



AGENCY GUIDE TO THE PUBLIC INTEREST DISCLOSURE ACT 2013

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Version 1

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Foreword

The *Public Interest Disclosure Act 2013* (PID Act) which commences on 15 January 2014 promotes the integrity and accountability of the Commonwealth public sector by creating a framework for facilitating the reporting of suspected wrongdoing and ensuring timely and effective investigation of reports.

At its heart, a public interest disclosure scheme is about removing barriers that prevent people who work in the public sector from speaking up about serious problems that impact on public administration. All staff across the public sector have a part to play in ensuring that problems are identified early, appropriate action is taken and those who report wrongdoing are protected from reprisal.

The PID Act supplements existing avenues for complaints and investigations and recognises the role of specialist investigative agencies. Disclosures can be made or allocated (with consent) to the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security and prescribed investigative agencies as appropriate. This flexible approach allows existing investigative processes and the expertise that goes with them to be utilised, while providing the necessary protection to disclosers.

This guide is intended to be a practical resource for agencies in explaining how the PID Act works, setting out their statutory obligations and suggesting best practice in handling public interest disclosures. This office has prepared a separate guide to assist people who are thinking of making a public interest disclosure.

Your feedback to us to help ensure better practice in dealing with public interest disclosures is welcomed.



Colin Neave
Commonwealth Ombudsman

1 INTRODUCTION

Outline
PID rules
PID standards

OUTLINE

This guide has been developed to assist Commonwealth agencies fulfil their obligations under the *Public Interest Disclosure Act 2013* (PID Act), PID rules and PID standards made by the Commonwealth Ombudsman (the Ombudsman).

The guide has seven chapters:

- 1 *Introduction* – explains the guide’s structure and explains PID rules and PID standards.
 - 2 *How the PID scheme works* – outlines the scope and elements of the public interest disclosure scheme
 - 3 *Agency commitment* – sets out the need for strong agency commitment to encourage reporting of wrongdoing and take appropriate action, and identifies the responsibilities of key agency staff
 - 4 *Facilitating reporting* – sets out how disclosures should be encouraged and received.
 - 5 *Assessing and investigating* – discusses how disclosures are allocated for investigation, key considerations in deciding to investigate, the conduct of investigations including procedural fairness, reports of investigation and notification requirements.
 - 6 *Support and protection* – discusses how disclosers are protected under the PID Act and avenues for assistance.
 - 7 *The role of key agencies* – sets out the role of the Ombudsman, the Inspector-General of Intelligence and Security (IGIS) and prescribed investigative agencies.
- Appendix 1 – Other matters* – provides further information details.

This guide refers where relevant to provisions of the PID Act, PID rules and PID standards made by the Ombudsman under s 74 of the PID Act. Individuals and agencies must comply with those provisions, rules and standards.

The guide also includes suggestions for agencies to follow when applying the law: these are recommended as good practice but are not a legal requirement. Agencies may wish to adapt those suggestions to suit their own purposes, depending on their size, functions and contact with external entities. Investigative agencies prescribed under the PID rules may follow their own procedures when investigating public interest disclosures.

If anything in this guide is inconsistent with requirements in the PID Act, PID rules or the PID standards as made and amended from time to time, the PID Act, rules or standards are to be followed. Unless otherwise indicated, references to provisions are references to sections of the PID Act.

PID RULES

The minister may make rules prescribing matters giving effect to the PID Act (s 83). These rules are legislative instruments registered under the *Legislative Instruments Act 2003*.

The rules may include prescribing investigative agencies (s 34). Those investigative agencies are able to receive public interest disclosures that they would have the power to investigate apart from the PID Act, and they can use their own investigative powers to do so (s 49).

PID STANDARDS

Under s 74 of the PID Act, the Ombudsman may make standards in relation to:

- » procedures for dealing with internal disclosures
- » the conduct of investigations under the PID Act
- » the preparation of reports of investigations
- » the giving of information and assistance to the Ombudsman and the IGIS and the keeping of records for the purposes of reporting information to the Ombudsman.

The PID standards are legislative instruments registered under the *Legislative Instruments Act 2003*. Individuals and agencies are obliged to comply with the PID standards.

2 HOW THE PUBLIC INTEREST DISCLOSURE SCHEME WORKS

The purpose of the PID Act

What is a public interest disclosure?

Who can make a public interest disclosure?

What can be disclosed?

What is not disclosable conduct?

Who can a public interest disclosure be made to?

What happens if information is disclosed outside these circumstances?

When is it in the public interest for a disclosure to be made?

THE PURPOSE OF THE PID ACT

The purpose of the PID Act is to promote the integrity and accountability of the Commonwealth public sector by:

- » encouraging and facilitating the making of disclosures of wrongdoing by public officials
- » ensuring that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure
- » ensuring that disclosures are properly investigated and dealt with (ss 6, 7).

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 for disclosers and reporting obligations for agencies.

WHAT IS A PUBLIC INTEREST DISCLOSURE?

A public interest disclosure may be an internal disclosure, an external disclosure or an emergency disclosure, as set out in s 26(1).

An internal disclosure is made when:

- » a person who is or has been a public official
- » discloses to their supervisor or manager, or an authorised officer of an agency
- » information which tends to show, or the discloser believes on reasonable grounds tends to show, one or more instances of disclosable conduct.

In limited circumstances a public official may disclose such information to a person outside government – this is known as an external disclosure or emergency disclosure.

The elements of making a disclosure under the PID Act are summarised in the following diagram, with more detail on the following pages.

What is a public interest disclosure?

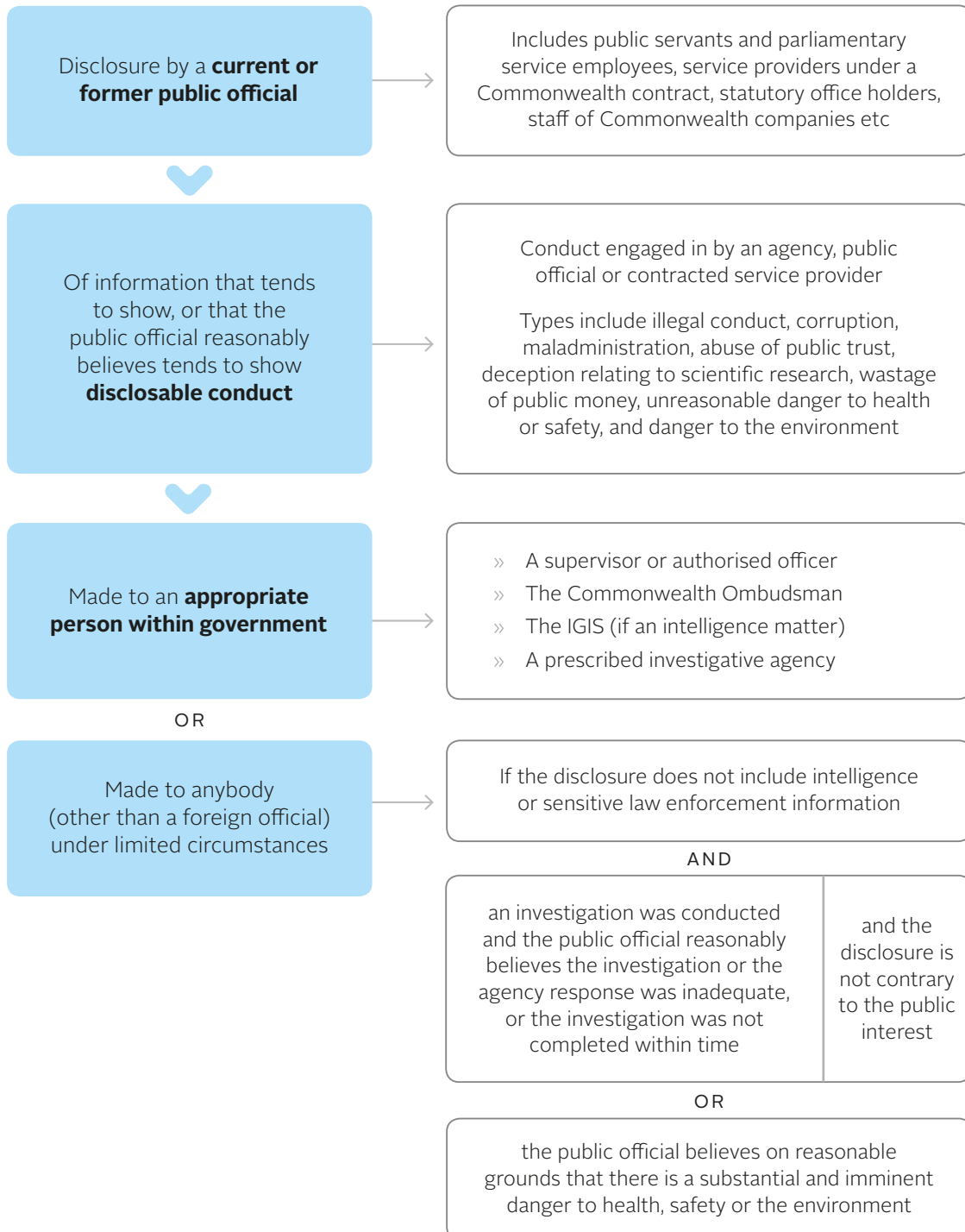


Figure 1 – What is a public interest disclosure?

WHO CAN MAKE A PUBLIC INTEREST DISCLOSURE?

A person must be a current or former 'public official', as defined in s 69 of the PID Act, to make a public interest disclosure. This is a broad term which includes a Commonwealth public servant, member of the Defence Force, appointee of the Australian Federal Police, Parliamentary Service employee, director or staff member of a Commonwealth company, statutory office holder or other person who exercises powers under a Commonwealth law. Individuals and organisations that provide goods or services under a Commonwealth contract (defined in s 30(3)) and their officers or employees are also included. This includes subcontractors who are responsible for providing goods or services for the purposes of the Commonwealth contract (s 30(2)).

An authorised officer is also able to deem an individual to be a public official if they reasonably believe the individual has information about wrongdoing and proposes to make a disclosure (s 70). Examples where an authorised officer might consider this appropriate include where a former volunteer with an agency, someone who has received funding from the Australian Government or a member of an advisory committee has 'inside information' about the agency's wrongdoing.

WHAT CAN BE DISCLOSED?

A public official can disclose information that they believe, on reasonable grounds, tends to show 'disclosable conduct'. Disclosable conduct is conduct by:

- » an agency (a term explained in more detail below)
- » a public official in connection with their position
- » a contracted Commonwealth service provider in connection with entering into or giving effect to the contract

if that conduct:

- » contravenes a Commonwealth, state or territory law
- » in a foreign country, contravenes a foreign law that applies to the agency, official or service provider
- » perverts the course of justice
- » is corrupt
- » constitutes maladministration, including conduct that is based on improper motives or is unreasonable, unjust, oppressive or negligent
- » is an abuse of public trust
- » involves fabrication, falsification, plagiarism or deception relating to scientific research, or other misconduct in relation to scientific research, analysis or advice
- » results in wastage of public money or public property
- » unreasonably endangers health and safety
- » endangers the environment
- » is prescribed by the PID rules (s 29(1)).

Without limiting any of those grounds, disclosable conduct also includes conduct by a public official that involves or is engaged in for the purposes of abusing their position as a public official, and conduct that could give reasonable grounds for disciplinary action against the public official (s 29(2)). It does not matter if the conduct occurred before or after 15 January 2014, or if the public official or contracted service provider alleged to have committed the wrongdoing has since ceased to be a public official or contracted service provider, as the case may be (s 29(3)).

An agency is broadly defined (s 71). It means:

- » a department
- » an executive agency under the *Public Service Act 1999* (Public Service Act) – that is, an agency established by the Governor-General rather than by legislation
- » a statutory agency under the Public Service Act
- » a Commonwealth authority (within the meaning of the *Commonwealth Authorities and Companies Act 1997*) or a Commonwealth company
- » the Australian Federal Police
- » the intelligence agencies: the Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Office of National Assessments, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation and Australian Signals Directorate
- » the Australian Prudential Regulation Authority
- » the High Court, Federal Court and any other court created by parliament
- » the Office of Official Secretary to the Governor-General
- » the Commonwealth Ombudsman
- » the IGIS
- » a prescribed entity established by a Commonwealth law
- » a prescribed person holding an office established by a Commonwealth law.

The PID Act extends to Australia's external territories (s 4) and to matters outside Australia that involve disclosable conduct by agencies (s 5).

WHAT IS NOT DISCLOSABLE CONDUCT?

It is not disclosable conduct just because a person disagrees with:

- » a government policy or proposed policy
- » action or proposed action by a minister, the Speaker of the House of Representatives or the President of the Senate
- » expenditure or proposed expenditure related to such policy or action (s 31).

Disclosable conduct also does not include judicial conduct, that is, the conduct of judicial officers, the judicial functions of court staff, tribunal staff or tribunal members, or any other conduct related to a court or tribunal unless it is of an administrative nature and does not relate to matters before the court or tribunal (s 32).

The conduct of members of parliament is not covered by the PID Act. However, the departments of the parliament and their employees are covered.

Disclosable conduct also does not include the proper performance of the functions and proper exercise of the powers of an intelligence agency or its officials (s 33).

Disclosable conduct by a public official must be conduct in connection with their position as a public official – in other words, conduct that is wholly private and has no bearing on their position as a public official is not disclosable conduct.

A disclosure made before the commencement of the PID Act on 15 January 2014 is not covered by the Act. However, a disclosure made after that date can relate to conduct that occurred at any time before then. In other words, it is the date the disclosure is made, not the date of the conduct, that determines whether the PID Act applies.

A report of wrongdoing in an Australian Public Service agency before 15 January 2014 may be covered by the whistleblower provisions of the Public Service Act. See www.apsc.gov.au (see Circular 2013/08 *APS whistleblowing scheme and public interest disclosures*).

WHO CAN A PUBLIC INTEREST DISCLOSURE BE MADE TO?

A disclosure must be made to an appropriate person in order to gain the protections available under the PID Act (s 26). The PID Act focuses on the reporting and investigating of wrongdoing within government, but allows for reporting outside government in specified circumstances.

Agencies – an internal disclosure

Public officials can report suspected wrongdoing either to their current supervisor (defined in s 8 to mean someone who supervises or manages them) in an agency, or to an authorised officer of their agency or the agency to which they previously belonged. Authorised officers are the principal officer (i.e. the agency head) and officers that the principal officer appoints under the PID Act (s 36).

Each agency must have procedures for dealing with public interest disclosures (s 59), and should set out in its procedures how a disclosure should be made. It is anticipated that the majority of public interest disclosures made will be internal disclosures.

Making a disclosure internally gives the agency the chance to investigate the matter and remove any danger or correct any wrong practices as quickly as possible.

If a person has information about suspected wrongdoing in an agency other than the one in which they work, they can also make a disclosure directly to an authorised officer in that agency. If the agency has ceased to exist since the suspected wrongdoing took place, the appropriate agency is generally the agency that has taken over its functions (s 35(3)).

A public official can also make a disclosure to authorised officers of the Commonwealth Ombudsman, if they believe on reasonable grounds that it would be appropriate for the Ombudsman to investigate (ss 26(1), 34).

If the matter involves an intelligence agency or intelligence-related information, there are two options: a public official can make a disclosure to the intelligence agency, or to an authorised officer of the IGIS if they believe on reasonable grounds that it would be appropriate for the IGIS to investigate (see www.igis.gov.au).

The PID Act also allows for agencies with special investigative powers to be prescribed under PID rules. If the matter concerns their functions and powers, a disclosure may be made to those special investigative agencies.

The PID Act extends to individuals and entities that provide goods or services under a contract with the Commonwealth, concerning wrongdoing related to entering into or giving effect to the contract. Concerns about their wrongdoing should be reported to the agency that is the principal beneficiary of the contract.

A public official can also make a complaint to the Ombudsman (or the IGIS, for matters relating to intelligence agencies) if they believe the agency that received their internal disclosure did not appropriately deal with it (ss 5 and 5A *Ombudsman Act 1976*).

Other people – external and emergency disclosures

A public official can make a public interest disclosure to other people, including people outside government, in limited circumstances as set out below.

Two other restrictions apply to these disclosures, namely that:

- » the matter must not include intelligence information or sensitive law enforcement information or concern an intelligence agency
- » a disclosure may not be made to a foreign public official.

It is anticipated that external and emergency disclosures will be rare.

External disclosure

A public official who has made an internal disclosure under the PID Act may make a disclosure to any person if:

- » the internal investigation under the PID Act was not completed (meaning that the report of investigation was not finalised) within 90 days or within a timeframe approved by the Ombudsman or IGIS (investigations conducted under other legislation such as the Ombudsman Act are not so limited), or
 - » they believe on reasonable grounds that the investigation under the PID Act was inadequate, or
 - » they believe on reasonable grounds that the agency took inadequate action after the investigation was completed (whether the investigation was conducted under the PID Act or under other legislation)
- and
- » it is not on balance contrary to the public interest for an external disclosure to be made (s 26(1) item 2).

An investigation is taken not to be inadequate to the extent that the response involves action that has been, is being or will be taken by a minister, the Speaker of the House of Representatives or the President of the Senate (s 26(2A)).

A public official making an external disclosure must not disclose more information than is reasonably necessary to identify the wrongdoing (s 26). They must also not disclose intelligence information, including sensitive law enforcement information. 'Intelligence information' is information, or a summary or extract of information, that:

- » has originated with or been received from an intelligence agency
- » might reveal such information or the technologies or operations of an intelligence agency
- » has been received from a foreign intelligence agency and might reveal a matter communicated in confidence
- » has originated or been received from the Department of Defence and might reveal operational intelligence or a program under which a foreign government provides restricted access to technology
- » identifies a current or former member or agent of ASIS or ASIO or could lead to their identity being reasonably inferred or established
- » is sensitive law enforcement information (see the full definition in s 41(1)).

'Sensitive law enforcement information' is information whose disclosure is reasonably likely to prejudice Australia's law enforcement interests, including a range of listed matters such as avoiding disruption to national and international law enforcement and criminal investigation, protecting informants and witnesses, and protecting the technologies and methods used in dealing with criminal intelligence and investigation (see the full definition in s 41(2)).

What is 'contrary to the public interest'?

The PID Act specifies various factors that must be taken into account in determining that a disclosure is not contrary to the public interest for the purposes of making an external disclosure (s 26(3)). These are:

- » whether the disclosure would promote the integrity and accountability of the Commonwealth public sector
- » the extent to which the disclosure would expose a failure to address serious wrongdoing
- » the extent to which it would help to protect the person who made the disclosure from adverse consequences
- » the principle that disclosures should be properly investigated and dealt with
- » the nature and seriousness of the disclosable conduct
- » any risk that the disclosure could damage the security or defence of the Commonwealth, or its relations with a state or territory, Norfolk Island or another country
- » the principle that Cabinet information should remain confidential unless it is already lawfully publicly available
- » if any information was communicated in confidence by a foreign government or authority or an international organisation, the principle that such information should remain confidential unless consent is given
- » any risk that disclosure could prejudice the proper administration of justice
- » the principle that legal professional privilege should be maintained
- » any other relevant matter.

Emergency disclosure

If a public official believes on reasonable grounds that the information they have concerns a substantial and imminent danger to the health or safety of one or more people or to the environment, they may make an emergency disclosure to anyone (s 26(1) item 3), provided they meet certain requirements:

- » The extent of the information they disclose must be only what is necessary to alert the recipient of the substantial and imminent danger.
- » If they have not previously made an internal disclosure about the matter, or if they have done so and the investigation is not yet completed, there must be exceptional circumstances justifying their action. (This might include, for example, if investigation was taking too long to complete having regard to the risk to a person's health and safety.)
- » As noted above, they must not disclose intelligence information, including sensitive law enforcement information.

Lawyers

A public official may disclose information to an Australian legal practitioner for the purposes of seeking legal advice or professional assistance in relation to making a disclosure, but they must not disclose intelligence information, including sensitive law enforcement information (s 26(1) item 4). If the public official knew, or should reasonably have known, that any of the information they were disclosing had a national security or other protective security classification, the lawyer must hold an appropriate security clearance.

It is an offence for the lawyer to disclose the information or use it for any purpose other than providing advice or assistance to the person (s 67).

WHAT HAPPENS IF INFORMATION IS DISCLOSED OUTSIDE THESE CIRCUMSTANCES?

A public official must use one of the proper avenues to gain the protections available under the PID Act. Those protections include confidentiality and immunity from criminal and civil liability or disciplinary action (see Chapter 6).

This means that a public official will not receive these protections if they give the information to someone outside government like a journalist or union representative, unless the conditions for an external or emergency disclosure are met. They may be in breach of their duty to maintain appropriate confidentiality in relation to official information they have gained in the course of their work, or be subject to other civil, criminal or disciplinary action.¹

The limitations on protection under the PID Act are there to encourage public officials to make a disclosure to the people and agencies that have the responsibility to take action and have proper processes in place to manage an investigation and remedy problems.

WHEN IS IT IN THE PUBLIC INTEREST FOR A DISCLOSURE TO BE MADE?

Matters that reflect private or personal interest are generally not matters of public interest, unless they are so fundamental (such as the rights to privacy) that protecting those interests is seen as being in the public interest.

Individual grievances or workplace conflicts would generally be appropriately dealt with by other existing agency and public sector mechanisms than be the subject of investigation under the PID Act.

However, where the nature of a disclosure or potential disclosure suggests that an individual grievance or workplace conflict could be reasonably construed as a matter more broadly representative of a larger or systemic issue (bullying or harassment matters that may be representative of a culture of bullying or harassment), then further investigation under the PID Act might be appropriate.

1 Such as *Crimes Act 1914*, s 79 (official secrets).

3 AGENCY COMMITMENT

Why public interest disclosures are important to agencies
The responsibilities of principal officers
Demonstrating the agency's commitment
Building management commitment
Establishing agency procedures
Appointing authorised officers
Ensuring staff awareness and training
Key roles and responsibilities
Freedom of information requests
Monitoring and evaluation

The PID Act, PID standards and agency procedures can only go part way to creating an effective public interest disclosure scheme. An essential part of a successful scheme is the agency's commitment to encourage reporting of wrongdoing, acting on disclosures where appropriate and protecting disclosers from any adverse consequences.

Strong agency commitment requires:

- » policies and procedures that demonstrate the agency's endorsement of reporting wrongdoing and the protection of disclosers
- » endorsement of senior management to the principles in the PID Act
- » commitment by supervisors and line managers, given that they will often be the first point of contact for disclosers and they have immediate responsibility for staff welfare
- » trust by public officials that agency procedures are sound and that the agency will ensure that disclosures will be acted on and disclosers will be protected from reprisal.²

WHY PUBLIC INTEREST DISCLOSURES ARE IMPORTANT TO AGENCIES

Public interest disclosures have many benefits to agencies. They can help to:

- » identify as early as possible conduct that needs correction
- » identify any weak or flawed systems which may make the agency vulnerable
- » avoid inefficiency and financial loss
- » reduce risks to the environment, or the health or safety of staff or the community.

If an agency ignores a problem, it is likely to get worse. A decision by a manager at any level to ignore or not properly manage a public interest disclosure may lead to:

- » missed opportunities to deal with a problem before it escalates
- » a compromised ability to deal with the information appropriately
- » damage to the agency's reputation and standing.

Making a public interest disclosure accords with the ethical culture of the Commonwealth public sector, including the employee's duty to act with integrity in the course of Australian Public Service and Parliamentary Service employment (s 13 of the *Public Service Act 1999*; s 13 *Parliamentary Service Act 1999*).

2 P Roberts, A J Brown & J Olsen, *Whistling while they work*, 2011, ANU E Press, p. 18.

THE RESPONSIBILITIES OF PRINCIPAL OFFICERS

The principal officer of an agency is the departmental secretary, chief executive officer or other head of an agency or prescribed authority, as defined in s 73 of the PID Act. Agencies and prescribed authorities are set out in ss 71 and 72 (see also Chapter 2).

Principal officers have specific responsibilities under the PID Act, including:

- » establishing procedures for facilitating and dealing with public interest disclosures relating to the agency (s 59(1)) - these procedures must include assessing risks that reprisals may be taken against a person who makes a disclosure, and providing for confidentiality of investigative processes
- » taking reasonable steps to protect public officials who belong to the agency from detriment or threats of detriment (s 59(3)(a))
- » appointing authorised officers (s 36)
- » ensuring there are sufficient authorised officers to be readily accessible to public officials who belong to the agency and that public officials are aware of their identity (ss 59(3)(b), (c))
- » notifying the discloser and the Ombudsman or IGIS as appropriate at various stages in handling a disclosure (ss 50, 50A, 51(4))
- » ensuring disclosures are properly investigated (ss 47, 53)
- » preparing an investigation report (s 51) and taking appropriate action in response to the report (s 59(4))
- » providing information and assistance to the Ombudsman and IGIS, including in relation to PID Act annual reporting (s 76(3)).

Each of these responsibilities is discussed in more detail in this guide. The principal officer can delegate any or all of those functions or powers to a public official who belongs to the agency (s 77(1)).

In addition to those specific responsibilities, the principal officer's leadership is critical in promoting an environment that encourages public officials to report suspected wrongdoing. This can be done by:

- » ensuring the agency's commitment is clearly demonstrated
- » building commitment in all levels of management.

DEMONSTRATING THE AGENCY'S COMMITMENT

Staff are more likely to report wrongdoing if they trust that appropriate action will be taken and they will be supported for having raised their concerns and be protected from reprisals.

A clear statement signed by the principal officer of the agency's commitment to the highest standards of ethical and accountable conduct and support for staff who make a public interest disclosure will greatly influence the success of the scheme. An appropriate place for this is at the start of the agency's policy or procedures on public interest disclosures (discussed below).

The principal officer must ensure that the agency has an effective system for receiving and dealing with public interest disclosures. This includes ensuring staff who make disclosures are supported and that reprisals are not taken. It also requires the allocation of adequate resources (both financial and human) to the public interest disclosure scheme.

The principal officer must establish internal procedures for facilitating and dealing with public interest disclosures (discussed below). They also have an essential role in ensuring that managers fully support reporting of wrongdoing and are committed to ensuring appropriate action is taken.

BUILDING MANAGEMENT COMMITMENT

All levels of management need to fully understand and support agency systems, policies and procedures relating to public interest disclosures. Specialist areas such as ethical standards units may coordinate and investigate, but proactively dealing with potential problems and wrongdoing in the workplace is part of good corporate governance and consistent with all managers' duty to provide a safe workplace for their staff, including taking reasonable steps to prevent inappropriate behaviour such as harassment and victimisation.

Managers and supervisors need to believe that the agency culture supports reporting of wrongdoing and that identifying problems from within their team gives them the best chance of fixing problems directly, rather than exposing them to criticism for having failed to prevent them. Managers may themselves be disclosers.

Senior management should engage with line managers and supervisors through training and communication strategies to ensure they have a positive attitude to staff reporting wrongdoing, are aware of their responsibilities, provide genuine support to disclosers and effectively manage their workplace if any conflict occurs or reprisals are threatened or taken against one of their staff.

ESTABLISHING AGENCY PROCEDURES

One of the principal officer's key responsibilities is to establish written procedures for facilitating and dealing with public interest disclosures relating to their agency (s 59). As outlined in Chapter 2, a disclosure may be made directly to the agency by a former or current staff member, a former or current public official in any other agency, or a service provider under a Commonwealth contract. The agency may also be allocated (if they consent) a disclosure that was received in another agency, including the Ombudsman or IGIS.

This guide has been developed to provide a framework for best practice. However, it is not a substitute for agencies developing their own policies and procedures to reflect their specific functions and responsibilities. Many agencies will be able to build on their procedures for protecting whistleblowers under the Public Service Act or other legislative or administrative schemes. Other agencies will need to develop new procedures.

Agency procedures for facilitating and dealing with public interest disclosures relating to the agency should:

- » clearly identify who is covered by the procedures and the types of wrongdoing to be reported
- » encourage the reporting of wrongdoing
- » describe the roles and responsibilities of key staff in receiving and managing public interest disclosures, and supporting and protecting disclosers
- » ensure the risks of reprisal are assessed
- » provide for confidentiality in making and investigating public interest disclosures
- » outline the investigative process and notification requirements
- » provide for the management of a person against whom an allegation has been made
- » provide for regular evaluation and monitoring of the effectiveness of agency procedures on public interest disclosures
- » provide for information to be passed to the Ombudsman and IGIS, as appropriate.

The procedures must conform to PID standards made by the Ombudsman under s 74, and should be clearly expressed so as to minimise uncertainty and promote consistency in handling disclosures across the agency. Further information about each of the matters listed above can be found throughout this guide.

Form of the procedures

It is up to each agency to choose the format of their procedures. Some agencies may choose to have an overarching policy document that sets out general principles, including the agency's commitment to public interest disclosures, its expectations of staff and its communication and training strategies, with a separate document containing more detailed procedures for receiving, investigating and managing public interest disclosures. Other agencies may prefer to include their general policy and detailed procedures in the same document.

An agency should make its written procedures available to each of its members of staff in a variety of ways, which could include:

- » as part of its staff induction process
- » through its Human Resources area
- » from authorised officers on request
- » on the agency's intranet.

The procedures should also be published on the agency's website so that former staff, staff of contracted service providers and others with an interest in making a disclosure about suspected wrongdoing can access them. Publication of public interest disclosure procedures on the agency's website is consistent with the requirements of the Information Publication Scheme under the *Freedom of Information Act 1982* (FOI Act).

Integrating the agency's response

Agency procedures on public interest disclosures should be integrated with other mechanisms for dealing with problems in the workplace, whether they are individual matters or more general workplace issues. Managers and staff need to be clear how the agency's various policies (for example, on bullying and harassment, workplace health and safety, grievances and Code of Conduct matters) relate to each other, so that they can make judgements about the appropriate course of action.

APPOINTING AUTHORISED OFFICERS

The principal officer must appoint in writing authorised officers to receive public interest disclosures (s 36). They must ensure that there is a sufficient number of authorised officers to be readily accessible to public officials who 'belong to' the agency (s 59(3)). This term includes staff of contracted service providers (s 69). An individual may have decided to make a disclosure or may want to first seek advice about the process or the protections available to them, and an authorised officer should be prepared to explain what the PID Act requires (s 60).

In appointing 'readily accessible' authorised officers the principal officer should consider such factors as:

- » the size of the agency
- » the geographical location of staff
- » the risk that requiring reports to be made to a particular area or particular officer may not encourage certain staff to be forthcoming or may raise a conflict of interest.

The principal officer must ensure that public officials who belong to the agency are aware of the identity of each authorised officer in the agency (s 59(3)(c)). The contact details of authorised officers should be easy to find, for example, on the agency's intranet or in staff bulletins (there may need to be other arrangements for contracted service providers who do not have access to those means). Provided there are avenues for making oral disclosures, it is also open to an agency to set up an online system for receiving written disclosures, such as through a SmartForm, or to use a generic email address such as 'pid@agencyname.gov.au'.

Because public interest disclosures may be made by former public officials or current public officials in other agencies, the principal officer also needs to ensure that details for contacting authorised officers are publically available. This could be on the agency's external website and this could be a generic contact email address or phone number rather than a list of individual officers' details (s 5 of the *Public Interest Disclosure Standard 2013* (PID standard)).

Authorised officers should be skilled in dealing with sensitive matters such as whistleblowing or complaint investigation, as they have important responsibilities under the PID Act (as discussed below).

ENSURING STAFF AWARENESS AND TRAINING

Staff are more likely to report wrongdoing if they know when they should report and who to report to, and are confident that they will be supported for having raised their concerns.

The agency should ensure that all staff are aware what a public interest disclosure is, what action to take if they suspect wrongdoing, how disclosures will be dealt with and the protections that are available to them. Research has shown a strong relationship between employees' belief they are covered by public interest disclosure legislation and their likelihood of reporting wrongdoing.³ To achieve this end, the agency needs to have effective awareness and training strategies. Suggestions for consideration are below.

Awareness strategies

Agencies should develop a communication strategy for raising staff awareness of the new public interest disclosure legislation and internal agency procedures. Methods can include:

- » using existing communication channels such as the intranet, staff circulars and bulletin boards
- » developing and distributing themed brochures, posters and screen savers
- » public statements of commitment from the agency head and other senior officers
- » managers and supervisors briefing staff on key points in staff meetings, including communicating the message that it is safe and acceptable to report wrongdoing
- » providing opportunities for staff at meetings with management to discuss practical situations
- » requiring staff to sign an undertaking that they have read and understood the agency's public interest disclosure procedures
- » if appropriate, openly acknowledging and discussing any wrongdoing that was reported, informing staff of changes that resulted and acknowledging (with their consent) staff who made disclosures.

Information sheets and other guidance materials will be progressively made available at www.pid.ombudsman.gov.au, but agencies should consider the need to develop their own material targeted to the needs of their own agency.

Training

Agencies should consider the need to develop specialised training for different audiences amongst their staff:

- » Staff need general training about how to make a disclosure, their rights and obligations, the investigative process and outcomes. A guide for disclosers is available at www.pid.ombudsman.gov.au, and agencies should consider how this might be tailored for their own needs.

3 Roberts, Brown & Olsen p. 28, citing P Roberts, 'Evaluating agency responses: the comprehensiveness and impact of whistleblowing procedures' in A J Brown (ed) *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*, 2008, ANU E Press, Canberra, pp. 237-243.

- » Managers and supervisors need to be trained in recognising when a matter may be a public interest disclosure and what action to take, including ensuring that staff are supported and protected against reprisals. This type of training should be recognised as part of general management competency requirements.
- » Authorised officers need training about their specific responsibilities under the PID Act, including making allocation decisions, notification requirements, conducting risk assessments and supporting disclosers, and awareness of other avenues for staff to take action (such as bullying and harassment).
- » Investigators need specialised training in conducting investigations, including investigation planning, procedural fairness requirements, interviewing witnesses, analysing evidence and report writing.

It is up to each agency to ensure that the necessary specialist skills are available.

KEY ROLES AND RESPONSIBILITIES

All staff in an agency have responsibilities in relation to public interest disclosures. Some responsibilities are listed in the PID Act, while others reflect good corporate governance and ethical behaviour. Responsibilities of principal officers are outlined above. Following is a discussion of the role and responsibilities of:

- » authorised officers
- » managers and supervisors
- » all staff.

Authorised officers

Authorised officers are officers of an agency authorised in writing by the principal officer for the purposes of the PID Act (s 36). They have a range of decision-making, notification and other responsibilities under the PID Act, including:

- » receiving disclosures from current or former public officials about disclosable conduct (s 26)
- » deeming a person to be a public official to facilitate the making of a public interest disclosure (s 70)
- » informing a person who may be unaware of the PID Act requirements that information that the authorised officer reasonably believes could concern disclosable conduct could be treated as an internal disclosure, explaining the requirements of the PID Act and advising the person of any designated publication restrictions (as defined in s 8) that may affect disclosure (s 60)
- » assessing reported information to determine if there are no reasonable grounds to believe the information could be considered to be a public interest disclosure (s 43(2))
- » making any preliminary inquiries necessary to make an allocation decision (s 43(4))
- » allocating all or part of the disclosure to the principal officer of their agency and/or another agency, with that agency's consent (ss 43(1), (6))
- » informing the principal officer of each relevant agency, and the Ombudsman or IGIS as appropriate, of allocation decisions and associated information (ss 44(1), 44(1A))
- » informing the discloser of the allocation decision (s 44(2))
- » consenting to the allocation of a disclosure by an authorised officer of another agency (s 43(6))
- » advising the discloser of a decision not to allocate, the reasons why and any other course of action that may be available under Commonwealth law (s 44(3)).

In addition to those statutory requirements, agencies should consider whether authorised officers (or staff in another area) should:

- » be a contact point in the agency for general advice about the operation of the PID Act
- » liaise with the Ombudsman or IGIS as required.

Agencies may wish to appoint a central coordinating officer to manage their interactions with other agencies, including allocation of disclosures and consenting to receive allocated disclosures, seeking extensions of time for investigations and otherwise liaising with the Ombudsman and IGIS as required. There need to be clear lines of communication with external agencies that are investigating matters relating to the agency, particularly in regard to ensuring that disclosers are protected from reprisals.

Managers and supervisors

A public official may make a disclosure to their 'supervisor' (ss 26). A supervisor includes any public official who supervises or manages the discloser (s 8). If the supervisor or manager believes that the information given to them concerns, or could concern, disclosable conduct, they must give that information to an authorised officer of the agency as soon as reasonably practicable (s 60A).

Managers and supervisors also have a key role in ensuring that the workplace culture supports the making of public interest disclosures. They can help to do so by:

- » being knowledgeable about the PID Act and agency procedures, particularly in relation to confidentiality requirements
- » being approachable to staff who wish to raise concerns
- » holding awareness sessions or discussion forums for their staff
- » ensuring staff undergo available training
- » confronting any workplace prejudices about making a disclosure
- » supporting a staff member who they know has made a public interest disclosure and ensuring they are protected from reprisal
- » increasing management supervision of the workplace if necessary (for example, if workplace conflict occurs because a disclosure has been made or an investigation is under way)
- » ensuring identified problems in the workplace are corrected
- » setting an example for staff.

All staff

The PID Act requires all public officials to use their best endeavours to assist the principal officer in the conduct of an investigation (s 61(1)). They must also use their best endeavours to assist the Ombudsman or IGIS in their functions under the PID Act (ss 61(2), (3)).

Beyond those specific responsibilities, all staff share the responsibility of ensuring the PID Act works effectively. Their role includes:

- » reporting matters where there is evidence that shows or tends to show disclosable conduct
- » identifying areas where there may be opportunities for wrongdoing to occur because of inadequate systems or procedures, and proactively raising those with management
- » supporting staff who they know have made public interest disclosures
- » keeping confidential the identity of a discloser and anyone against whom an allegation has been made, if they become aware of those matters.

FREEDOM OF INFORMATION REQUESTS

Documents associated with a public interest disclosure are not for that reason exempt from the operation of the FOI Act. Requests for access to documents under the FOI Act must be considered on a case by case basis. A range of exemptions may apply to individual documents or parts of documents, particularly in relation to material received in confidence, personal information, operations of agencies, and law enforcement.

The principal officer should ensure that any agency officer handling freedom of information requests is aware of the confidentiality and secrecy provisions under the PID Act that may be relevant to their decision to grant or refuse access. If a document originates from another agency including the Ombudsman or IGIS, the agency should contact that agency to seek their comment prior to making a decision to grant access.

MONITORING AND EVALUATION

An agency should put in place an effective system for recording the numbers and types of public interest disclosures, the number of investigations, the outcomes (including agency action taken in response to investigation report findings and recommendations), and details of any support provided to a discloser and allegations of reprisal. Much of this information will be needed to satisfy the principal officer's obligation to provide information to the Ombudsman for the annual report on the operation of the PID Act (s 76 and s 15 of the PID standard). It will also help agencies to evaluate the effectiveness of their procedures and identify any systemic issues.

The agency may also wish to monitor the resources (financial and human) allocated to handling public interest disclosures, particularly in complex investigations. Once the procedures have been in place for some time, it may also be useful to survey staff about their awareness of, and trust in, the procedures, and the attitude of managers to the agency's process, so that improvements can be made.

4 FACILITATING REPORTING

Reasons why wrongdoing may not be reported
Procedures on receiving disclosures
Confidentiality
Risk assessment

The objects of the PID Act include encouraging and facilitating the making of public interest disclosures by public officials (s 6(b)). Simply setting up a system to receive disclosures is not sufficient. To ensure that public officials will come forward with concerns about serious wrongdoing, it is necessary to:

- » promote an agency culture that encourages disclosures (as outlined in Chapter 3)
- » establish clear procedures that identify what should be disclosed, to whom and with what supporting information
- » allow for alternative reporting pathways
- » assure staff that their confidentiality will be protected
- » allow for anonymous disclosures
- » protect staff against reprisals
- » support staff who have made a disclosure.

Protection and support of staff are addressed in Chapter 6. The other matters are discussed below.

REASONS WHY WRONGDOING MAY NOT BE REPORTED

Employees who are prepared to speak up about wrongdoing are widely recognised as one of the most important and accurate sources of information for agencies to identify and address problems in the workplace, as they see 'close up' what is happening.

However, there is considerable evidence that many employees are reticent to report wrongdoing or to do so in a timely way.⁴ Disincentives can include a desire to protect career prospects; avoidance of workplace conflict; fear of reprisal; unwillingness to 'rock the boat'; uncertainty over the seriousness of the problem; and doubt that the agency would provide protection.

Key to an effective reporting system is clarity in agency procedures, including alternative pathways to report wrongdoing. Providing for anonymous disclosures and realistic undertakings of confidentiality are also important.

PROCEDURES ON RECEIVING DISCLOSURES

Agencies need to make the following matters as clear as possible in their internal procedures:

- » who can make a disclosure
- » how a person can be deemed to be a public official
- » how a disclosure can be made
- » anonymous disclosers
- » who can receive a disclosure
- » identifying a report as a public interest disclosure
- » the relevance of the discloser's motive
- » what supporting information should be provided
- » the discloser's own wrongdoing
- » the discloser's obligations
- » false and misleading reports.

Who can make a disclosure?

As described in Chapter 2, a current or former public official may make a disclosure, and receive protection, under the PID Act. 'Public official' is broadly defined, covering people in or with a relevant connection to the Commonwealth public sector, including staff of contracted service providers (s 69).

The agency's procedures should identify clearly who is covered. Agencies are encouraged to look beyond the general description of 'public official' in s 69 and describe the groups of people within their agency (such as temporary and casual employees, appointees, members of staff of prescribed authorities, members of the Defence Force, Parliamentary Service employees and directors of Commonwealth companies). Agencies should also consider identifying stakeholders who might be in a position to identify wrongdoing in their agency (such as key contracted service providers and their officers or employees).

Can a person be deemed to be a public official?

If a person who intends to make a disclosure was not a public official at the time they obtained the information they intend to disclose, they may be deemed to be a public official by an authorised officer who believes on reasonable grounds that the person has information that concerns disclosable conduct (s 70). This may be appropriate, for example, if a former volunteer with an agency or someone who has received funding from the Australian Government has 'inside information' about the agency's wrongdoing. The authorised officer can determine a person to be a public official on the person's request or on their own initiative (s 70(2)). If it is in response to a person's request, the authorised officer must either make the determination, or refuse to make the determination and advise the person of the reasons (s 70(3)).

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

The power to deem a person to be a public official does not apply if the person is a judicial officer or a member of a Royal Commission (s 70(3A)).

How can a public interest disclosure be made?

A public interest disclosure may be made orally or in writing (s 28(1)). A person making a disclosure does not need to assert that the disclosure is made under the PID Act for it to be a public interest disclosure and for the requirements of the PID Act to apply (s 28(3)).

If a disclosure is made orally, a record should be made of what was said. It is good practice to ask the discloser to sign the record as being correct.

Supervisors and authorised officers will need to consider whether or not reports made to them are of a nature that requires action under the PID Act, or whether the issues can be resolved quickly through prompt management action or other appropriate avenues. Issues to consider include the seriousness of the wrongdoing reported and whether the person making the report is at potential risk of reprisal.

Can a discloser be anonymous?

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

One of the requirements for making a public interest disclosure is that the person is or was a public official (s 26(1)). This does not mean that the person has to prove their status. They may give information that supports that status, for example, by stating that they used to work for the agency or otherwise explaining how they know about the wrongdoing they are reporting. If they do not, the authorised officer may wish to ask questions along these lines (if the person has provided contact details). However, it is suggested that authorised officers should be generous in their interpretation of the requirement that the discloser is a current or former public official, and treat an anonymous discloser as such unless there is evidence to suggest otherwise. The focus should be on the purpose of the PID Act to encourage reports of wrongdoing and ensure they are properly dealt with.

Agency procedures should state that disclosures may be made anonymously and assure staff that anonymous disclosures will be acted on whenever possible. However, the procedures should also note that there are reasons why staff might consider identifying themselves to an authorised officer, or at the very least providing a means of contact:

- » The PID Act requires agencies to keep a discloser's identity confidential, subject to limited exceptions including the discloser's consent (ss 20, 21). The person's identity may nonetheless become apparent if an investigation is commenced. If the person's identity needs to be disclosed or is likely to become apparent, the agency should discuss this with them.
- » It will be difficult to ensure protection from reprisal if the agency does not know the discloser's identity.
- » 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 (s 48(1)(i)).
- » A discloser who does not provide a means of contact cannot be updated on the progress of the matter, including the outcome of the investigation.

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

Who can receive a public interest disclosure?

Agency procedures should make clear that a current or former public official has alternative ways to report suspected wrongdoing. While experience in other jurisdictions shows that most reports of wrongdoing are made to line managers, an individual may have reasons to make a disclosure to another person or agency. A range of options is set out in s 26:

- » If the person is a current staff member, they can disclose the information to their supervisor or manager. If the supervisor or manager believes that the information concerns, or could concern, one or more instances of disclosable conduct, the supervisor or manager must give the information to an authorised officer of the agency as soon as reasonably practicable (s 60A).
- » The person can disclose the information to an authorised officer of the agency. An authorised officer is a public official who belongs to the agency and is either the principal officer or is appointed in writing as such by the principal officer (s 36). The principal officer is the agency head – that is, the departmental secretary, chief executive officer, Commissioner of the AFP, or other position as head of an agency, including an individual prescribed under the PID rules (see the full definition in s 73). Agencies may wish to specify in their procedures their preferred option for making a disclosure (for example, large agencies may have specialist integrity units), but they cannot prevent a person from making a disclosure via another avenue.
- » The person can disclose the information to the Ombudsman, IGIS or a prescribed investigative agency. The Ombudsman, IGIS or investigative agency may investigate the matter (and can use their general investigative powers under their own legislation to do so), or they may allocate the matter to the relevant agency for investigation.
- » The person can disclose the information to their supervisor or authorised officer in a different agency. This may happen, for example, if the person has moved to a new agency and reports suspected wrongdoing in their previous workplace. The authorised officer who receives the disclosure will then consider which agency the matter should be allocated to.

Contact details for authorised officers must be readily accessible to public officials (see Chapter 3). A public official may feel more comfortable making their disclosure to the Ombudsman, IGIS or an investigative agency if the disclosable conduct involves more senior staff in their agency or if they feel that reprisal is likely. An authorised officer in the agency that receives the disclosure may discuss the matter with the discloser before proceeding.

While the intent of the PID Act is to have agencies develop an appropriate framework that provides public officials with an avenue to speak up about wrongdoings (or potential wrongdoings) within their own agency, an agency's procedures should include reference to the options of making a disclosure to the Ombudsman, IGIS or prescribed investigative agencies, and setting out the grounds under which external and emergency disclosures may be made.

Does the person need to identify their report as a public interest disclosure?

A person need not expressly identify their report of wrongdoing as a public interest disclosure, as they are not required to do so under the PID Act (s 28(3)). They may not even know that their information or allegations could constitute a public interest disclosure.

This does not mean that every complaint about workplace conduct should be treated by managers, supervisors and authorised officers as a public interest disclosure, particularly as one of the grounds for not investigating a matter under the PID Act is that it is not 'serious disclosable conduct'. Complaints can cover a wide range of matters, including workplace disputes, harassment or bullying complaints, health and safety concerns, and allegations of improper conduct. Some matters (such as those alleging inappropriate behaviour) can be managed by less formal approaches, such as resolving the matter managerially, and/or reviewing policies or procedures. In other cases a matter may initially appear to be a personal grievance but on investigation may reveal more complex issues (for example, investigation of a complaint about an incident of harassment may reveal a serious workplace culture issue).

Agencies need to steer a path between encouraging staff and former staff to bring forward genuine concerns about workplace issues so that appropriate action can be taken, and avoiding setting such a low threshold for public interest disclosures that supervisors and managers are swamped either with unfounded suspicions or with formal PID Act processes where prompt resolution would be better. Relevant factors to consider include the seriousness of the alleged wrongdoing and the need to protect the person making the report.

If a supervisor or manager identifies that a matter is sufficiently serious to be treated as a public interest disclosure, they should let the person know that their report will be treated as such, that it will be referred to an authorised officer and, if they are able to do so, explain the protections given by the PID Act, or refer them to an authorised officer who can do so.

What supporting information should the discloser provide?

No particular information is specified in the PID Act. The onus is not on the discloser to prove the disclosure; they only need to put the agency on notice that they honestly believe on reasonable grounds that there has been wrongdoing.

Agencies may wish to specify in their procedures that, depending on the circumstances, a discloser should think about covering as many of the following matters as possible in their disclosure so as to help the agency to determine how to proceed:

- » their name and contact details
- » 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
- » whether they believe their information is a public interest disclosure under the PID Act (they do not have to describe it that way for it to be treated as a public interest disclosure)
- » if they are concerned about possible reprisal as a result of making a disclosure.

The agency's procedures should advise disclosers to be clear and factual, and to avoid speculation, personal attacks and emotive language as they divert attention from the real issues. They should also make clear that the discloser should not investigate a matter themselves before making the disclosure – doing so may hinder a future investigation. Disclosers should also be aware that the sooner they raise their concerns, the easier it may be for the agency to take action.

The authorised officer should ask the discloser for any supporting correspondence or other documents, such as file notes or a diary of events, and the names of any people who witnessed the conduct or who may be able to verify what the discloser is saying.

The authorised officer should reassure the discloser that even if the information they provide turns out to be incorrect or unable to be substantiated, their disclosure is protected by the PID Act, provided that they:

- » made the disclosure to an appropriate person under the PID Act, and
- » honestly believe on reasonable grounds that the information tends to show disclosable conduct.

Is the discloser's motive for reporting relevant?

A person receives protection if they report disclosable conduct in compliance with the PID Act. Their motive or intention does not determine whether investigation is warranted. There can often be a history of conflict in a workplace, particularly if the person has tried to report wrongdoing in the past and they feel their concerns have been dismissed or ignored. This does not mean that their report should be discounted. Those receiving disclosures must be careful to look at the substance of the report rather than focusing on what they believe to be the person's motive for reporting.

When taking information from the discloser, it is nonetheless important to emphasise to the person that they should try to remain factual and focus on the issues related to the wrongdoing rather than being emotive about individuals.

What about the discloser's own wrongdoing?

Agency procedures should clearly state that making a disclosure does not necessarily protect the discloser from the consequences of their own wrongdoing, including where they have been involved in the misconduct they are reporting.

However, a discloser may come forward with a report of serious wrongdoing in which they had minor involvement. It is up to the agency to decide in an individual case whether to exercise their discretion not to take action against the discloser.

What about false or misleading reports?

A person who makes a disclosure that is intentionally false or misleading will not gain the protections under the PID Act (s 11). Agencies should ensure that staff are clear about this so as to minimise the occurrence of false reporting.

Agencies may also wish to refer an incident of false reporting to the appropriate area for disciplinary action. However, such action if taken too promptly can quickly deter other staff from making disclosures. Agencies should consider only referring the clearest of cases of false or misleading reports for action.

What are the discloser's obligations?

The authorised officer should emphasise to the discloser that they should not discuss the details of their disclosure with anyone who does not need to know. Discussions with those people will not be covered by the protections in the PID Act.

The discloser should be advised to be discreet about the fact that they have made a public interest disclosure, the information in their disclosure and any information that would identify someone they allege has acted wrongly. If the matter is investigated, the investigator must make sure that everyone involved is treated fairly and impartially.

The discloser should also be prepared to provide further information to help the investigator, as this will often be required. All public officials must use their best endeavours to assist in any investigation (s 61).

CONFIDENTIALITY

Agencies need to make every reasonable effort to protect the discloser's identity. It is a criminal offence for a public official who is involved in handling a disclosure to reveal the discloser's identifying information to anyone else without their consent or use it for another purpose, unless it is for the purposes of the PID Act, an investigation by the Ombudsman or the IGIS, or another Commonwealth law or prescribed law, or if the information has already lawfully been published (s 20). The discloser's identifying information must also not be disclosed to a court or tribunal except when necessary to give effect to the PID Act (s 21). In addition, agencies are bound by obligations under the *Privacy Act 1988* in relation to storing personal information securely and limiting its use and disclosure.

However, the discloser's identity, or information that would effectively identify them, may need to be disclosed to certain other people if that is necessary:

- » to investigate the disclosure effectively (for example, if the wrongdoing that was reported was directed solely against the discloser), or
- » to protect them against reprisals (for example, if there are concerns that it is impossible for them to remain in their current workplace).

In such circumstances, the authorised officer should emphasise that the PID Act cannot provide absolute protection of the discloser's identity in all situations. Even if the staff involved in handling the disclosure take the utmost care to protect the discloser's identity, they may not be able to prevent the identity from becoming known. Other staff may guess who made the disclosure once an investigation is under way, particularly if the discloser has previously complained about the issue to colleagues or flagged their intention to disclose.

If it is necessary or highly likely that the discloser's identity will be revealed, the agency should discuss this with them before proceeding. It may be appropriate to seek the discloser's consent to reveal their identity to appropriate people. The agency should also take steps to protect the discloser against reprisal (see Chapter 6). This underlines the importance of conducting a risk assessment of reprisal as soon as possible after the disclosure is received (see below).

Even 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 that they can at least be notified of the progress of the matter as required by the PID Act.

RISK ASSESSMENT

Agency procedures must include assessing risks that reprisals may be taken against a person who makes a public interest disclosure (s 59(1)(a)). This involves assessing the specific behaviour and circumstances that may result in reprisals, and then putting in place appropriate strategies to prevent or contain them. Inappropriate workplace behaviour, including harassment, intimidation, undermining of authority, ostracism, humiliation, questioning of motives and heavier scrutiny of work, can greatly increase stress and can result in serious injury to someone who has made a disclosure. The risk assessment can include not only the risk of direct reprisal against the discloser, but also the risk of related workplace conflict or difficulties.

An accurate and objective risk assessment allows the agency to put suitable strategies in place to control the risks and defend itself against any allegations of having failed to protect a discloser.

When should a risk assessment be done?

The risk assessment should be completed as soon as possible after a disclosure is received, or after the agency is notified that a disclosure concerning their agency has been received (for example, if the Ombudsman, IGIS or investigative agency decides to investigate a disclosure made directly to them). This gives the agency the best chance of recognising any risk of reprisals or associated workplace conflict.

The authorised officer should conduct an assessment based on a checklist of risk factors. If the disclosure is first made to a manager or supervisor and the person wishes their identity to remain anonymous, the manager or supervisor should conduct a risk assessment.

Who should be consulted?

The best sources of information about potential risks are people who are involved in the particular workplace, especially the discloser and their supervisor or manager (provided that person is not involved in the alleged wrongdoing).

Asking the discloser why they are reporting wrongdoing and who they might fear a reprisal from can be helpful in:

- » assessing likely perceptions amongst staff as to why the discloser came forward and how colleagues may respond if the discloser's identity becomes known
- » managing the discloser's expectations about how other staff might perceive their disclosure
- » reducing the potential for future conflict between the discloser and management about whether effective support was provided
- » identifying the motives of staff allegedly involved in reprisals if a later investigation becomes necessary.

The supervisor or manager may also be a valuable source of information about these matters.

How should a risk assessment be conducted?

Agencies may have their own well developed processes for assessing risks. However, the following framework⁵ is suggested for consideration. It 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?

Identifying risks

The agency should develop a list of risk factors that can alert authorised officers and managers to problems. Those provided in the table on the following page (Table 1 – Indicators of a higher risk of reprisals or workplace conflict) are suggestions only. The person doing the risk assessment should clearly define the individual factors affecting the particular discloser and the specific workplace when determining if there are factors that make it likely that reprisals or related workplace conflict will occur.

5 Based on the model developed by the NSW Ombudsman, *Managing risk of reprisals and conflict*, Public Interest Disclosure Guideline C4, available at www.ombo.nsw.gov.au.

Assessing risks

The person assessing the risk should consider:

- » the likelihood of reprisals or related workplace conflict occurring – this may be high if:
 - there have already been threats
 - there is already conflict in the workplace
 - a combination of circumstances and risk factors indicate reprisals or related workplace conflict are likely
- » the potential consequences if they do occur – both to the discloser's immediate and long term wellbeing and the cost to the agency.

Controlling risks

The agency should plan and implement strategies to control the risks likely to expose a discloser to reprisals or related workplace conflict. Any decision should be made in consultation with the discloser.

If the risk is assessed as sufficiently high, the agency should prepare a plan to prevent and contain reprisals against the discloser or related workplace conflict. If it has been determined that a discloser will require support, the agency should develop a strategy for providing an appropriate level of support, such as appointing a support person.

If the discloser's identity is likely to be known or become known in their workplace, the agency should adopt a proactive approach, for example, by raising the matter with staff, reiterating the agency's commitment to encouraging and where appropriate investigating public interest disclosures, and reminding staff that taking or threatening a reprisal is a criminal offence.

Monitoring and reviewing risks

Problems in the workplace can arise at any point after a disclosure has been made, including during an investigation. The risk assessment should be monitored and reviewed as necessary, including by checking with the discloser to see if reprisals have been made or threatened.

Indicators of a higher risk of reprisals or workplace conflict⁶

Threats or past experience	<ul style="list-style-type: none"> » 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	<ul style="list-style-type: none"> » 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	<ul style="list-style-type: none"> » 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	<ul style="list-style-type: none"> » Is or was the reported wrongdoing directed at the discloser?* » Are there multiple subjects of the disclosure? » Is the disclosure about a more senior officer?* » Is the discloser 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?*

Table 1 – Indicators of a higher risk of reprisals or workplace conflict

* Note: Risks of poor treatment for reporting wrongdoing identified by research (Brown, AJ (ed.) 2008, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp. 137-164).

5 ALLOCATING AND INVESTIGATING

Allocating disclosures
Investigating a disclosure
Conducting an investigation
Ensuring confidentiality
Keeping records
Criminal matters
After the investigation
Pitfalls to avoid

Once a report of wrongdoing has been made to a supervisor, manager or authorised officer, the PID Act requires certain steps to be taken. The diagram on the next page shows a simplified outline of the process relating to internal disclosures, with more detail set out in the following pages.

ALLOCATING DISCLOSURES

Determining if the information is an internal disclosure

The first step is that an authorised officer will examine the information that has been supplied and decide whether it is an internal disclosure under the PID Act. If a person has disclosed information to their supervisor or manager and that person reasonably believes the information could concern disclosable conduct, they must pass the information to an authorised officer as soon as reasonably practicable (s 60A). Because of the confidentiality requirements, the supervisor or manager should get the person's consent before passing on their identifying information (s 44(1)).

The authorised officer must allocate the matter for investigation, unless they are reasonably satisfied that there is no reasonable basis for considering the matter to be an internal disclosure (s 43(2)). This would be the case, for example, if the matter does not involve the actions of a Commonwealth agency, public official or contracted service provider, or amounts only to an individual's disagreement with government policy.

The authorised officer must take this action within 14 days of becoming aware of the disclosure, unless there is a good reason why they need further time (s 43(5)). An example might be that initial inquiries take longer due to the unavailability of a person or persons with whom the authorised officer may need to make contact.

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

- » a person who is or has been a public official
- » discloses to an authorised internal recipient
- » information which tends to show, or the discloser believes on reasonable grounds tends to show
- » one or more instances of disclosable conduct.

Who qualifies as a public official, what is disclosable conduct and who is authorised to receive a disclosure are discussed in Chapters 2 and 4. The other elements of an internal disclosure are discussed below.

Dealing with an internal disclosure

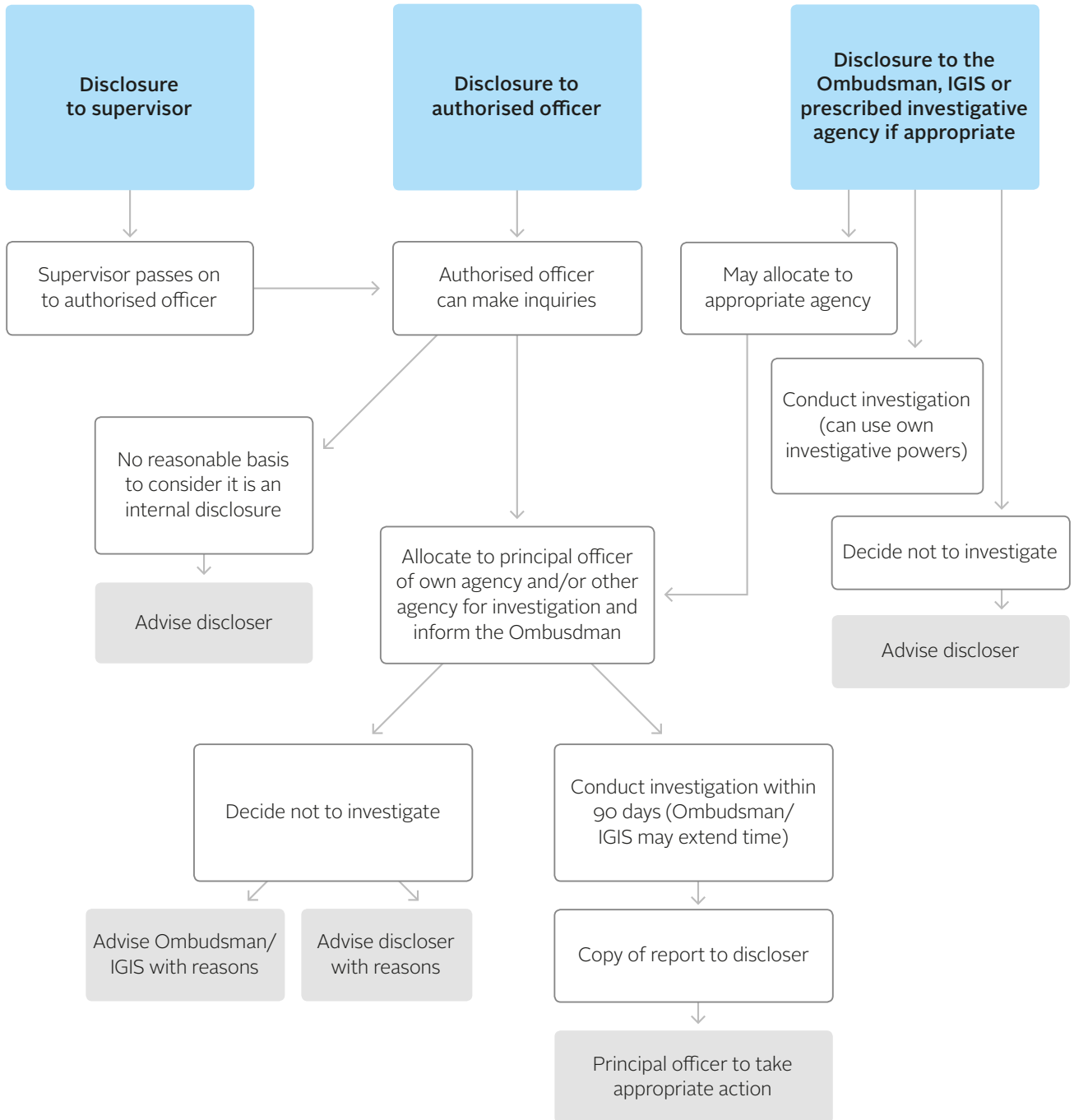


Figure 2 – Dealing with an internal disclosure

Belief on reasonable grounds

A belief is more than a suspicion or assertion: the person reporting the wrongdoing must be more likely to accept that wrongdoing occurred than reject that idea.

Belief 'on reasonable grounds' means that a reasonable person would believe in the circumstances that the wrongdoing had occurred. Personal prejudice or animosity towards someone is not sufficient. 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 need not be evidence which would be admissible in a court of law (for example, hearsay could be considered).

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 only need to provide sufficient information to put the agency on notice that disclosable conduct may have occurred or be occurring.

Agencies should be careful not to encourage staff to investigate a matter themselves before making a disclosure, as such actions may prejudice a future investigation.

Should preliminary inquiries be undertaken?

The PID Act gives an authorised officer the power to make any inquiries and obtain further information before making a decision about allocating the matter for investigation (s 43(4)). The authorised officer needs to quickly assess the information provided and to ascertain if anything more needs to be known before they can make an informed decision. If there is evidence of criminal conduct at that early stage, the authorised officer may also need to consider referring that evidence to police.

Making preliminary inquiries is not the same as conducting an investigation. Conclusions are never reached or criticisms made. To do so can give rise to concerns of bias in a subsequent investigation.

Preliminary inquiries could include asking the discloser for further details. If doing so, the authorised officer should be careful to explain to the discloser why they are asking and avoid creating the perception that they doubt the discloser's truthfulness.

Which agency should a disclosure be allocated to?

The authorised officer must allocate the handling of the disclosure to one or more agencies, including their own agency, the Ombudsman, the IGIS or a prescribed investigative agency, provided that agency consents (s 43). In making the decision, the authorised officer must have regard to the principle that:

- » an agency should not handle the disclosure unless 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 or the IGIS
- » if the agency is the IGIS, some or all of the conduct relates to an intelligence agency
- » if the agency is a prescribed investigative agency, that agency has the power to investigate the disclosure otherwise than under the PID Act (s 43(3)).

The agency that the disclosure concerns will generally be apparent from the information provided. If it is not apparent, the authorised officer might wish to make limited inquiries to determine the most appropriate agency for allocation, including by discussing the issue further with the discloser or with an agency.

Allocation to more than one agency

While a disclosure can be allocated to more than one agency under s 43, the authorised officer should be careful that this does not create a situation where parallel investigations into the same matter occur. It would be suitable where a disclosure deals with distinct issues that are best investigated by separate agencies.

Who needs to consent to the allocation?

If an authorised officer wishes to make an allocation to another agency, an authorised officer of that agency must consent to receive the allocation (s 43(6)). It would normally be expected that if the matter relates to their agency's activities, the authorised officer would 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 the 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.

Can subsequent allocations be made?

An authorised officer may, after allocating a disclosure to one or more agencies, decide later to allocate part or all of the disclosure to another agency (s 45). 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).

What information must be given to the receiving agency?

Once a decision has been made to allocate a disclosure, the authorised officer must inform the principal officer of the relevant agency of:

- » the allocation to their agency
- » the information that was disclosed
- » the suspected disclosable conduct
- » the discloser's name and contact details, if those are known to the authorised officer and the discloser consents (s 44).

The authorised officer should ensure that they ask the discloser for their consent to pass their contact details to the receiving agency. If the discloser declines, the authorised officer should advise the receiving agency that the discloser was asked and did not consent.

What must the Ombudsman or IGIS be told?

The authorised officer must also inform the Ombudsman (if the disclosure is allocated to an agency that is not the IGIS or an intelligence agency) or the IGIS (if the disclosure is allocated to an intelligence agency) of the matters of which the principal officer of the receiving agency must be informed (s 44(1A)). This obligation reflects the oversight role of the Ombudsman and the IGIS. Again, the discloser's name and contact details can only be provided to the oversight agencies if the discloser consents.

While the full details of the information disclosed should be provided to the principal officer of the agency, a brief outline or synopsis is appropriate for the Ombudsman or the IGIS. It will not be practical for the Ombudsman or the IGIS to be notified of the full details of every disclosure. This arrangement will also assist in managing security concerns and protecting the confidentiality of the matter.

What should the discloser be told?

The authorised officer must let the discloser know about their decision to allocate the matter for investigation (s 44(2)). This should be done as soon as practicable. Notice of the allocation decision may be given to the discloser in the same document that gives notice of an investigation decision (s 50(4)). This would only happen if the same agency was investigating and the two decisions were close in time.

If the authorised officer decides not to allocate the matter because they have determined it is not an internal disclosure, they must tell the person the reasons why, and advise them of any other options that they might have under Commonwealth law (s 44(3)) – for example, in relation to a workplace grievance.

It is important to give the person as full an explanation as possible – for example, the person may have a genuine and strong belief that the conduct they reported was improper, but they may 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 to the Ombudsman or IGIS.

The authorised officer should also consider whether the person has expressed any concerns about their need for support or protection in the workplace and whether the agency needs to take any follow up action (see Chapter 6). Even if the information turns out to be incorrect or is unable to be substantiated, the person is still protected under the PID Act, provided they reasonably believed that the information they disclosed concerns disclosable conduct.

The authorised officer need not notify the person if it is not reasonably practicable (s 44(4)). A person may be considered to be contactable where they have provided a mail or email address, telephone number (and either answer the phone after several attempts or provide for a message to be left), or another nominated avenue by which direct contact may be made or a private message may be left during working hours.

What records need to be kept?

Section 6 of the PID standard requires agency procedures to state that an authorised officer must make a written record of the allocation decision, the reasons for the decision and the receiving agency's consent. The agency procedures must also require a written record of whether the discloser was notified and the details of how that happened (the day, time and means of notification, and the content of the notification). Appropriate records must be kept.

INVESTIGATING A DISCLOSURE

The principal officer must investigate a disclosure that has been allocated for investigation unless the PID Act allows otherwise. The principal officer may delegate any of their functions or powers to a public official who belongs to the agency (s 77). References to the principal officer in this chapter include references to their delegates, including an investigator.

When can an agency decide not to investigate?

The principal officer may decide not to investigate, or may discontinue an investigation, only on a ground set out in s 48, that is, if:

- » the discloser is not a current or former public official
- » the information does not to any extent concern serious disclosable conduct (see below)
- » the disclosure is frivolous or vexatious
- » the disclosure is the same or substantially the same as another disclosure which has been or is being investigated under the PID Act (this avoids duplication)
- » the disclosure is the same or substantially the same as a disclosure already investigated or currently being investigated under another Commonwealth law, and
 - it would be inappropriate to conduct another investigation at the same time, or
 - the principal officer is reasonably satisfied that there are no matters that warrant further investigation
- » the discloser has advised the principal officer that they do not wish the investigation to be pursued, and the principal officer is reasonably satisfied that there are no matters that warrant further investigation
- » it is impracticable to investigate the disclosure because:
 - of the age of the information
 - the discloser has not revealed their name and contact details, or
 - the discloser has failed, or is unable, to give the investigator the information or assistance they requested.

An investigation that has started may be discontinued on the same basis.

What is serious disclosable conduct?

The PID Act does not define 'serious disclosable conduct'. The principal officer should consider all the relevant circumstances based on the information before them. Factors which might be considered could include:

- » whether the wrongdoing, if proven, involves an offence with a significant penalty or would lead to severe disciplinary or other consequences
- » whether the wrongdoing was one of a series of incidents that indicates a course of conduct
- » the level of trust, confidence or responsibility placed in a public official who is alleged to have acted wrongly
- » the level of risk to others or to the Commonwealth
- » the harm or potential harm arising from the conduct, including the amount of public money wasted
- » the benefit or potential benefit derived by the public official or others
- » whether the public official acted in concert with others, and the nature of their involvement
- » any apparent premeditation or consciousness of wrongdoing

- » what the public official ought to have done and how their conduct might reasonably be viewed by their professional peers
- » any applicable codes of conduct or policies
- » maladministration that relates to significant failure in the administration of government policy, programs or procedures.

This list is not exhaustive and is provided as a guide to the types of issues that might be considered when determining if disclosable conduct is serious.

What is meant by frivolous or vexatious?

An example of a frivolous disclosure would be something so minor that no action is warranted, for example, a complaint that a public official made a minor error in a written document without any resulting disadvantage to anyone.

In determining whether a disclosure is vexatious, the principal officer should consider such factors as whether:

- » the disclosure was made with the intention of annoying or embarrassing someone, or was made for another purpose, rather than being made in good faith by a person concerned about stopping or preventing wrongdoing
- » the allegations are so obviously untenable or manifestly groundless that they cannot possibly be made out⁷.

However, the principal officer should be careful not to dismiss a disclosure merely because it appears to arise from workplace conflict or be associated with animosity, since it may also involve substantive issues of misconduct or wrongdoing which should be investigated.

Does a decision not to investigate prevent other action?

A decision not to investigate, or investigate further, under the PID Act does not prevent any other type of investigation of the matter (s 48(2)).

For example, a disclosure might be made about an alleged breach of the Code of Conduct under the Public Service Act. If the requirements for making an internal disclosure were met, the discloser would be given protection under the PID Act. However, the principal officer might determine that the alleged wrongdoing is not 'serious disclosable conduct', meaning it is not sufficiently serious to warrant investigation under the PID Act. Nonetheless, the allegation may still warrant investigation under the Code of Conduct procedures in force under the Public Service Act.

The same principle applies to an investigation that has commenced. The investigator may consider that part or all of the matter would be more appropriately dealt with under another Commonwealth law (s 47(3)), decide not to investigate that aspect further under the PID Act and recommend in their investigation report that action be taken under that other law.

Who must be notified of a decision not to investigate?

Notice of a decision not to investigate must be given to the discloser, provided they are readily contactable (s 50). The notice must give reasons for the decision and other action that may be available to them under other Commonwealth laws (such as in relation to a workplace grievance) (s 50(2)). The principal officer may delete from the reasons any material that would cause the document to be exempt for the purposes of Part IV of the FOI Act, or cause the document to have, or be required to have, a national security or other protective security classification or to contain intelligence information (s 50(3)).

⁷ *Attorney General v Wentworth* (1988) 14 NSWLR 481, 491.

A principal officer who decides not to investigate an internal disclosure must also give their reasons to the Ombudsman, or to the IGIS in relation to intelligence agencies (s 50A). The Ombudsman will have a notification form for agencies on its website.

The principal officer may give notice of the investigation decision in the same document that would give notice of an allocation decision under s 44 of the PID Act (s 50(4)).

CONDUCTING AN INVESTIGATION

An internal disclosure may be investigated in one of two ways:

- » under the PID Act
- » under other legislation applying to the Ombudsman, IGIS and prescribed investigative agencies.

Investigations under other legislation

The Ombudsman, IGIS and prescribed investigative agencies may use their own separate investigative powers rather than investigating under the PID Act (s 49). For example, the Ombudsman has powers to investigate under the *Ombudsman Act 1976*, and the IGIS has powers under the *Inspector-General of Intelligence and Security Act 1986*.

On completing an investigation under a separate investigative power, the Ombudsman, IGIS or prescribed investigative agency must inform the principal officer of each agency to which the suspected disclosable conduct relates that the investigation is complete, and must also inform the discloser if contacting them is reasonably practicable (s 49(4)).

The time limits and other provisions discussed below do not govern this type of investigation. The investigation, including the discretion not to investigate further, will instead be governed by the legislation under which the agency is acting (such as the *Ombudsman Act 1976* in the case of the Ombudsman).

Investigations under the PID Act

The investigation of a public interest disclosure under the PID Act is conducted as the principal officer (or their delegate) sees fit (s 53), subject to the need to comply with PID standards in force under s 74 and the following requirements:

- » Where the investigation relates to fraud against the Commonwealth, the principal officer must also act in accordance with the Commonwealth Fraud Control Guidelines (see regulations made under the *Financial Management and Accountability Act 1997* (FMA Act)) to the extent that those requirements are not inconsistent with the PID Act (s 53(4)).
- » In investigating an alleged breach of the Code of Conduct under the Parliamentary Service Act 1999, the principal officer must comply with the procedures established under s 15(3) of that Act.
- » In investigating an alleged breach of the Code of Conduct under the Public Service Act, the principal officer must comply with the procedures established under s 15(3) of that Act (s 53(5)).

This is consistent with the principle that the PID Act does not displace existing investigative mechanisms.

Who should investigate?

The principal officer is responsible for conducting investigations, and may delegate those powers and functions to an officer who belongs to their agency (s 77.) An investigator should be skilled in conducting investigations, and should become familiar with the PID Act, especially the confidentiality requirements and the protections for disclosers.

Investigators must ensure that they do not have an actual or perceived conflict of interest (for example, if information suggests they or a family member are implicated in the alleged wrongdoing). Unless there are other compelling reasons not to do so, they should be separate from the workgroup where the alleged wrongdoing has occurred.

How should investigations be carried out?

The principal officer (or their delegate) may obtain information from such persons and make such inquiries as they think fit (s 53(2)).

General guidance for investigators can be found in the Australian Government Investigation Standards 2011 (AGIS), available at www.ag.gov.au. The AGIS sets out minimum standards for agency investigations involving suspected breaches of the law and is mandatory for all agencies required to comply with the FMA Act. It has useful information on such topics as investigation planning, interviewing witnesses and finalising investigations. The Administrative Review Council also has produced a range of Best Practice Guides on aspects of administrative decision-making, including natural justice requirements, assessing evidence and decision writing, available at www.arc.ag.gov.au.

The PID Act does not give investigators any powers to compel witnesses to attend interviews, answer questions or produce documents. However, the principal officer is entitled to ask employees any relevant question concerning their employment.

If the disclosure is being investigated by the Ombudsman, IGIS or prescribed investigative agency under separate legislation, the powers and discretions under that legislation will apply.

Do Commonwealth secrecy provisions apply to investigations?

A Commonwealth law that prohibits the disclosure, recording or use of information does not apply to a disclosure, recording or use in connection with the conduct of a disclosure investigation, except if it is contrary to a designated publication restriction (s 75(1)(a)).

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

There is no exemption from the effect of a Commonwealth secrecy provision that is enacted after 15 January 2014 and is expressed to have effect despite s 75 (s 75(2)).

What does procedural fairness require?

In an administrative investigation the investigator must ensure that a person against whom allegations are made is accorded procedural fairness (also known as 'natural justice'). What procedural fairness requires varies with the circumstances, but essentially it means that the person is entitled to:

- » have a decision-maker act fairly and without bias
- » know the substance of allegations and evidence against them if an adverse finding is going to be made about their conduct
- » have a reasonable opportunity to respond.

Procedural fairness does not mean that a person against whom allegations are made must be advised as soon as the disclosure is received or an investigation is commenced. There may be good reasons to carry out certain investigations before interviewing a person who is suspected of wrongdoing, particularly if there are concerns that they may collude with others or evidence may be destroyed if they are alerted.

Nor does procedural fairness equate to a right to know the identity of the discloser who has alleged that the person has committed wrongdoing. However, the person may be able to guess the discloser's identity because the substance of the allegations makes it evident (for example, if the alleged wrongdoing was directed at the discloser, or if the discloser is known to be the only witness to an incident). If this is likely, it should be discussed with the discloser in advance (see Chapter 4). If the discloser is not willing to be identified, the investigator should consider whether it is possible to rely on other available information to support the allegations, so as to protect the discloser's identity.

A person also does not need to be told about an allegation against them that is of no substance (for example, if the agency determines not to investigate on the basis that the disclosure is clearly frivolous or vexatious).

Is there a time limit for investigations?

Investigations under the PID Act must be completed (that is, an investigation report must be completed) within 90 days of the date the matter was allocated for investigation (s 52(1)). While a straightforward matter may be completed quickly, more complex issues, where significant evidence needs to be gathered, may take much longer.

The Ombudsman, or the IGIS in the case of intelligence agencies, may grant one or more extensions of time (ss 52(3), (4)). If an extension is granted, the Ombudsman or the IGIS will inform the discloser and give reasons for the extension (s 52(5)). This does not apply if contacting the discloser is not reasonably practicable. In cases where the Ombudsman or the IGIS don't have the discloser's identifying or contact details the agency handling the disclosure will be asked to notify the discloser. The principal officer of the handling agency must also let the discloser know, as soon as reasonably practicable after the extension is granted, about the progress of the investigation (s 52(5)).

Agencies should lodge an application for an extension of time to investigate well before the end of the 90 days where it is likely or known that the investigation will not be completed within the time limit (or well before a first time-limit extension is about to expire and the agency needs a second extension). Such an application should include reasons why, in the agency's view, the investigation cannot be completed within the 90 days, the views of the discloser and an outline of action taken to progress the investigation.

The Ombudsman or the IGIS will consider the circumstances before granting an extension, including views of disclosers where practicable, as well as the reasons provided by the agency.

An investigation that is not completed within time does not become invalid (s 52(6)). However, agencies should request an extension if they need one, as otherwise the discloser may decide to release the information publicly on the basis that the investigation was not completed within time (see Chapter 2 regarding external disclosures).

Agencies that investigate public interest disclosures under another law (the Ombudsman, IGIS and prescribed investigative agencies) are not bound by the time limits in the PID Act, but rather by the legislation under which they investigate.

When will the Ombudsman investigate?

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

The Ombudsman will consider whether special reasons exist to conduct an investigation, or allocate the matter to the agency where the disclosable conduct is alleged to have occurred, or to a prescribed investigative agency with appropriate jurisdiction. If the Ombudsman does decide to investigate a disclosure, the investigative powers under the *Ombudsman Act 1976* will generally be used rather than the powers under the PID Act.

The Ombudsman may also investigate under the *Ombudsman Act 1976* if a complaint is made about an agency's actions in handling a public interest disclosure.

When will the IGIS investigate?

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

The IGIS will look for specific reasons to conduct an investigation rather than allocating the disclosure to the relevant agency. In most instances it will be appropriate for the agency where the disclosable conduct is alleged to be occurring or have occurred to conduct the investigation.

Can immunity from disciplinary action be granted?

Making a public interest disclosure does not protect the person from liability for their own wrongdoing (see Chapter 6). However, the discloser or another witness may seek immunity from disciplinary action for providing information about improper conduct in which they are implicated. It is up to the person with the power to take disciplinary action in each agency to decide how to exercise the discretion in such circumstances. The nature and seriousness of the witness's misconduct will be relevant to that decision.

Investigating disclosures that allege breaches of the APS Code of Conduct

When a disclosure concerns the conduct of APS employees that could give reasonable grounds for investigation of a suspected breach of the APS Code of Conduct (i.e. an investigation in accordance with an agency's procedures, established under s 15(3) of the Public Service Act), an agency may have two courses of action available.

Investigation under the PID Act

The principal officer of an agency may investigate the disclosure under Part 3 of the PID Act to assess if there is any substance to the alleged misconduct.

The PID investigation may be of short duration. This investigation may include consideration of whether a different investigation should be conducted under another law of the Commonwealth (s 47(3) – an investigation in accordance with an agency's s 15(3) procedures is another law of the Commonwealth for this purpose). The principal officer may choose to complete the PID investigation if he or she is satisfied that there is sufficient evidence to start a Code of Conduct inquiry under the Public Service Act. The principal officer should then prepare a report under s 51 of the PID Act.

In these circumstances, on this investigation, the principal officer in his or her report on the investigation may record a recommendation or a decision that a Code of Conduct inquiry under the Public Service Act be commenced. The Code of Conduct inquiry would be a subsequent separate investigation under s 15(3) of the Public Service Act to determine whether an APS employee has breached the Code of Conduct under that Act.

If the principal officer decides that there is insufficient prima facie evidence of the breach of the APS Code of Conduct arising from the disclosure then he or she should record their reasons for reaching this conclusion.

Discretion not to investigate or investigate further under the PID Act

The principal officer may determine not to investigate (or investigate further) a disclosure, if an investigation into the same (or substantially the same) disclosable conduct is already underway or has been concluded under procedures established under s 15(3) of the Public Service Act (48(1)(f-g)). If such a determination is made, the principal officer is required to notify the discloser of a decision not to investigate (or investigate further) under s 48, with reasons for the decision (ss 50(1) and 50(3) of the PID Act).

ENSURING CONFIDENTIALITY

It is an offence for a person who has information obtained in the course of conducting a disclosure investigation or in connection with their powers and functions under the PID Act to disclose or use the information (s 65(1)). The penalty is imprisonment for two years or 120 penalty units, or both. No offence is committed if:

- » the disclosure or use of the information is for the purposes of the PID Act or in connection with the person's powers and functions under the PID Act
- » the disclosure or use is for the purposes of, or in connection with, taking action in response to a disclosure investigation
- » the information has previously been lawfully published and is not intelligence information, or if it is intelligence information, the principal officer of the source agency for the information has consented to the disclosure or use (s 65(2)).

Agency procedures must provide for confidentiality of investigative processes (s 59(1)(b)).

Disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the discloser and any person who is the subject of the disclosure.

All interviews should be conducted in private. In particular, any interviews with the discloser should be arranged discreetly to avoid identification by other staff. Care should be taken to avoid any unauthorised divulging of information. All information obtained, including documents and interview tapes, should be stored securely and be only accessible by those who need to see them. Those who are interviewed should be advised that information about the matter is confidential, that release of information may jeopardise an investigation and that they may be committing an offence if they divulge any information that is likely to identify the discloser.

To satisfy confidentiality requirements, and to minimise the possibility of detrimental action, agencies should establish a secure record system to deal with internal disclosures. Agencies should ensure that:

- » all paper and electronic documents and files are secure and only able to be accessed by authorised officers, investigators and other officers involved in managing the disclosure
- » other materials such as interview tapes are stored securely with access only by officers involved in handling the disclosure
- » communications are not sent to an email address to which other staff have access or to a fax machine in an open area.

Disclosers will often be anxious about the prospect of information about their disclosures being revealed. The authorised officer should assure the discloser that their identity will be protected as much as possible at all times and of the procedures that are in place to ensure confidentiality (see Chapter 4). However, they also need to be realistic about the agency's capacity to protect the discloser's identity in certain circumstances, for example, if it is well known within an agency that only the discloser could have access to the relevant information. The discloser must be made aware that, to investigate a matter, their identity will quite possibly be revealed. While confidentiality may not be able to be maintained, the discloser is still afforded protection against reprisal.

KEEPING RECORDS

Good records ensure that all action taken regarding the receipt and processing of a public interest disclosure is reviewable (including by the Ombudsman or IGIS).

Details about how and when a public interest disclosure was made must be recorded and kept in a secure place. If the disclosure was given verbally, consideration should be given to asking the discloser to sign a record of the disclosure. Subsequent conversations where the disclosure is discussed should also be documented. Each disclosure should be given a unique reference number. Details of the risk assessment of reprisal, allocation, the investigation, notifications to the discloser and others should also be kept. The records should be factual and free from unnecessary statements such as personal opinion.

Agencies are required to provide to the Ombudsman certain information about disclosures they have handled for the purposes of the annual report under the PID Act (refer s 15 of the PID standard).

CRIMINAL MATTERS

When should a criminal matter be referred to police?

An investigator who suspects that information disclosed as part of an internal disclosure, or information that is obtained during the course of an investigation, constitutes evidence of an offence against a Commonwealth, state or territory law, may disclose that information to a member of a relevant police force (s 56(1)). Depending on the particular offence involved, this could be a police force of a state or territory.

However, in cases where the potential offence is serious (that is, punishable by imprisonment for two years or more), notification of the relevant police force is mandatory (s 56(2)). These notification provisions apply when an investigation is being conducted under the PID Act as well as where an investigative agency conducts a PID investigation using a 'separate investigative power'.

Notification to police under s 56 of the Act does not necessarily mean the investigation under the PID Act (or under other legislation) can or should stop. If police do commence an investigation, the principal officer may decide not to investigate further on the basis that it would be inappropriate to conduct another investigation at the same time (s 48(1)(f)). However, the investigator would need to know that police were investigating the matter—notification to them alone would not be sufficient.

When should an agency conduct a criminal investigation?

The PID Act has not altered the current situation whereby some agencies, such as ASIC under the *Corporations Act 2001*, are able to investigate certain criminal offences. The AFP investigates serious or complex crime against Commonwealth laws, which can include fraud. Other agencies may investigate less serious incidents of fraud against the Commonwealth.

As noted above, if a public interest disclosure involves suspected fraud, an agency investigation must be conducted in accordance the *Fraud Control Guidelines* in force under the FMA Act, available at www.comlaw.gov.au (s 53(4)). Such investigations should in turn follow the *Australian Investigative Standards* which set out minimum case handling standards, including minimum training requirements for investigators and requirements for conducting interviews and preparing briefs of evidence.

If the matter does not involve criminal conduct, an administrative investigation is appropriate.

KEEPING THE DISCLOSER INFORMED

A discloser can easily become concerned or dissatisfied if they feel they are being left in the dark or that nothing is happening. The PID Act requires the discloser to be notified at various stages in the process, provided the person's contact details are available. The discloser must be advised:

- » when the disclosure is either allocated for investigation, or not allocated because it has been determined not to be an internal disclosure

- » of information about the principal officer's discretionary powers to not investigate within 14 days of the disclosure being allocated (s 9 of the PID standard)
- » if the agency decides to investigate
- » if the investigation is under the PID Act, the estimated length of the investigation
- » if the agency decides not to investigate, the reasons for the decision and any action that might be available to the discloser under other Commonwealth laws
- » if an investigation is conducted under the PID Act and an extension of time is granted by the Ombudsman or IGIS, the progress of the investigation
- » after the investigation report is completed.

Apart from the legislative requirements, the agency should keep the discloser up to date with reasonable information on what is being done in response to their disclosure. Early in the process, an authorised officer should make sure the discloser understands:

- » what the agency intends to do
- » the likely timeframe for an investigation
- » the discloser's responsibilities (such as maintaining confidentiality)
- » how they will be updated on progress and outcomes
- » who to contact if they want further information or are concerned about reprisal.

Any questions or concerns the discloser raises should be addressed honestly and as soon as possible. If they have not heard anything within a reasonable period, they are entitled to ask for an update. The discloser can also be referred to:

- » the agency's public interest disclosure procedures
- » support networks or services
- » the guide for disclosers and this guide, available at www.pid.ombudsman.gov.au.

It is important to balance the requirement to inform the discloser with the need to maintain confidentiality in the investigative process. The authorised officer and investigator need to be careful not to release information if doing so will impact on anyone's safety, the ongoing investigation, or the confidentiality of anyone who is under investigation.

It is also important to remind disclosers that they do not 'own' a public interest disclosure. It is up to agencies to determine how best to resolve matters by identifying problems and taking corrective action.

AFTER THE INVESTIGATION

After an investigation, the principal officer must ensure that a report is prepared and that appropriate action is taken by the agency.

Reports of investigation

After an internal disclosure has been investigated, the principal officer must prepare a report that sets out the matters considered, how long the investigation took, any findings that were made, any action either recommended or taken, any claims or evidence of detrimental action to the discloser, and the agency's response to those claims (s 51).

Detriment means any disadvantage, including dismissal, injury in a person's employment, discrimination between an employee and other employees, or alteration of an employee's position to their disadvantage (s 13(3)) (see Chapter 6). It does not include administrative action that is reasonable to protect a person from detriment (s 13(3)).

Investigation reports must as a minimum set out the following:

- » the matters considered in the course of the investigation
- » the duration of the investigation
- » the principal officer's findings
- » the action (if any) that has been, is being, or is recommended to be taken to address those findings
- » any claims made about, and any evidence of, detrimental action taken against the discloser, and the agency's response to those claims and that evidence (s 51(2)).

Reports must also comply with the PID standard issued by the Ombudsman under s 74.

The investigation report must show that conclusions have been drawn based on sufficient substantiating evidence.

Copy for the discloser

The principal officer must give a copy of the investigation report to the discloser within a reasonable time of preparing it (provided that contacting the discloser is reasonably practicable) (s 51(4)). The version given to the discloser may have some information deleted if it is likely to enable the identification of any person (the discloser or another person, such as someone who is under investigation), or if including the information would cause the document:

- » to be exempt under the FOI Act (exempt material includes commercially valuable information, material obtained in confidence, Cabinet information, personal information whose disclosure would be unreasonable and contrary to the public interest, and information that could prejudice an investigation or affect the effectiveness of agency audit procedures)
- » to have a national security or protective security classification, or
- » to contain intelligence information or sensitive law enforcement information.

If the investigation is conducted under another law by the Ombudsman, IGIS or investigative agency, the discloser will be informed that the investigation is complete (s 49(3)). The information that they can receive about the outcome will depend on the law under which the investigation was conducted.

What should a person be told if allegations were made against them?

If the allegations in a disclosure have been investigated and the person who is the subject of them is aware of the allegations or that there has been an investigation, that person should be formally advised of the outcome of the investigation as it relates to them.

Agencies should consider how they will support the subject of a disclosure when allegations, which may have been publically disclosed, are shown to be clearly wrong or unsubstantiated.

What action does an agency need to take?

What happens at the end of an investigation will vary with the circumstances. The principal officer must take appropriate action in response to recommendations and other matters contained in the investigation report. Actions might include:

- » commencing Code of Conduct proceedings under the Public Service Act or another disciplinary process
- » referral of the matter to the police or another body that can take further action
- » mediation or conciliation of a workplace conflict
- » an internal audit or other review of an issue or the operations of a particular unit
- » implementing or changing policies, procedures or practices
- » conducting training and awareness sessions for staff.

What happens if the disclosure is not substantiated?

There may be a number of reasons why a public interest disclosure is not substantiated, including insufficient evidence to find on the balance of probabilities that any disclosable conduct occurred. The discloser should be given as much information as possible in light of confidentiality limitations, and be assured that it does not mean that making a disclosure was not worthwhile. The information the discloser provided may be useful in making the agency aware of possible gaps in its policies or procedures, or lead to consideration of how to prevent similar issues in the future.

Regardless of the outcome, the discloser should be assured that they will still be protected under the PID Act for making a disclosure and that the agency will continue to support them.

What if the discloser is not satisfied with the agency's action?

A person who has made an internal disclosure may be unhappy with the agency's decision not to investigate a matter. If the disclosure is investigated, they may believe that the investigation or the agency's response to the investigation was inadequate. A reasonable belief that an investigation under the PID Act was inadequate or that the agency's response was inadequate is one of the conditions for making an external disclosure (see Chapter 2).

A discloser who is unhappy with the process or how they have been treated may also complain to the Ombudsman (or the IGIS in the case of intelligence agencies). Agencies may want, therefore, to consider review or reconsideration measures to address situations where a discloser is not satisfied with the agency's handling of an internal disclosure.

In order to manage those possibilities well, it is important to manage the discloser's expectations from the outset. They should be clear about the fact that they do not 'own' the public interest disclosure, and that it is up to the agency to determine how best to resolve matters by identifying problems and taking corrective action.

It is also important that explanations given to the discloser at the end of the investigation are as comprehensive as possible, allowing for privacy and confidentiality considerations. The discloser needs to feel that the agency values their contribution in bringing the matter to their attention. Disclosers should be encouraged to approach the agency if they wish to discuss concerns about the process or the outcome. Agency procedures should nominate who to contact in that case.

When is an investigation or subsequent action inadequate?

The PID Act does not define when an investigation or action taken by an agency as a result of the investigation is inadequate.

However, an investigation would generally be considered inadequate if:

- » the investigator showed bias or there was a strong apprehension of bias in how the investigation was conducted
- » information that was reasonably available, relevant and materially significant was not obtained
- » the findings or recommendations set out in the report were unreasonable on the basis of the information obtained during the investigation
- » the investigation report did not set out findings or recommendations that should reasonably have been made on the basis of the information obtained.

Action taken as a result of the investigation may be considered inadequate where the report recommended certain action be taken and no action was or is planned to be taken.

PITFALLS TO AVOID

Some common problems to avoid include:

- » significant delay in completing investigations
- » lack of awareness of legislation, procedures and guidance material
- » not maintaining confidentiality in investigations
- » conflicts of interest
- » giving witnesses the opportunity to collude
- » not pursuing obvious lines of enquiry
- » poor quality of investigation reports, with findings lacking sufficient substantiating evidence
- » investigators having little or no experience or training in conducting investigations.⁸

8 See Ombudsman Victoria, *Annual Report 2010*, pp 74-76, for discussion of these recurring issues in public interest disclosure investigations in Victoria.

6 SUPPORT AND PROTECTION

Protecting the discloser's identity
Immunity from liability
Reprisal
Support
Supporting and protecting a person who is subject to an allegation
Protection for agency staff

The PID Act provides a means for protecting public officials, and former public officials, from adverse consequences of disclosing information that, in the public interest, should be disclosed (s 7(1)). Supporting and protecting disclosers and other staff is an important agency responsibility that is key to successful implementation of the scheme.

The PID Act provides for:

- » protection of the discloser's identity
- » immunity from civil, criminal or administrative liability
- » protection from reprisal.

These protections and immunities apply not only to internal disclosures, but to external and emergency disclosures made in accordance with the PID Act.

Even if the discloser's report of wrongdoing turns out to be incorrect or unable to be substantiated, they are still protected under the PID Act, provided they reasonably believe or believed at the time of the disclosure that the information tends to show disclosable conduct. However, making a public interest disclosure does not exclude a person from being reasonably managed or disciplined for any unsatisfactory performance or disclosable conduct on their part.

In addition to the protections under the PID Act, an agency should ensure that support is provided where appropriate. The agency should also be mindful of their responsibilities towards anyone against whom an allegation has been made.

Each of these topics is discussed in more detail below, followed by an explanation of how people involved in handling or investigating a public interest disclosure are protected.

PROTECTING THE DISCLOSER'S IDENTITY

A person commits an offence if they disclose or use information that is likely to enable the identification of the discloser (s 20), 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 required under another Commonwealth law or a prescribed state or territory law
- » is in connection with the Ombudsman's functions under s 5A of the *Ombudsman Act 1976* or the IGIS's functions under s 8A of the *Inspector-General of Intelligence and Security Act 1986*.

A penalty of imprisonment for 6 months or 30 penalty units, or both, applies.

What is required?

Balancing the need to protect the discloser's identity with protecting them against reprisal and facilitating an investigation can be challenging. In order to protect a discloser's identity, agencies should:

- » limit the number of people who are aware of the discloser's identity or information that would tend to identify them
- » remind each person who has the information that they should keep it confidential and that unauthorised disclosure may be a criminal offence
- » assess whether anyone who is aware of the discloser's identity may have a motive to take reprisals against them or impede the progress of the investigation, and monitor the situation
- » ensure that the discloser can communicate with a support person, the authorised officer or investigator without alerting other staff.

A discloser may consent to their identifying information being released to certain other people (such as the Ombudsman, another agency that has been allocated the disclosure or their workplace) – if so, it is good practice to ask them to confirm this in writing. If they do not consent, it may not be practicable to protect their identity, particularly if it is widely known that the person has made the disclosure, or if identifying information needs to be disclosed for the matter to be effectively investigated.

Will a person's identity be disclosed to a court or tribunal?

The requirement to protect a discloser's identity remains even where court or tribunal proceedings are involved. A former or current public official is not to be required to disclose to a court or tribunal identifying information that the person has obtained, or produce to a court or tribunal a document containing identifying information, except where necessary to give effect to the PID Act (s 21).

Anonymous disclosers

If an anonymous disclosure is made, it is difficult for an agency to protect the discloser and other staff from reprisal or workplace conflict.

Staff may speculate, correctly or otherwise, about who made the disclosure, and that person may be at risk of reprisal. If the discloser's identity becomes known, the risk of reprisal may escalate and require prevention or mitigation strategies to be implemented, such as raising the issue with staff, reminding them of the agency's commitment to the public interest disclosure process and reminding them that reprisal is a criminal offence.

A risk assessment should be conducted when the disclosure is received, in order to consider whether the discloser's identity can be readily ascertained or may become likely during an investigation (see Chapter 4).

IMMUNITY FROM 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 (s 10(1)(a)). This means, for example, that a person would not be committing an offence against the secrecy provisions of the *Crimes Act 1914* for making a disclosure in accordance with the PID Act. The person also has absolute privilege in proceedings for defamation in respect of the public interest disclosure (s 10(2)(a)).

No contractual or other remedy may be enforced, and no contractual or other right may be exercised, against a person on the basis of the public interest disclosure (s 10(1)(b)). A contract to which the discloser is a party cannot be terminated because of the public interest disclosure (s 10(2)(b)).

However, these immunities do not apply if the discloser:

- » knowingly makes a statement that is false or misleading (s 11)
- » makes a disclosure knowing that it contravenes a designated publication restriction and without a reasonable excuse for doing so (s 11A). (As explained in Chapter 5, a designated publication restriction means certain restrictions listed in the PID Act (s 8). They generally concern protecting the identity of people by such means as court or tribunal orders that information not be published (such as under the *Family Law Act 1975* and the *Migration Act 1958*), witness protection and law enforcement mechanisms (see the full definition in s 8).

The immunities under s 10 apply despite any provision in another Commonwealth law, unless that other provision is enacted after 15 January 2014 and is expressed to have effect despite s 10 or Part 2 of the PID Act (s 24).

It is important to note that making a disclosure about matters that include a discloser's own wrongdoing does not protect them from liability for their wrongdoing (s 12).

What happens if proceedings are commenced?

If civil or criminal proceedings are instituted against someone because they made a disclosure, the discloser can claim immunity under s 10 of the PID Act (s 23). The discloser must be able to point to evidence that suggests a reasonable possibility that their claim is correct (s 23 (1)(a)). It is then a matter for the person bringing the proceedings against the discloser to prove that the claim is incorrect (s 23(1)(b)). Other evidentiary and procedural matters that apply in such circumstances are also covered in s 23.

REPRISAL

A person who makes a public interest disclosure is protected from reprisal in the following ways:

- » it is a criminal offence to cause detriment to a person because it is suspected or believed that they have made or will make a public interest disclosure
- » a discloser has the right to apply for an injunction to prevent a reprisal
- » a discloser has the right to apply for compensation for loss, damage or injury suffered from a reprisal.

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 (s 13(1)).

Taking a reprisal is a criminal offence, punishable by imprisonment for two years or 120 penalty units, or both (s 19). It is not necessary to prove that a person actually made or intended to make a public interest disclosure (s 19(2)): what is relevant is the intention and action (or omission) of the person who took the reprisal.

A person also commits an offence if they threaten to take a reprisal and either intend the threat to cause fear or are reckless about this occurring (s 19(3)). The threat may be express or implied, conditional or unconditional (s 19(4)). It is not necessary to prove that the person who was threatened actually feared that the threat would be carried out (s 19(3)).

'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 (s 13(2)). For example, it could include an action (or threat of action) that results in:

- » a physical or psychological injury, including a stress-related injury
- » intimidation, harassment or victimisation
- » loss or damage to property
- » disadvantage to a person's career (for example, denying them a reference or a promotion without appropriate reasons).

The agency may be open to a claim for damages if it cannot show it took reasonable steps to prevent a reprisal (see below).

What is not a reprisal?

Administrative action that is reasonable to protect the discloser from detriment is not a reprisal (s 13(3)). For example, where a person has made a disclosure in relation to practices in their immediate work area, it may be appropriate to transfer them to another work area to ensure they are not harassed or victimised. It is important to ensure there is no perception that they are being punished for having made a disclosure.

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.

What should an agency do to protect a discloser?

Principal officers (i.e. agency heads) must put procedures in place for assessing risks that reprisals might be taken (see Chapter 4), and must ensure that public officials who belong to the agency are protected from detriment or threats of detriment related to public interest disclosures (s 59).

The agency head's responsibility to protect public officials who belong to their agency applies even if the public official has made a disclosure relating to another agency, or if a different agency (such as the Ombudsman or IGIS) is investigating the disclosure. Staff should be encouraged to advise an authorised officer or their supervisor or manager if they believe they are being or may be subject to a reprisal.

Every allegation of reprisal must be taken seriously, recorded and responded to. All those involved in handling the public interest disclosure and aware of the discloser's identity – which may include the authorised officer, investigator, supervisor, manager and anyone else to whom the discloser has agreed to reveal their identifying information or who has that information for the purposes of the PID Act – need to monitor the work environment for signs of detriment and if necessary, take corrective action early. If harassment or victimisation is ignored, problems are likely to escalate.

Responses to alleged reprisals will depend on their seriousness and other circumstances. Actions which may be taken to resolve workplace conflict include holding discussions with staff, providing guidance and support and closer supervision of the workplace for inappropriate workplace behaviours. Managers should also be conscious of setting an example for staff in their approach to public interest disclosures and support for disclosers. Action under an agency's bullying and harassment policy may be appropriate. In many agencies, conduct amounting to a reprisal will be a breach of the applicable code of conduct and can be dealt with under the agency's disciplinary system. Detrimental action may also be a criminal offence.

If the situation is potentially serious enough to require significant action such as transfer, relocation, a leave of absence, physical protection or an injunction, options should be discussed with the (specialist) area best able to assist in such PID-related matters in the agency.

What orders can the Federal Court make?

A person who has made a public interest disclosure can apply to the Federal Court or Federal Circuit Court for a range of orders where reprisal against them has been threatened or taken. Multiple orders may be made in relation to the same conduct (s 17). A person has the right to take such action even if a prosecution for a reprisal offence has not been or cannot be brought (s 19A).

Injunctions, apologies and other orders

Where the court is satisfied that another person took, threatened, or is taking or threatening, a reprisal, the court may grant an injunction:

- » restraining that person from taking or threatening to take a reprisal
- » requiring the person to do something, including making an apology, or
- » any other order the court considers appropriate (s 15).

The court may also make orders, including an injunction, against other people who are involved in taking, or conspiring to take, reprisal action (for example, by aiding or abetting the reprisal, inducing the conduct against the person or in any way being knowingly concerned in the conduct) (s 15(2)).

Compensation

A person has the right to apply for compensation for loss, damage or injury suffered from a reprisal or threat of reprisal (s 14). A claim can be made not only against the person causing the reprisal but also their employer if the reprisal is in connection with their position as an employee (s 14(1)) (the court may order that the employer is jointly or wholly liable).

The employer has a defence if they took reasonable precautions and exercised due diligence to avoid the reprisal or threat (s 14(2)).

Reinstatement

The court may order a person to be reinstated to their position, or a position at a comparable level, if satisfied that the person's employment was terminated (or purported to be terminated) wholly or partly as a reprisal for making or proposing to make a public interest disclosure (s 16).

What remedies are available under the *Fair Work Act 2009*?

Making a public interest disclosure is recognised for the purposes of the *Fair Work Act 2009* (Fair Work Act), which protects employees from any unlawful adverse action based on their workplace rights. Section 22 provides that the Fair Work Act applies in relation to the making of a public interest disclosure as if, for the purposes of the Fair Work Act, the PID Act were a workplace law and the making of the disclosure was a process or proceeding under a workplace law. As a result, the right to make a public interest disclosure is a workplace right for employees under the Fair Work Act.

To avoid duplication, a person cannot apply for an order under the PID Act if they have applied for an order in relation to the same conduct under ss 394 or 539 of the Fair Work Act (s 22A(1)). Similarly, a person who has made an application under the PID Act cannot apply to the court under the Fair Work Act (s 22A(2)). (This restriction does not apply if the other application has been discontinued or failed for want of jurisdiction s 22A(3)).

The agency should encourage staff to make sure that the agency knows their concerns so that they can take any appropriate action to protect them, and encourage them to talk over any concerns with an authorised officer, supervisor or manager.

SUPPORT

Section 7 of the PID standard provides that internal agency procedures must outline any support that will be made available to public officials who make disclosures relating to the agency.

A discloser who feels supported and sees the agency's procedures as fair is more likely to accept the agency's decision, even if the outcome is not what they wished. The agency should provide active support for the discloser, including:

- » acknowledgement for having come forward with a report of wrongdoing
- » an offer of support and information about what options are available
- » an assurance that the agency will take all reasonable steps necessary to protect them.

Although an investigator may be able to provide general information about the investigation process, they are not the most appropriate person to support a discloser. Their role is to investigate matters objectively and impartially, and they may sometimes reach a conclusion that the discloser was not expecting, based on the evidence they have.

Apart from a supervisor or manager (if appropriate) or an authorised officer, the following sources of support can be very helpful to a discloser who is finding the process stressful:

- » peer support officers
- » family and friends
- » Employee Assistance Programs which provide staff with access to professional counselling services.

Some agencies may have established networks that can be utilised for support, such as a peer support or harassment contact officer network. Larger agencies may have professional staff such as welfare officers. It may be appropriate to seek the discloser's consent to provide their details to an appropriate support person. Disclosers should be advised that they can discuss their general situation and the process with support people, but they should not provide information that would identify those alleged to have committed wrongdoing or other information that they have a duty to keep confidential. They may also disclose information to a lawyer for the purposes of seeking legal advice or professional assistance in relation to making a disclosure (other than intelligence information, including sensitive law enforcement information), and this disclosure is authorised under the PID Act (see Chapter 2).

What impact can investigations have on the workplace?

If an investigation becomes generally known to staff (as is likely once interviews commence) people's reactions can vary considerably. Some staff may welcome action being taken, while others may not. As a result, workplace tensions may arise.

Managers can help by keeping the channels of communication open, while maintaining confidentiality as far as practicable. If the discloser's confidentiality has already been compromised, managers may:

- » let staff know that information about disclosable conduct has been provided
- » allow staff to air their feelings
- » provide information about the PID Act and agency procedures
- » indicate when further information is likely to be available.

What are the ongoing support requirements?

It is important that the authorised officer or other appropriate person involved in handling the disclosure contacts the discloser periodically to advise them of progress on their disclosure, taking into account confidentiality requirements (see Chapter 5 for notification requirements), and to ensure that the discloser is not suffering any detriment.

In particular, if a matter is not allocated for investigation or if an investigation is unable to substantiate their allegations, the discloser should be given sufficient information to help them understand the reasons (see Chapter 5 for further details).

Managing the discloser's performance

Agencies must ensure that all staff understand that making a public interest disclosure does not prevent supervisors and managers from addressing the discloser's unsatisfactory performance in the workplace.

Nor does making a disclosure protect a person from the consequences of their own improper conduct if they are implicated in the wrongdoing they have reported (s 12). However, the agency may consider that the discloser's admission is a mitigating factor when considering disciplinary or other action against them, for example, if the discloser has brought to light information about serious wrongdoing in which they had minor involvement. This is a matter for the agency's discretion.

Disciplinary or other action against a discloser may be perceived as being taken in retaliation for making the disclosure, rather than reasonable action to address unsatisfactory performance. If such action is being contemplated, the agency must be able to demonstrate clearly that:

- » there are sufficient grounds for the action
- » the action is reasonable and proportionate, and
- » the action is not being taken because the person made a disclosure.


All actions, conversations, decisions and reasons should be documented thoroughly. The agency's procedures in relation to performance management and/or disciplinary action should be followed. A manager may also wish to obtain legal advice prior to taking any action against the discloser, to ensure that they are not left open to an allegation of taking a reprisal.

SUPPORTING AND PROTECTING A PERSON WHO IS SUBJECT TO AN ALLEGATION

Agencies may also wish to consider support for any staff member who is the subject of an allegation made in a public interest disclosure.

A person who is subject to allegations of wrongdoing should be given information about their rights and obligations under the PID Act, and about the agency's investigation procedures and any other relevant matter, such as Code of Conduct proceedings. In an investigation the agency must ensure that the person is accorded procedural fairness, but this does not mean they need to be immediately informed about the disclosure or the investigation (see Chapter 5 for further information about procedural fairness).

A key principle to bear in mind is that anyone who is subject to an allegation or an investigation is innocent of any wrongdoing until proven otherwise, and they may be completely exonerated. They are likely to find the experience very stressful. Agencies should ensure that all staff are aware of access to employee assistance programs or other support if they need it.



The identity of a person who is the subject of allegations or an investigation should also be protected as much as practicable. Information that identifies them should only be passed to those involved in the investigation or in taking other necessary action under the PID Act (such as action to minimise the risk of reprisal against the discloser).

PROTECTION FOR AGENCY STAFF

Section 78(1) provides that a principal officer or their delegate, an authorised officer or a supervisor or manager of a discloser is not liable to any criminal or civil proceedings or any disciplinary action for acting in good faith in the exercise of functions and powers under the PID Act.

This protection does not apply to a breach of a designed publication restriction (ss 8, 78(2)). Nor does it affect any right under the *Administrative Decisions (Judicial Review) Act 1977*, to seek review by a court or tribunal of a decision, conduct or failure to make a decision.

7 THE ROLE OF KEY AGENCIES

The Ombudsman
The Inspector General of Intelligence and Security
Prescribed investigative agencies

THE OMBUDSMAN

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

- » determining standards with which agencies must comply
- » 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
- » preparing annual reports on the operation of the PID Act.

In addition, the Ombudsman is able to receive and investigate complaints about the handling of public interest disclosures under the *Ombudsman Act 1976*. The Ombudsman may also use own motion powers under the *Ombudsman Act 1976* to investigate public interest disclosure matters.

Determining standards

The Ombudsman has the power to determine PID standards in relation to particular matters covered by the Act (s 74). The PID standards are legislative instruments and are available at www.comlaw.gov.au (a link will also be available on the Ombudsman's website).

Agencies must comply with the Ombudsman's PID standards when:

- » preparing procedures for dealing with internal disclosures made under the Act
- » investigating disclosures under the Act
- » preparing reports of investigations
- » providing information to Ombudsman for the purposes of the Ombudsman's annual reporting role.

Receiving, allocating and investigating disclosures

A public official may make a disclosure directly to the Ombudsman about wrongdoing relating to any agency if they believe on reasonable grounds that it would be appropriate for the Ombudsman to investigate the matter. The only exception is if the matter relates to an intelligence agency - in that case the person may make a disclosure directly to the IGIS.

Unless special circumstances exist, the Ombudsman or IGIS may allocate a disclosure it receives from a public official to another appropriate agency, including the agency the disclosable conduct relates to or the agency the public official belongs to. This is consistent with a key principle under the PID scheme that an agency should handle disclosures internally and that disclosers should be protected from reprisals.

When investigating a disclosure the Ombudsman may, where appropriate, use the general investigative powers under the *Ombudsman Act 1976*. The broad powers include requiring the production of documents or other written records, requiring questions to be answered, examining witnesses on oath or affirmation, visiting premises and inspecting documents.

Making decisions about extensions of time

Agencies have 90 days to complete their investigation of a public interest disclosure, including preparing the investigation report. The Ombudsman (or the IGIS in the case of intelligence agencies) can grant extensions of time either on request from a discloser or agency, or, alternatively, on their own initiative. If extensions are granted or made the Ombudsman (or IGIS) must inform the discloser of the decision and reasons for the extension (s 52).

Providing assistance, education and awareness programs

The Ombudsman's functions include assisting principal officers, authorised officers and public officials in relation to the PID Act, and conducting education and awareness programs (s 62). Information sheets and guides are available on the Ombudsman's website. Agencies and disclosers (both potential and actual) are also able to email and phone the Ombudsman's office in the event that they have queries regarding the operation of the PID Act. The Ombudsman's office also provides presentations on the operation of the PID scheme to agencies and other stakeholders and will continue to conduct awareness and information sessions in the future.

Preparing annual reports

The Ombudsman must prepare a report to parliament each year on the operation of the PID Act (s 76). This report must include the following information for the financial year from agencies (s 76(2))

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

Assisting the Ombudsman

An agency must provide information requested by the Ombudsman for the purposes of preparing the Ombudsman's annual report under the PID Act (s 76). Agencies need to have regard to any PID standards set by the Ombudsman under s 74 of the Act when providing information. The information may have deleted from it any information that is likely to enable the identification of any person, and any information which would result in the document being exempt under the FOI Act or result in it having a national security or other protective security classification (s 76(4)).

More broadly public officials are required to use their best endeavours to assist the Ombudsman in the performance of the Ombudsman's function under the PID Act (s 61(2)). This includes assistance with the Ombudsman's role in receiving notifications of allocation of public interest disclosures, assessing requests for extension of time for investigations and receiving notification and reasons from agencies where discretion not to investigate or not investigate further have been exercised. Similar requirements apply to intelligence agencies assisting the IGIS under the PID Act (s 61(3)).

Investigations under the *Ombudsman Act 1976*

One of the Ombudsman's main functions under the *Ombudsman Act 1976* is to investigate complaints made about the actions and decisions of government agencies. This can include complaints about how an agency has handled a public interest disclosure. The Ombudsman may, however, exercise discretion not to investigate such a complaint or may transfer the complaint to more appropriate oversight agencies specified under the *Ombudsman Act 1976*.

The Ombudsman also has the power to conduct own motion investigations. The scope of such investigations commonly relates to systemic issues and may include how agencies have undertaken their responsibilities under the PID Act.

THE INSPECTOR GENERAL OF INTELLIGENCE AND SECURITY

The IGIS performs a similar role as the Ombudsman in respect to the six intelligence agencies: the Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Office of National Assessments, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation and Australian Signals Directorate. These roles include

- » receiving notifications of allocations by intelligence agencies
- » receiving notifications from intelligence agencies where the discretion has been exercised not to investigate or not investigate further
- » receiving, allocating and investigating disclosures about intelligence agencies
- » making decisions about extensions of time for intelligence agency investigations
- » providing assistance, education and awareness programs
- » assisting the Ombudsman in relation to the performance of the Ombudsman's functions under the PID Act.

The IGIS can use investigative powers under the *Inspector-General of Intelligence and Security Act 1986* when investigating disclosures under the PID Act, and can conduct own motion investigations. More information about the role and functions of the IGIS are at www.igis.gov.au.

PRESCRIBED INVESTIGATIVE AGENCIES

Investigative agencies are those agencies listed in PID rules as well as the Ombudsman and IGIS (s 8). They are statutory agencies that have special powers to investigate matters within a particular jurisdiction.

Investigative agencies can use their investigative powers under their own legislation when dealing with a disclosure under the PID Act (s 49).

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

APPENDIX 1 – OTHER MATTERS

FURTHER INFORMATION

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

- » The Administrative Review Council has produced a range of Best Practice Guides on aspects of administrative decision-making, including natural justice requirements, assessing evidence and decision writing, available at www.arc.ag.gov.au.
- » The AGIS are available at www.ag.gov.au. The AGIS sets out minimum standards for agency investigations involving suspected breaches of the law and is mandatory for all agencies required to comply with the FMA Act. It has useful information on such topics as investigation planning, interviewing witnesses and finalising investigations.
- » The PID Act, PID rules and PID standards made by the Ombudsman are at www.comlaw.gov.au.
- » For information about the role and functions of the IGIS, see www.igis.gov.au.
- » For information about breaches of the APS Code of Conduct, see www.apsc.gov.au.
- » Information about Australian workplace rights and rules and the role of the Fair Work Ombudsman is at www.fairwork.gov.au.
- » More information on the PID scheme, including fact sheets and guides, is on the Ombudsman's website at www.pid.ombudsman.gov.au.