek one or more extensions of time from the Ombudsman (or their delegate).

A request for an extension of time should be made where an investigation has not been completed within 70 days of the date the disclosure was allocated and the investigator considers completion is not possible within the remaining timeframe. However, where it is apparent to the investigator at an earlier point in the investigation that its scope will necessitate longer than 90 days, they should consider seeking an extension as soon as it is practicable to reasonably estimate the additional time required.

A request for extension should include the reasons why the investigation cannot be completed within the time limit, the views of the discloser about the proposed extension and an outline of action taken to progress the investigation.

An investigation that is not completed within 90 days, or by the revised due date where an extension has been granted, does not become invalid.

Confidentiality

The investigation of the disclosure should be conducted in as confidential a manner as is possible. In particular, the identity of both the discloser and the person alleged to have engaged in the disclosable conduct should not be revealed except where this is reasonably necessary for the effective investigation of the disclosure.

Some of the reasons why it may be necessary to reveal identifying information include:

- procedural fairness requirements
- where, due to the nature of the allegations under investigation, not knowing the discloser's identity would prevent a witness from offering essential or relevant information, or
- where it is necessary to inform other appropriately senior Office staff about the existence of an investigation, or the identity of the discloser or other people involved in the investigation (including the subject and witnesses), insofar as this is required to support the implementation of strategies to protect disclosers and witnesses from reprisal.

If taking any of these steps becomes necessary, the investigator should inform the affected person – which may be the discloser, a witness or the subject of the allegations – about who will be made aware of their identity, in the context that an investigation is on foot, and explain why it is necessary.

Any preliminary verbal enquiries conducted by an Authorised Officer or interviews conducted by delegates (including investigators) should be conducted in private.

Any preliminary verbal enquiries or interviews with the discloser should be arranged so as to avoid the identification of the discloser by other staff of the Office.

Reports of investigations

In preparing a report of an investigation under the PID Act the investigator must comply with the PID Act, the Ombudsman's Standard and these procedures.

A report of an investigation under the PID Act must set out:

- the matters considered in the course of the investigation
- the duration of the investigation
- the investigator's findings (if any)
- the action (if any) that has been, is being or is recommended to be taken, and
- any claims made about, and any evidence of, detrimental action taken against the discloser, and the Office's response to those claims and that evidence.

Where relevant, a report must:

- identify whether there have been one or more instances of disclosable conduct
- identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct (if any) relates
- explain the steps taken to gather evidence
- set out a summary of the evidence, and
- set out any recommendations made based on that evidence.

Where an investigator has completed a report of an investigation under the PID Act, and where they have been given the discloser's contact details, the investigator must, as soon as practicable, advise the discloser in writing:

- that the report has been completed, and
- whether the report was completed within the time limit provided for by the PID Act.

The investigator must, within a reasonable time of preparing a report of an investigation under the PID Act, give a copy of the report to the discloser.

The investigator may delete from the copy of the report given to the discloser any material:

- that is likely to enable the identification of the discloser or another person, or
- the inclusion of which would result in the copy being a document:
 - that is exempt for the purposes of Part IV of the *Freedom of Information Act 1982*, or
 - having, or being required to have, a national security or other protective security classification, or
 - which contains intelligence information, or
 - which contravenes a designated publication restriction.

Record keeping

Where an Authorised Officer is required to keep a record under these procedures, the record may be kept in hard copy or in an electronic form or in both. Access to these records must be restricted to the Authorised Officers, delegates (including investigators) or other employees in the Office who require access in order to perform some function under the PID Act or for the purposes of another

law of the Commonwealth (for example, under the *Work Health and Safety Act 2011* or the *Public Service Act 1999*).

Where a form or correspondence is required to be sent under these procedures, a copy of the form or correspondence must be kept.

All records made for the purposes of the PID Act in accordance with these procedures must be marked in accordance with the Protective Security Policy Framework (PSPF) Security Classification System⁷ and stored in the appropriate storage container.

Any email messages sent by Authorised Officers or delegates that contain identifying information must be clearly marked 'Private and Confidential'.

Where a person will cease being an Authorised Officer in the Office (including because of resignation or movement to another agency), their PID records must be transferred to another Authorised Officer in the Office.

Monitoring of investigations

Where a disclosure relating to the Office is allocated to the Office for handling, the Authorised Officer will provide a brief to the Principal Officer which contains a summary of the information disclosed, the suspected disclosable conduct (by reference to the relevant item or paragraph of the PID Act definition) and, if the discloser consents, the name and contact details of the discloser.

Thereafter, the PID Team will coordinate a regular report to the Principal Officer which contains advice about the progress of any investigation, whether and why a decision not to investigate has been made under section 48, whether and why a request for extension of time to investigate has been made and whether a request for extension of time has been granted.

⁷ Generally an 'Official: Sensitive' marking would be required.

PROTECTIONS AVAILABLE TO DISCLOSERS AND SUPPORTS DURING THE PROCESS

The Office encourages and supports the reporting of wrongdoing by public officials in accordance with the PID Act.

This means that the Office will take active steps to support and to protect persons who make disclosures under the PID Act, and also those persons who provide assistance in the course of an investigation.

Protecting the discloser's identity

It is an offence for any person to disclose or use information that is likely to enable the identification of the discloser unless the discloser consents, the identifying information has already been lawfully published, or the disclosure or use:

- is for the purposes of the PID Act
- is for the purposes of another Commonwealth law or a prescribed State or Territory law, or
- is in connection with the Ombudsman or the IGIS carrying out their public interest disclosure functions under the *Ombudsman Act 1976* or the *Inspector-General of Intelligence and Security Act 1986* (respectively).

In order to protect a discloser's identity and to guard against the potential misuse of identifying information, the Office will:

- 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 information that they should keep it confidential and that unauthorised disclosure may be a criminal offence
- ensure the discloser can communicate with a support person, the Authorised Officer or investigator without alerting other staff, and
- assess whether anyone who is aware of the discloser's identity may have a motive to take reprisals against the discloser or impede the progress of an investigation, and monitor the situation.

Immunity from criminal and civil liability

A person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the disclosure.

No contractual or other remedy may be enforced, and no contractual or other right may be exercised, against a person on the basis of the public interest disclosure. A contract to which the discloser is a party cannot be terminated because of the public interest disclosure.

Immunity from disciplinary action

The immunities above do not apply if the discloser:

- knowingly makes a statement that is false or misleading, or

- makes a disclosure knowing that it contravenes a designated publication restriction and without a reasonable excuse for doing so.

Making a disclosure about matters that include a discloser's own wrongdoing does not protect a discloser from liability for their wrongdoing.

Protection against reprisal

It is an offence to take reprisal action against a person who has made or intends to make a disclosure.

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, may have made or intends to make a public interest disclosure.

'Detriment' includes any disadvantage to a person, including dismissal, injury in their employment, discrimination between them and other employees or alteration of their position to their disadvantage.

What is not a reprisal?

Administrative action that is reasonable to protect the discloser from detriment is not a reprisal. 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.

Making a disclosure also does not exclude the discloser from reasonable management action for any unsatisfactory performance or wrongdoing on their part – such action is not a reprisal.

How will the Office respond to reprisal action?

The Office will not tolerate any reprisal action against a person who makes a public interest disclosure. Every allegation of reprisal will be taken seriously, recorded and responded to.

Reprisal risk assessment

At the outset, as soon as is practical after receiving a disclosure, an assessment will be conducted by the Authorised Officer to assess the risk that reprisal action may be taken against the discloser, as well as strategies to prevent or contain reprisals. Further information in relation to the risk assessment process, and who might be consulted in that process, is contained in the section titled [Risk assessment](#).

A responsibility to act

After the Authorised Officer's initial assessment role ends, everybody involved in handling a public interest disclosure and aware of the discloser's identity – which may include 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 – has a responsibility to act if signs of detriment become apparent to them. In the event they observe or are told of concerning behaviour, they must escalate this information to a senior manager for consideration and rapid response. In the context of the Office's responsibility to act on concerns relating to reprisal arising from disclosures about the Office, a senior manager is taken to be a Senior Assistant Ombudsman or higher.

If a discloser believes that reprisal action has been or is being taken against them because they have made a disclosure, they should immediately tell their supervisor (provided that person is not involved in the alleged wrongdoing) or a senior manager and the investigator. As detailed above,

supervisors and investigators have a responsibility to promptly escalate any such concerns to a senior manager.

If a senior manager receives a report of reprisal action against a discloser, they will ensure that the Office:

- takes all steps possible to stop that alleged reprisal and protect the discloser, having reference to the vulnerabilities and strategies identified in the reprisal risk assessment – subject to the seriousness of the reprisal concerns raised, this might include consideration of the appropriateness of remote working arrangements or a period of leave, for either, or both, the discloser and the subject of the allegations
- takes action to investigate the suspected reprisal (noting that such a report may indicate disclosable conduct and will be referred by a supervisor or senior manager to an Authorised Officer for assessment) – depending on the circumstances, this might include confidential discussions with any or all of the following: the discloser, the alleged perpetrator, the discloser’s supervisor, the site supervisor and the relevant Senior Assistant Ombudsman
- establishes whether reprisal has occurred, and
- if reprisal is found to have occurred, arranges for the matter to be dealt with in an appropriate manner.

A person can also take the following actions, on their own initiative, if they have experienced reprisal action as a consequence of making a disclosure:

- report the reprisal to Police, noting that it is a criminal offence to cause detriment to a person because of a suspicion or belief that they have made, or will make, a public interest disclosure
- apply for an injunction to prevent a reprisal, and
- apply for compensation for loss, damage or injury suffered from a reprisal.

Support for disclosers

The Office recognises that the PID process can be difficult and stressful for disclosers, who may experience anxiety about the impact of any investigation on workplace relationship dynamics. Sometimes, a discloser might not consider they are experiencing reprisal action within the meaning of the PID Act, but may nonetheless have concerns about being treated differently in their work area.

The Office encourages disclosers to discuss any such concerns with their supervisor, if comfortable doing so, and will also provide the following:

- the offer of a support person and information about other available support options;
- an assurance the Office will take all reasonable steps necessary to protect them
- regular updates on the progress of the investigation
- if workplace stress and reprisal risks cannot be otherwise mitigated, consideration of allowing transfer to a different work area or access to leave whilst the investigation remains ongoing, and
- at the end of the disclosure process, an opportunity for debriefing and discussion of any questions or concerns.

A support person would be somebody who is not the Authorised Officer or the investigator, and whose role may be to check regularly on the discloser's wellbeing. They may provide general reassurance and guidance insofar as the discloser might experience heightened stress in the workplace during the investigation. While a support person may help the discloser to identify if other professional supports may be beneficial, it is important to recognise that they will not be qualified, nor expected, to provide psychological counselling.

A discloser who is finding the process stressful may also access the Office's Employee Assistance Program.

Supporting and protecting a person against whom a disclosure has been made

A person who is subject to an allegation made in a public interest disclosure will be informed of the allegation (or allegations) if an adverse finding against them is considered likely. This is consistent with the person's entitlement to be accorded procedural fairness where their interests may be affected by an administrative decision. In view of these considerations, the process for the subject of an allegation will include one or more of the following actions:

- providing the person with information about their rights and obligations under the PID Act
- providing the person with information about the Office's investigation procedures and any other relevant matter, including informing them of the progress of any investigation
- ensuring the identity of the person is protected as much as reasonably practicable, and
- advising them of the availability of the Office's Employee Assistance Program.

Support for witnesses

The Office recognises that being a witness in an investigation can also be difficult and witnesses may access the Office's Employee Assistance Program if they find the process stressful. The investigator should also provide assurance to all witnesses who belong to the Office that the Office will take all steps reasonably necessary to protect them from reprisal.

If a witness believes that detrimental action has been or is being taken against them as a reprisal for providing assistance to the investigator, they should immediately tell their supervisor (provided that person is not involved in the alleged wrongdoing) or a senior manager and the investigator. As detailed above, supervisors and investigators have a responsibility to promptly escalate any such concerns to a senior manager (that is, a Senior Assistant Ombudsman or higher).

If a senior manager receives a report of reprisal action against a witness, they will ensure that the Office:

- takes all steps possible to stop that alleged reprisal and protect the witness, having reference to the vulnerabilities and strategies identified in the investigator's risk assessment
- takes action to investigate the suspected reprisal (noting that such a report may indicate disclosable conduct and will be referred by a supervisor or senior manager to an Authorised Officer for assessment) – as with disclosers who make reprisal claims, and depending on the circumstances, this might include confidential discussions with any or all of the following: the witness alleging reprisal, the alleged perpetrator, the witness' supervisor, the site supervisor and the relevant Senior Assistant Ombudsman
- establishes whether reprisal has occurred, and
- if reprisal is found to have occurred, arranges for the matter to be dealt with in an appropriate manner.

ATTACHMENT A: CONDITIONS FOR MAKING AN EXTERNAL, EMERGENCY OR LEGAL PRACTITIONER DISCLOSURE

The PID Act allows for the making of external, emergency and legal practitioner disclosures, to *any person other than a foreign public official*, however there are strict pre-conditions which must be satisfied in order for the discloser to retain the protections and immunities afforded under the PID Act.

The requirements for these three types of disclosures, found in section 26 of the PID Act, are summarised below.

External disclosure

- 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
- the discloser has previously made an internal disclosure relating to the same information
- the discloser has reasonable grounds to be dissatisfied with the adequacy of, or response to, the ensuing investigation, or the investigation was not completed within the statutory time limit
- the disclosure is not contrary to the public interest
- no more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct
- the information does not consist of, or include, intelligence information, and
- none of the conduct with which the disclosure is concerned relates to an intelligence agency.

Emergency disclosure

- the discloser believes on reasonable grounds that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the environment
- the extent of the information disclosed is no greater than is necessary to alert the recipient to the substantial and imminent danger
- there exceptional grounds to justify the discloser's failure to make an internal disclosure previously (if they have not done so) or not waiting for an internal disclosure investigation to be completed, and
- the information does not consist of, or include, intelligence information.

Legal Practitioner disclosure

- the disclosure is made for the purposes of obtaining legal advice, or professional assistance, from the recipient in relation to the discloser having made or proposing to make, a public interest disclosure
- if the discloser knew or ought reasonably to have known, that any of the information has a national security or other protective security classification, the recipient holds the appropriate level of security clearance, and
- the information does not consist of, or include intelligence information.

ATTACHMENT B: INDICATORS OF A HIGHER RISK OF REPRISALS OR WORKPLACE CONFLICT

Threats or past experience	Has a specific threat against the discloser been received? Is there a history of conflict between the discloser and the subjects of the disclosure, management, supervisors or colleagues? Is there a history of reprisals or other conflict in the workplace? Is it likely that the disclosure will exacerbate this?
Confidentiality unlikely to be maintained	Who knows that the disclosure has been made or was going to be made? 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? Is the discloser's immediate work unit small? Are there circumstances, such as the discloser's stress level, that will make it difficult for them to not discuss the matter with people in their workplace? Will the discloser become identified or suspected when the existence or substance of the disclosure is made known or investigated? Can the disclosure be investigated while maintaining confidentiality?
Significant reported wrongdoing	Are there allegations about individuals in the disclosure? 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 intent to take reprisals – for example, because they have a lot to lose? Do these people have the opportunity to take reprisals – for example, because they have power over the discloser?
Vulnerable discloser	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 employed part-time or on a casual basis? Is the discloser 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?

Extracted from the Ombudsman's ['Agency Guide to the Public Interest Disclosure Act 2013'](#).