PUBLIC INTEREST DISCLOSURE SCHEME

CHAPTER 5: Initial assessment and allocation under the PID Act

AGENCY GUIDE TO THE *PUBLIC INTEREST DISCLOSURE ACT 2013*

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5 Initial assessment and allocation under the PID Act

Once an authorised officer has received a disclosure of suspected wrongdoing (either directly from the discloser, or via the discloser's supervisor), the PID Act requires them to take certain steps.

The authorised officer should promptly perform an initial assessment of the disclosure, noting they must use their best endeavours to make an allocation decision within 14 days, unless there is a good reason why they need further time (s 43(11)).

The 14-day timeframe commences the day after:

- the day the disclosure is made or given to an authorised officer, if no previous decision has been made about the allocation
- the day the principal officer of the recipient agency receives the recommendation under that section, if the allocation decision is made following the reconsideration of a previous decision about the allocation in response to a recommendation from the Ombudsman or the IGIS, or
- if a stop action direction under the NACC prevented allocation, the day when the authorised officer becomes aware that the direction no longer applies.

An example of an acceptable reason for taking more than 14 days to allocate a disclosure would be when the authorised officer needs to undertake preliminary enquiries to decide whether a disclosure meets the threshold for an internal disclosure but cannot conclude those inquiries within 14 days.

In making an allocation decision, an authorised officer may either:

- allocate the disclosure to one or more agencies (s 43(3)(a)), or
- decide not to allocate the disclosure to any agency (s 43(3)(b)) where the authorised officer is satisfied on reasonable grounds that:
  - there is no reasonable basis on which the disclosure could be considered a public interest disclosure (as defined in s 26 of the PID Act) (s 43(4)(a)), or
  - the conduct would be more appropriately investigated under another law or power (s 43(4)(b)) (see 5.3.2 below).

The initial assessment and factors to consider in making an allocation decision are explained in more detail below.

5.1 INITIAL ASSESSMENT – IS THE INFORMATION AN 'INTERNAL DISCLOSURE'?

When an authorised officer receives a disclosure of suspected wrongdoing, they must consider the disclosed information and decide whether it meets the criteria for an internal disclosure under the PID Act, including whether they are an authorised internal recipient for that disclosure.

What constitutes an internal disclosure is set out at s 26(1) of the PID Act. An internal disclosure is made when:

- a person who is or has been a public official, or who is deemed to be a public official by an authorised officer (see 2.3.1, 2.3.2, 2.5.1.2, 4.1.1 and 4.1.2 of this guide)
- discloses to an authorised internal recipient - or to their supervisor, who refers the information to an authorised internal recipient – (see 4.1.3 of this guide and 5.1.2 below)
- information which tends to show, or the discloser believes on reasonable grounds tends to show one or more instances of disclosable conduct (see 2.5 and 2.6 of this guide and discussed below in 5.1.3).

Authorised officers should be mindful that a disclosure will not be an internal disclosure if it is made in the course of performing the discloser's ordinary functions (see 4.1.4.1 of this guide).

If the disclosure does not conform to all of these grounds, then it is not a public interest disclosure and cannot be allocated or investigated under the PID Act. While the discloser would not be entitled to immunities under the PID Act, this does not affect the applicability of the reprisal protections under the PID Act – these protections are discussed further in Chapter 8 of this guide.

If the disclosure cannot be allocated on the basis that it is not an internal disclosure, an authorised officer should still turn their mind to whether the disclosure would be appropriately investigated under another law or power.

5.1.1 Preliminary inquiries

The PID Act gives an authorised officer the power to obtain information and make inquiries for the purposes of making an allocation decision under the PID Act (s 43(10)).

Making preliminary inquiries is not the same as investigating. The authorised officer's task is to quickly assess the disclosed information to ascertain if they need to know anything more before they can make an informed decision about:

- whether the disclosure of information could be considered an internal disclosure under the PID Act
- whether the authorised officer is an authorised internal recipient for that disclosure (see 4.1.3 of this guide)
- who the disclosure should be allocated to for handling (provided that the answers to the two above preceding questions is 'yes').

Preliminary inquiries could include asking the discloser for further information that they could reasonably be expected to have knowledge of. The authorised officer should be careful to explain to the discloser why they are asking for this information and avoid creating the perception that they doubt the discloser's truthfulness. The authorised officer should also be careful that their questions to the discloser do not give the impression that the discloser is required to collect further evidence or investigate the matter themselves. The officer conducting preliminary inquiries should not seek evidence to confirm or contradict the discloser's information or to reach a conclusion about whether the alleged conduct occurred. This is the task of the relevant principal officer to whom the disclosure is allocated for handling under the PID Act, as part of investigating the disclosure. Further, an authorised officer conducting preliminary inquiries should be careful not to express any criticism of the discloser or any person alleged to have committed wrongdoing, as this can give rise to concerns of bias in a subsequent investigation.

If there is evidence of criminal conduct at that early stage, the authorised officer may consider referring that evidence to police in accordance with the agency's usual arrangements. If the conduct disclosed raises a corruption issue that concerns the conduct of a current or former staff member of the agency and that the authorised officer suspects could involve conduct that is serious or systemic, the authorised officer must refer the conduct to the NACC (or to either the NACC or the IGIS, in the case of an authorised officer in an intelligence agency) (see Chapter 10).

Authorised officers should also be mindful that if the disclosure relates to an intelligence agency or the intelligence functions of the AFP or ACIC, and the discloser claims the disclosure is 'urgent', the authorised officer must provide written notice of the disclosure to the IGIS within 1 business day (s 45A(2)) (see 9.2.1 of this guide).

5.1.2 Who is an 'authorised internal recipient'?

Section 34 of the PID Act sets out who is an authorised internal recipient of an internal disclosure.

For conduct relating to agencies other than intelligence agencies, an internal disclosure can be made to an authorised officer of:

- the agency to which the conduct relates
- the agency to which the discloser belongs, or last belonged
- the Ombudsman, if the discloser believes on reasonable grounds that it would be appropriate for the Ombudsman to investigate the disclosure

- the IGIS, if:
  - the discloser believes on reasonable grounds that the disclosure relates to the intelligence functions of the ACIC and the AFP, and it would be it would be appropriate for the IGIS to investigate the disclosure, or
- a prescribed investigative agency (other than the Ombudsman or the IGIS), if that investigative agency has the power to investigate the disclosure other than under the PID Act.

For conduct relating to an intelligence agency, an internal disclosure can be made to an authorised officer of:

- the intelligence agency
- the IGIS, if the discloser believes on reasonable grounds that it would be appropriate for the IGIS to investigate the disclosure
- a prescribed investigative agency (other than the Ombudsman or the IGIS), if:
  - none of the information is intelligence information, and
  - that investigative agency has the power to investigate the disclosure other than under the PID Act.

A supervisor or manager (s 26) in any agency can also receive disclosures from persons they manage and must provide the information to an authorised officer in their agency as soon as reasonably practicable:

- if the supervisor or manager reasonably believes that the information concerns, or could concern, one or more instances of disclosable conduct, they must give the information to an authorised officer[1] in the agency they belong to as soon as reasonably practicable after the disclosure is made (s 60A(3))
- in such circumstances, the supervisor or manager must also inform the discloser of relevant matters under the PID Act (s 60(A)(2)) (see 2.7.1.2 and 3.3.2 of this guide).

The NACC, where the disclosure relates to corrupt conduct, can receive and investigate a public interest disclosure where it is also a 'NACC disclosure' for the purposes of the PID Act – that is, the disclosure raises a corruption issue under the NACC Act (see Chapter 10 of this guide).

5.1.3 Does the information 'tend to show disclosable conduct'?

An internal disclosure under the PID Act must include information that:

- tends to show disclosable conduct (an objective test), or
- the discloser believes, on reasonable grounds, tends to show disclosable conduct (a subjective test, based on facts sufficient to induce that belief in a reasonable person).

To assist in assessing these criteria, we discuss below the meaning of the terms 'belief on reasonable grounds' and 'tends to show disclosable conduct'. We also explain that personal work-related conduct is excluded from the definition of disclosable conduct, with limited exceptions.

5.1.3.1 'Tends to show'

A mere allegation with no supporting information is not sufficient to 'tend to show' that wrongdoing has occurred or may be occurring: there must be sufficient information to support the allegation. If there is not, the discloser should be asked for additional information.

However, it is important to remember that a discloser does not need to *prove* their allegations. They need only to provide sufficient information to put the agency on notice that disclosable conduct may have occurred or be occurring.

Agencies should make clear that staff should not investigate a matter themselves before or after making a disclosure. Such actions may prejudice an investigation and may involve actions outside the staff member's authority.

[1] See 2.7.1.1 and 3.3.1 for an explanation of who is an authorised officer for an agency and how they are appointed.

5.1.3.2 'Belief on reasonable grounds'

A belief is more than a suspicion or assertion. To believe something, the person reporting the suspected wrongdoing must honestly hold the view that wrongdoing is more likely than not to have occurred. However, it is not sufficient for the discloser to personally hold the belief that wrongdoing has occurred; rather, they must have 'reasonable grounds' for their belief.

Personal prejudice or animosity towards someone would not, on its own, be 'reasonable grounds' for a belief that wrongdoing has occurred. Some tangible support for the belief would be necessary. This could be based on direct observation of wrongdoing; evidence such as documentary records or missing items of value; or corroboration by other people. It does not need to be evidence which would be admissible in a court of law (for example, hearsay could be considered).

The authorised officer will need to consider the disclosed information and decide whether it would lead a reasonable person to believe, in the circumstances, that wrongdoing is likely to have occurred. The discloser's motive for making the disclosure, or their personal opinion of the person(s) involved are unlikely to be relevant considerations.

5.1.3.3 Personal work-related conduct

If a disclosure only contains information about personal work-related conduct, it will not be a public interest disclosure that requires allocation under the PID Act (s 29) **unless** an exception in s 29(2A) applies.

Personal work-related conduct is defined in s 29A of the PID Act – it is where one official engages in conduct that relates to another public official's engagement, appointment or the exercise of their functions or powers and the conduct has personal implications for that second official. Examples listed in the PID Act include bullying and harassment, conduct relating to the terms and conditions or engagement, disciplinary action, and a number of other types of conduct. It is important to note these are illustrative examples and not an exhaustive list of what may constitute personal work-related conduct.

In assessing whether a disclosure solely about personal work-related conduct should be allocated as an internal disclosure under the PID Act, an authorised officer must consider whether the personal work-related conduct tends to show one or more of the exceptions in s 29(2A). The exception in s 29(2A) means that a disclosure of information about personal work-related conduct **will** be about disclosable conduct if the information tends to show conduct that:

- is reprisal action (s 29(2A)(a))
- is of such a significant nature that it would undermine public confidence in an agency (s 29(2A)(b)), or
- has other significant implications for an agency (s 29(2A)(c)).

If the information that has been disclosed tends to show one of these matters, it will be disclosable conduct for the purposes of making an allocation decision. If the disclosure satisfies all requirements for a public interest disclosure (s 26), the authorised officer must allocate it as a public interest disclosure *unless* the conduct disclosed would be better investigated under another law or power (s 43(4)(b)).

The question of whether the disclosure tends to show conduct that is of 'such a significant nature' that it would undermine public confidence in an agency, or have 'other significant implications' for an agency, will depend on the facts of each case.

Authorised officers should have regard to the PID Act's role as an integrity framework for the public service. Public officials occupy a position of trust, and it is essential that they provide the public with confidence in relation to their conduct. Where a public official engages in wrongdoing, their conduct can potentially have broader implications for the confidence the community has in an agency, or in Commonwealth agencies more broadly. Examples of personal work-related conduct that is of such a significant nature that it would undermine public confidence in an agency could include:

- systemic conduct across the agency or across a significant part or function of an agency, such as systemic, discriminatory employment practices or nepotism
- conduct that relates to the management or control of the agency, or involves serious criminal conduct, where even a single instance, or a small number of instances of the conduct may undermine public confidence in the agency, or

- conduct that calls into question the impartiality or independence (where this is relevant to its status) of the agency.

Examples of personal work-related conduct that may have other significant implications for an agency may include, for example:

- conduct that calls into question the eligibility of an officeholder to hold that office, or
- conduct that relates to, and has the potential to substantially adversely affect, the performance of a core function of the agency.

If the authorised officer is satisfied on reasonable grounds that all the conduct disclosed is personal work-related conduct, and none of it falls with one of the exceptions in s 29(2A), then the disclosure does not contain any disclosable conduct. In the absence of any other information that tends to show disclosable conduct, the authorised officer would have no reasonable basis to on which to consider the disclosure is a public interest disclosure under the PID Act and must decide not to allocate it (s 43(4)(a)).

As a decision under s 43(4)(a) means that there was no public interest disclosure under the PID Act and therefore the immunities under s 10 of the PID Act do not apply, it is important that agencies are clear about the basis for their decision not to allocate when providing notification to the discloser (see 5.2 below for information on notification requirements).

Disclosures that contain both disclosable conduct and personal work-related conduct that meet the requirements in s 26 of the PID Act for allocation should be allocated as a public interest disclosure under the PID Act *unless* the conduct disclosed would be more appropriately investigated under another law or power.

In assessing whether information disclosed, including personal work-related conduct, tends to show disclosable conduct, the authorised officer should err on the side of caution and, if in doubt, refer the information to a principal officer for investigation.

5.2 BEFORE MAKING AN ALLOCATION DECISION

Before making an allocation decision, the authorised officer must consider whether they have satisfied their obligation under s 60(1) of the PID Act. Section 60(1) applies if the authorised officer has reasonable grounds to believe that a disclosure contains, or could contain, disclosable conduct and that the discloser is unaware of the requirements of the PID Act. The authorised officer must explain to the discloser:

- that the disclosure may be treated as an internal disclosure under the PID Act
- what the PID Act requires for a disclosure to be an internal disclosure
- the circumstances in which a disclosure must be referred to an agency, or other person or body, under another law of the Commonwealth, and
- any orders or directions that the authorised officer is aware of that are designated publication restrictions that may affect the disclosure of the information (see authorised officer responsibilities in 3.3.1 of this guide).

If a disclosure was initially made to a supervisor, before being provided to the authorised officer, the discloser should have been provided with much of this information (see manager and supervisor responsibilities in 3.3.2 of this guide). However, this knowledge should not be assumed, and the authorised officer should check with the supervisor what information the discloser has been given about the requirements and operation of the PID Act.

5.3 DECISIONS NOT TO ALLOCATE A DISCLOSURE UNDER THE PID ACT

Once the authorised officer has considered whether the disclosed information meets the criteria for an internal disclosure under s 26 of the PID Act, they must decide whether or not to allocate it to an agency. There are only two circumstances where an authorised officer can decide not to allocate a disclosure to any agency:

- where there is no reasonable basis on which the disclosure could be considered a public interest disclosure (s 43(4)(a) – see 5.3.1 below) or
- where the conduct disclosed would be more appropriately investigated under another law or power (s 43(4)(b) – see 5.3.2 below).

In either case, the authorised officer must be satisfied on reasonable grounds of the circumstances. The authorised officer is required to notify the discloser and the Ombudsman or the IGIS (as appropriate) of a decision not to allocate the disclosure under the PID Act (s 44A – see 5.3.3 below).

The authorised officer is also required to notify the Ombudsman or the IGIS (as appropriate) if a stop action direction issued by the NACC prevents the authorised officer from making a decision about allocating the disclosure (s 44B – see 5.3.4 below).

5.3.1 No reasonable basis on which the disclosure of information could be considered a public interest disclosure

If the authorised officer is not satisfied that that there is a reasonable basis for considering the information to be an internal public interest disclosure, they are not required to allocate it to an agency for handling under the PID Act (s 43(3) – see 5.1 above). Some examples of matters which an authorised officer would not be satisfied are internal disclosures are:

- a disclosure about the conduct of an employee of a state government agency
- a disclosure that amounts only to an individual's disagreement with government policy
- a disclosure that amounts only to an assertion that all officials within a particular team or branch are corrupt
- a disclosure that is comprised only of personal work-related conduct, and that does not tend to show the conduct was reprisal action or meets one of the other criteria in s 29(2A) (see 5.1.3.3 above)
- a disclosure about a grant recipient.

The PID Standard requires the authorised officer to make a record of the decision not to allocate the disclosure to any agency, including the reasons for the decision. While not required to do so, if the conduct disclosed would be more appropriately investigated under another law or power, as a matter of best practice the authorised officer should also take reasonable steps to refer the conduct or facilitate its referral (what constitutes reasonable steps is described further in 5.3.3.1 below).

In assessing whether information disclosed tends to show disclosable conduct, the authorised officer should, if in doubt, err on the side of caution and refer the information to a principal officer for investigation, including where the information disclosed may contain both disclosable conduct and other conduct, such as personal work-related conduct, or where the information disclosed relates to personal work-related conduct that may fall within the exceptions provided in s 29(2A).

5.3.2 Conduct disclosed would be more appropriately investigated under another law or power

An authorised officer may decide not to allocate an internal disclosure if they are satisfied on reasonable grounds that the conduct disclosed would be more appropriately investigated under another law or power of the Commonwealth (s 43(4)(b)).

However, an authorised officer cannot decide not to allocate on this basis ***only*** because the conduct disclosed raises a corruption issue that must be referred to the NACC (s 43(4A)). As the NACC is not ***required*** to investigate any of the referrals it receives, the authorised officer cannot be certain that a referral will result in investigation of the disclosure. A disclosure that raises a corruption issue must be referred to the NACC but should continue to be handled in accordance with the PID Act unless the NACC Commissioner issues a stop action direction in relation to the disclosure (see 5.3.4 below).

The option to refer a disclosure for investigation under another law or power provides agencies with the flexibility to respond to disclosures in the way that best addresses the concerns raised. A similar discretion is also available to the principal officer and their delegates after a disclosure has been allocated for investigation (see Chapter 6 of this guide). It is important that authorised officers only refer disclosed conduct where investigation under the other law or power would be ***more*** appropriate than investigation under the PID Act. This might, for example, be because powers available under the other law would be better suited to conducting an effective investigation of the disclosure, or the powers available under the other law include the ability to directly impose disciplinary action if the alleged wrongdoing is substantiated.

The PID Standard requires the authorised officer to make a record of the decision not to allocate the disclosure to any agency including the reasons for the decision. This would include the reason that the authorised officer considers the other law or power is more appropriate.

5.3.2.1 Taking 'reasonable steps' to refer the conduct disclosed

If the authorised officer decides not to allocate the conduct disclosed because it would be more appropriately investigated under another law or power, the authorised officer must, as soon as reasonably practicable, take reasonable steps to refer the conduct disclosed, or otherwise facilitate its referral, for investigation under the other law or power (s 44A(2)). Reasonable steps may include:

- arranging the transfer of documents to the relevant agency
- providing the discloser with the contact details for making a complaint under the more appropriate relevant law or power, and
- providing the discloser with any forms or background information necessary to make the complaint under that other law or power.

What constitutes reasonable steps to facilitate a referral will depend on the individual circumstances. There may be circumstances where a complaint under another law or power must be made by the discloser and therefore cannot be directly referred for investigation by the authorised officer.

5.3.3 Notice requirements for a decision not to allocate

If the authorised officer decides not to allocate a disclosure, the authorised officer must give written notice to both the discloser and either the Ombudsman or the IGIS, as appropriate. The authorised officer must provide this notice as soon as reasonably practicable after making the decision not to allocate.

5.3.3.1 Giving notice to the discloser

If it is reasonably practical to contact the discloser, the authorised officer must notify them in writing of:

- the decision not to allocate the disclosure, including whether the decision was made because:
  - there was no reasonable basis on which the disclosure could be considered a public interest disclosure (s 43(4)(a)) or
  - the disclosure could be considered a public interest disclosure but would be more appropriately investigated under another law or power (s 43(4)(b))
- the reasons for the decision
- if the authorised officer has taken, or proposes to take, action to refer the conduct or facilitate its referral for investigation under another law or power – the details of any such action, including:
  - the other law or power
  - the agency, person or body to which the conduct has been, or will be, referred to
  - the steps taken, or proposed to be taken, for the conduct to be referred or to facilitate its referral (s 44A(4))
- if the authorised officer doesn't propose to take action to refer the conduct – any courses of action that might be available to the discloser under another law or power (s 44A(3)(a)).

It is important to give the discloser as full an explanation as possible – for example, they may have a genuine belief that the conduct they reported was improper but not have been aware of surrounding circumstances which justify the conduct. Failing to give a proper explanation increases the likelihood that the person will lose trust in the agency's public interest disclosure process and may lead them to complain unnecessarily to the Ombudsman or IGIS.

Agencies should ensure they advise disclosers of additional important information to ensure that the discloser understands how the PID Act will apply to their disclosure following the authorised officer's decision not to allocate:

- where a disclosure is not allocated under s 43(3), the discloser will not have grounds to make an external disclosure under the PID Act.
- where an authorised officer decides not to allocate a disclosure because there is no reasonable basis on which the disclosure could be considered a public interest disclosure, the discloser will not receive immunities under the PID Act as these only apply where a person makes a public interest disclosure.

A decision about allocation under s 43(3) does not affect the applicability of the reprisal protections under the PID Act – these protections are discussed further in Chapter 8 of this guide.

If it is not reasonably practicable to contact the discloser, the authorised officer is not required to notify the discloser of their decision not to allocate the matter. However, the PID Standard requires the authorised officer to make a record of their decision and the reasons for it, and explain why contacting the discloser was not practicable. This record may be important if the Ombudsman or the IGIS needs to investigate the matter at a later date – for example, as a result of a complaint.

5.3.3.2 Giving notice to the Ombudsman or the IGIS

The authorised officer must also give written notice to the Ombudsman or the IGIS (as relevant) of the following details relating to a decision not to allocate a disclosure (s 44A(3)):

- the decision not to allocate
- the reasons for the decision
- whether the authorised officer has taken, or proposes to take, action to refer the conduct or facilitate its referral for investigation under another law or power, and
- details of any such action, including:
  - the other law or power, and
  - the agency, person or body to which the conduct has been, or will be, referred to, and
  - the steps taken, or proposed to be taken, for the conduct to be referred or to facilitate its referral (s 44A(4)).

5.3.4 Notice of a NACC stop action direction that prevents allocation

The NACC Commissioner may direct an agency head (principal officer) to stop taking specified action (a stop action direction) in relation to a public interest disclosure which involves a corruption issue unless the action is permitted by the Commissioner (s 43 of the NACC Act – see Chapter 10 of this guide). A direction could require the agency not to take particular actions set out in the direction, or not to take action of any kind in relation to a corruption issue.

5.3.4.1 Notifying the discloser

A stop action direction may include or extend to preventing an authorised officer from allocating a disclosure under the PID Act or notifying a discloser about a stop action direction which prevents the allocation of their disclosure under the PID Act.

To help maintain trust in the agency's public disclosure processes, a discloser should be kept apprised of the progress of their disclosure throughout the processes under the PID Act. If a stop action prevents allocation of a disclosure, there is no legislative requirement to notify the discloser. However, the authorised officer should consider whether it is reasonably practicable and appropriate to provide such notice, including whether:

- the stop action direction prevents the authorised officer providing such notice, and
- the discloser is contactable.

Subject to these considerations, it is best practice for an authorised officer to, as soon as reasonably practicable, notify the discloser in writing that they cannot allocate, or reallocate, the disclosure because of a stop action direction under the NACC Act. Subsequently, if that direction is revoked by the Commissioner, the authorised officer must, as soon as reasonably practicable, inform the discloser if they allocate, or reallocate, the disclosure.

If an authorised officer is uncertain whether a stop action direction would prevent notice being given to the discloser, the authorised officer should seek clarification from the principal officer of their agency, who, in turn, should clarify the remit of the direction with the NACC Commissioner.

If a stop action direction specifically prevents them notifying a discloser about the stop action direction, the principal officer may consider whether:

- permission should be sought from the Commissioner under s 43(3) of the NACC Act to provide notice of the direction to the discloser, and
- the provision of notice would meet any of the relevant exceptions under s 44(1) of the NACC Act (see Chapter 10).

In deciding whether to notify a discloser about a stop action direction under the NACC Act, including whether to seek permission from the Commissioner to do so, a principal officer should consider the impact that notifying a discloser about a stop action direction may have on any investigation conducted by the NACC as well as the effect that a lack of notice would have on the discloser.

5.3.4.2 Notifying the Ombudsman or the IGIS

Where a stop action direction prevents allocation of a disclosure, the authorised officer must also give written notice to the Ombudsman or the IGIS (as appropriate) of the following, (s 44B):

- the information that was disclosed
- the conduct disclosed
- the discloser's name and contact details, if they are known, and the discloser consents to that information being provided to the Ombudsman or the IGIS (as appropriate)
- the stop action direction under the NACC Act that prevents allocation of some or all of the disclosure.

5.4 DECISIONS TO ALLOCATE UNDER THE PID ACT

Once the authorised officer is satisfied that the disclosed information is an internal disclosure and it is appropriate to investigate it under the PID Act, they must allocate it for handling under the PID Act (s 43(3)).

5.4.1 Which agency should a disclosure be allocated to?

The authorised officer may allocate the handling of the disclosure to one or more agencies, including their own agency, an agency in the same portfolio as their agency, the Ombudsman, the IGIS or a prescribed investigative agency (s 43(3)(a)).[2]

In most cases, a disclosure should be allocated to the agency to which the conduct disclosed relates. The principal officer for each agency is required to establish procedures for dealing with disclosures relating to that agency (see 3.2.2 of this guide).

The agency the conduct disclosed relates to will generally be apparent from the information the discloser provides. If it is not apparent, the authorised officer might wish to make preliminary inquiries to determine the most appropriate agency for allocation, including by discussing the issue further with the discloser or with an agency.

In making an allocation decision, the authorised officer must have regard to the principles in s 43(5) that an agency should not handle the disclosure unless one or more of the following circumstances apply:

[2] There are currently no prescribed investigative agencies under the PID Act.

- some or all of the disclosable conduct relates to that agency
- if the agency is the Ombudsman, some or all of the conduct relates to an agency other than an intelligence agency, the intelligence functions of an agency prescribed by the PID Act (ACIC and AFP), or the IGIS
- if the agency is the IGIS, some or all of the conduct relates to an intelligence agency or the intelligence functions of an agency prescribed by the PID Act (ACIC and AFP)
- if the agency is a prescribed investigative agency (other than the Ombudsman or the IGIS), that agency has the power to investigate the disclosure other than under the PID Act.

The authorised officer must also have regard to any other matters they consider relevant, including:

- whether another agency in the same portfolio as the recipient agency would be better able to handle the disclosure, which would permit the authorised officer to allocate the disclosure to that agency under s 43(8)
- any recommendations from the Ombudsman or the IGIS under s 55 about the allocation of the disclosure.

If the authorised officer of an agency, other than an investigative agency, wishes to allocate the disclosure to an agency other than their own, this may only be done with the consent of that other agency (see 5.4.3 below).

An authorised officer cannot allocate a disclosure to the IGIS if the disclosure relates to action taken by an examiner of the ACIC performing functions and exercising powers as an examiner (s 43(7)).

5.4.2 Allocation to more than one agency

While a disclosure can be allocated to more than one agency under s 43(3)(a), the authorised officer should be careful that this does not create a situation where parallel investigations are conducted into the same matter. Allocation to more than one agency is unlikely to be appropriate except if a disclosure includes distinct issues that are best investigated by separate agencies. In circumstances where more than one agency is allocated a disclosure, it is likely to be appropriate to inform each agency of the other's involvement.

5.4.3 Who needs to consent to the allocation?

If an authorised officer wishes to allocate a disclosure to another agency, they must first obtain the consent of an authorised officer of that other agency (s 43(9)). It is normally be expected that if the matter relates to their agency's activities, the authorised officer will consent. If they do not consent, the authorised officer making the allocation decision will need to determine whether there is another appropriate agency or whether their own agency should investigate the matter.

The authorised officer making the allocation decision may find it appropriate to contact the other agency early in the decision-making process, particularly if they would like some preliminary information to assist them in determining if the matter should be allocated to that other agency.

Agencies that have many authorised officers should consider nominating one officer to coordinate and consent to allocations from other agencies, so as to streamline their processes.

Authorised officers who belong to the Ombudsman or the IGIS are not required to obtain consent before allocating a disclosure to an agency. However, an authorised officer belonging to the Ombudsman or the IGIS must *consult* with an authorised officer of the other agency before allocating the disclosure to the other agency for handling.

5.4.4 Can a disclosure be reallocated?

An authorised officer may, after allocating a disclosure to one or more agencies, decide later to reallocate part or all of the disclosure to another agency (s 45(1)). This may happen if the true nature or extent of a problem only becomes apparent during an investigation (for example, if the investigation reveals that staff in another agency appear to have been involved in wrongdoing). An authorised officer may also reallocate a disclosure following a recommendation from the Ombudsman or the IGIS under s 55 of the PID Act (see Chapter 9 of this guide).

5.4.5 Notice requirements for a decision to allocate a disclosure

Once the authorised officer decides to allocate a disclosure to an agency, they must provide written notice to the principal officer of the agency to which the disclosure is allocated, the Ombudsman or the IGIS (as appropriate), and the discloser (if reasonably practicable).

5.4.5.1 Giving notice to the principal officer

When the authorised officer decides to allocate a disclosure to an agency, they must inform the principal officer of that agency (s 44(3)). The authorised officer must provide written notice of the following matters:

- that the disclosure has been allocated to their agency
- the information that was disclosed
- the conduct disclosed, and
- the discloser's name and contact details, if known to the authorised officer and the discloser consents to their details being provided.

The authorised officer should ensure that they ask the discloser for their consent to pass their contact details to the relevant agencies, including the receiving agency.

If the discloser declines, the authorised officer should advise the receiving agency that the discloser was asked and did not consent. If the discloser does not consent to their identity being revealed, they could be asked if they would like to provide an anonymous means of contact (such as an email address that does not include their name), so they can be notified of the progress of the matter as required by the PID Act. While a discloser's name and contact details cannot be provided where the discloser does not consent, an authorised officer should explain to the discloser that other information provided to the principal officer, or relevant oversight agency, for the purposes of the PID Act may enable the discloser to be identified (s 20(3)(a)) (see 5.6.1 below).

The authorised officer can and should provide other relevant materials to the principal officer to facilitate investigation. In considering whether redactions are necessary to supporting documentation provided by a discloser, the authorised officer should consider whether these would diminish the utility of the information.

If the authorised officer allocates the disclosure to more than one agency, they must provide this information to the principal officer of each agency.

5.4.5.2 Giving notice to the Ombudsman or the IGIS

When an authorised officer allocates a disclosure to any agency for handling under the PID Act, they must also inform the Ombudsman, unless the disclosure is allocated to:

- the Ombudsman
- the IGIS
- an intelligence agency, or the ACIC or the AFP in relation to that agency's intelligence functions.

If the disclosure is allocated to an intelligence agency, or to the ACIC or the AFP in relation to that agency's intelligence functions, the authorised officer must inform the IGIS instead. The authorised officer must provide written notice of the same matters they are obliged to inform the principal officer of the receiving agency (s 44(2)). The discloser's name and contact details should not be provided to the oversight agency unless the discloser expressly consents. If they do not consent, the discloser can consider whether they wish to provide a pseudonym email address to the oversight body to use as a means of contact, if needed.

Authorised officers in agencies required to report to the Ombudsman should use the form published on the Ombudsman's website to provide notice of an allocation decision.[3] The IGIS's website www.igis.gov.au also has information to assist agencies who are required to notify it of an allocation decision.

[3] Forms to notify the Ombudsman are available on the Ombudsman's website at https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing.

5.4.5.3 Giving notice to the discloser

The authorised officer must, as soon as practicable, provide the discloser with a copy of the written notice provided under s 44(2) to the principal officer of the agency that has been allocated their disclosure for handling under the PID Act (s 44(4)). The authorised officer should make a written record of their decision to allocate the disclosure and when and how they notified the discloser (see 5.5 below). If the authorised officer has decided to allocate the disclosure to their own agency for handling, they should also inform the discloser about the principal officer's powers to decide not to investigate the disclosure, or stop investigating it (see 6.1.1 of this guide, and s 9, PID Standard).

The discloser may be notified of the allocation and investigation decisions in a single document (s 50(4)). However, this should only be done if the two decisions are close in time. The notice requirements for a decision not to investigate a disclosure are explained in 6.5 of this guide, and the notice requirements when the disclosure is to be investigated are explained in 7.1.1 of this guide.

If it is not reasonably practicable to contact the discloser, the authorised officer is not required to notify the discloser of their allocation decision (s 44(4)). However, the authorised officer must still make a record of their decision and the reasons for it, including details of the time, date and method of any attempts to contact the person (see 5.5 below).

5.5 RECORDS OF ALLOCATION DECISIONS

The authorised officer should make a written record of their allocation decision (including a decision not to allocate a disclosure), the reasons for the decision and – if allocated to another agency for handling – the receiving agency's consent to the allocation. Section 6(1) of the PID Standard provides that this requirement must be included in each agency's PID procedures.

The authorised officer should also make a written record of whether the discloser was able to be notified of the allocation decision and the details of how that happened. Section 6(2) of the PID Standard provides that each agency's PID procedures must require appropriate records of the date, time and means of notification, and the content of the notification to the discloser.

The authorised officer should also make a written record of their risk assessment and any action taken to protect or support the discloser (see Chapter 5.6 of this guide).

5.6 CONDUCTING AN INITIAL RISK ASSESSMENT

Agency procedures must include arrangements for assessing the risk that reprisals may be taken against a person who makes a public interest disclosure (s 59(4)(a)). This involves assessing the specific behaviour and circumstances that may result in reprisals, then putting in place appropriate strategies to prevent or contain them.

Importantly, the protections against reprisal action – including the positive duties of the principal officer and authorised officer – may still apply even where the disclosure does not constitute a valid public interest disclosure for the purposes of the PID Act. The protections are designed to ensure that disclosers are protected against reprisal action taken on the basis that a person has or may have made, proposes to make, or could make a public interest disclosure – even if their disclosure does not ultimately meet the criteria in the PID Act. Detailed information about risk assessments is included in this guide from 8.5 onwards.

5.6.1 Protection of the discloser's identity

One aspect of the risk assessment is assessing the likelihood of the discloser's identity becoming known. In circumstances where a discloser has not chosen to remain anonymous (see Chapter 4), they may still be anxious about the prospect of their identity being revealed. The authorised officer should assure the discloser that their identity will be protected as much as possible at all times and advise them of the procedures in place to ensure confidentiality of the investigation process.

This is particularly important in the context of the obligation on principal officers to take reasonable steps to encourage and support:

- public officials who make, or are considering making, a public interest disclosure to the agency (s 59(2)(a)), and
- persons who provide, or are considering providing, assistance in relation to a public interest disclosure (s 59(2)(b)).

Principal officers and authorised officers also have a positive obligation to protect public officials who belong to their agency from reprisals (ss 59(9) and 60(2) – see 3.2 of this guide). The PID Act also makes it an offence for anyone to take or threaten reprisal against a discloser and provides access to a court for remedies. Chapter 8 of this guide contains further information about the legal protections in the PID Act for disclosers and others, including the specific legal protections for the discloser's identity.

However, it is important that authorised officers give a discloser honest and realistic expectations about the agency's capacity to prevent their identity becoming known as the source of the disclosed information. The discloser must be made aware that, during the course of an investigation, their identity may become apparent. For example, if the discloser is one of a very small number of people who have access to the relevant information, or if the information they have disclosed was something they were told privately and in confidence, others may guess they were the source of the information.