

Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021*

Notifiable instrument NI2021–381

made under the

Public Interest Disclosure Act 2012, section 32 (Integrity commissioner’s guidelines)

1 Name of instrument

This instrument is the *Public Interest Disclosure (Integrity Commission – Managing Disclosures and Conducting Investigations) Guidelines 2021*.

2 Commencement

This instrument commences on the day after notification.

3 Commission’s Guidelines

I make the *Integrity Commission (Managing Disclosures and Conducting Investigations) Guidelines 2021* as set out at Schedule 1 to this instrument.

The Hon Michael F Adams QC

Commissioner
ACT Integrity Commission

24 June 2021

*Name amended under Legislation Act, s 60



Schedule 1

Public sector entity guide to managing disclosures and conducting investigations under the *Public Interest Disclosure Act 2012*

A guide for public sector entities to assist their administration of their obligations under the *Public Interest Disclosure Act 2012* (ACT).

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COMMISSIONER'S FOREWORD

The *Public Interest Disclosure Act 2012* (ACT) ('**PID Act**') provides the legal framework for determining what disclosures qualify as public interest disclosures ('**PID**') and the protections given to disclosers, who may be public officials or private individuals. The essential purpose of the PID Act is to encourage people who become aware of misconduct in the public sector to come forward. It does this by protecting them from any retribution, reprisal, or retaliatory actions to which they might be exposed by making reports and to ensure that appropriate investigations of their information is undertaken. PIDs must be about substantial problems concerning maladministration, threats to public health or safety, or the environment. ACT public sector entities play a critical role under the PID Act as receivers of initial reports and investigating those which qualify as PIDs as well as protecting disclosers from retribution or retaliation.

The ACT Integrity Commission ('**Commission**') is required to issue guidelines to assist public sector entities in dealing with reports of wrongdoing which may be PIDs, how disclosures must be investigated and how disclosers are to be protected. These guidelines provide practical advice, as well as an overview of how the PID Act operates in practice.

Ensuring that reports of wrongdoing are investigated appropriately is critical to the overall operation of the PID scheme. Rigorously investigating reports of public sector wrongdoing provides confidence that wrongdoing within our public sector will be identified, corrected, and prevented.

It is the responsibility of all citizens to speak up if they witness, or suspect, wrongdoing. Whistle-blowers, in particular, play an important role in ensuring government remains accountable, transparent, and responsive to scrutiny. The PID Act provides critical statutory protections to those brave enough to speak out.

It is worth noting that the PID Act is only a part, albeit important, of the framework for dealing with mismanagement within the ACT public sector. Every employee has the duty of reporting and/or dealing with unethical or harmful conduct that could adversely affect the functions of a public sector entity, even where the conduct does not come within the PID Act. Furthermore, it is serious misconduct for a public official to take adverse actions against an employee for performing this duty, capable of constituting a criminal offence and possibly also amounting to corrupt conduct within the meaning of the *Integrity Commission Act 2018* (ACT).

The Hon Michael F Adams QC

Commissioner

ACT Integrity Commission

KEY TERMS

Term	Description
ACT Public Service ('ACTPS')	The ACT Public Service is established under section 12(1) of the <i>Public Sector Management Act 1994</i> (ACT) ('PSM Act'). The ACTPS is made up of the administrative units declared under the Administrative Arrangements as they exist from time to time.
ACTPS entity	<p>These fall into five different categories:</p> <ul style="list-style-type: none"> • Administrative units (eg Chief Minister, Treasury and Economic Development Directorate, Justice and Community Safety Directorate, ACT Health Directorate, etc); • Territory authorities (bodies established for a public purpose under an Act, eg Canberra Institute of Technology, ACT Insurance Authority, Teacher Quality Institute, Cemeteries Authority, etc); • Territory-owned corporations or their subsidiaries (corporations established under the <i>Territory-Owned Corporations Act 1990</i> (ACT) eg Icon Water Limited); • Territory instrumentalities (corporations established under the <i>Corporations Act 2001</i> (Cth) or another Act or statutory instrument that are: <ul style="list-style-type: none"> ○ subject to control or direction by a Minister; or ○ composed of people whose majority are appointed by: <ul style="list-style-type: none"> ▪ a Minister; ▪ the Head of Service; ▪ a director-general; or ▪ a statutory office-holder); and • Statutory office-holders (eg ACT Ombudsman, Auditor-General, Commissioner for Revenue, Director of Public Prosecutions, Registrar-General, Human Rights Commissioner, Public Trustee and Guardian, Electoral Commissioner, Work Safety Commissioner, Conservator of Flora and Fauna, the Clerk of the Legislative Assembly etc).
Disclosable conduct	Conduct which involves either maladministration, or a substantial and specific danger to public health or safety, or the environment.
Discloser	A person who makes a disclosure.
Disclosure	A report regarding suspected disclosable conduct.
Disclosure Officer	A person nominated by a public sector entity to receive disclosures, or a person specified in section 11 of the PID Act.
Integrity Commission ('the Commission')	The Commission is comprised of the Commissioner(s) and is supported by staff.
Integrity Commissioner	The Integrity Commissioner is the head of the Commission, referred to in this document as 'the Commissioner'.
Investigating entity	An investigating entity is a public sector entity which investigates disclosures which the Commission has assessed as qualifying as a PID.
Legislative Assembly entity	<p>A Legislative Assembly entity is any of the following:</p> <ul style="list-style-type: none"> • a member of the Legislative Assembly; • the Office of the Legislative Assembly; • a person employed under the <i>Legislative Assembly (Members' Staff) Act 1989</i> (ACT); or • an officer of the Assembly.



Member of the Legislative Assembly (' MLA ')	An elected representative sitting in the ACT Legislative Assembly.
Procedural fairness	'Procedural fairness' means acting fairly in administrative decision making. It relates to the fairness of the procedure by which a decision is made, and not the fairness in a substantive sense of that decision. ¹ Generally, this means providing to people against whom adverse findings may be made an opportunity to be heard.
Protected information	Protected information is information obtained through the exercise of a function under the PID Act.
Public Interest Disclosure (' PID ')	A PID is a special type of complaint relating to maladministration or threats to public health or safety, or the environment.
Public official	A person who is or has been an employee of a public sector entity; or a contractor, employee of a contractor, or volunteer exercising a function of a public sector entity.
Public sector entity	Either a Legislative Assembly entity or an ACTPS entity.
Receiving officer	An aggregate term describing officials who are in receipt of disclosures. Receiving officers include: <ul style="list-style-type: none"> • disclosure officers; • managers and supervisors; • officials whose area of functional responsibility concerns the subject of the disclosure; and • any other party whom the PID Act describes as being competent to receive disclosures.
Respondent	A person against whom allegations are made (ie the person who is alleged to be responsible for the wrongdoing). They are called a respondent because they must respond to the allegations put to them.
Senior Executives with Responsibility for Business Integrity and Risk (' SERBIR ')	Senior executives who are tasked with upholding and managing risks to public sector integrity.
Third parties	Members of the Legislative Assembly or journalists.
Whistle-blowers	Colloquial term used to describe disclosers.

¹ Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (January 2016) 393.

AN OVERVIEW OF THE PID SCHEME

The Commission is required to make guidelines about the investigation of PIDs and the way in which disclosures under the PID Act are dealt with by public sector entities, members of the Legislative Assembly and journalists. These guidelines deal with the former; it is envisaged that guidelines concerning the latter will shortly be issued.

The following section provides a brief overview of the PID Act and how it operates. A short outline of the Commission's role under the PID Act is also provided. These concepts are more fully explored in the Commission's related materials which are for the benefit of disclosers and MLAs (see **Related material**).

The role of the Commission

The Commission's primary functions under the PID Act are to:

- make procedures for dealing with PID Act disclosures;²
- decide whether a disclosure qualifies as a PID; and
- where a disclosure does qualify as a PID, decide which public sector entity (including the Commission) is best placed to investigate it.

In addition, the Commission has an oversight function of all investigations under the PID Act and can review, at any time:

- decisions to end investigations of disclosures;³
- decisions to decline to investigate disclosures;⁴
- actions taken in relation to PIDs or disclosures about disclosable conduct;⁵
- actions proposed to be taken in relation to PIDs or disclosures about disclosable conduct;⁶ and
- measures implemented by investigating entities to protect disclosers, witnesses or respondents.

In reviewing such actions or decisions, the Commission can ask anyone to provide information relevant to the review, including protected information.⁷ Public officials must comply with all requests by the Commission.⁸

The Commission may, following a review:

- amend a decision or action taken under the PID Act;⁹
- set aside a decision and substitute a new decision made under the PID Act;¹⁰ or
- take no action.¹¹

The Commission may issue directions to an official or public sector entity to take, or not take, action in respect of any disclosable conduct subject to review.¹²

Where the Commission exercises any of the powers described above (except where the Commission chooses to take no action), the Commission must advise the discloser of the proposed action and provide reasons for the decision.¹³

² Public Interest Disclosure Act 2012 (ACT) ('PID Act') s 33.

³ Ibid s 29(1)(a).

⁴ Ibid.

⁵ Ibid s 29(1)(b).

⁶ Ibid.

⁷ Ibid s 29(2).

⁸ Ibid s 29(3).

⁹ Ibid s 29(4)(a).

¹⁰ Ibid s 29(4)(b).

¹¹ Ibid s 29(4)(c).

¹² Ibid s 29(5).

¹³ Ibid s 31.



The Commission may also prepare a report in respect of a public sector entity's handling of a PID for the Minister, who is obliged to table the report within nine sitting days of receiving it.¹⁴

The Commission is also responsible for all annual reporting in respect of the PID Act.¹⁵ It is also the Commission's responsibility to publish guidelines and provide education in respect of the PID Act.

What are PIDs and why do we need disclosers?

PIDs are a special type of report which attracts protection for those who make them. In the ACT, when reports refer to particular subjects and make specific allegations, they may fall into this special category. People who make PIDs are called 'disclosers' but are more commonly known as 'whistle-blowers'. They play a critical role in ensuring that the administration of government is transparent, and that public sector wrongdoing is investigated and corrected. It is because of this important role that laws have been made to protect them.

Reporting suspected wrongdoing is essential to maintaining the integrity of the functioning of the ACT Government and public service. By making reports of wrongdoing, disclosers may help to:

- fix maladministration;
- prevent dangers to people or the environment;
- improve public administration; and
- bring to account people who have committed or permitted wrongdoing.

The PID Act is not always the most appropriate mechanism by which to report or respond to alleged wrongdoing. The critical factor that distinguishes a PID from other types of complaints is that they must concern 'disclosable conduct', which relates to substantial and specific maladministration, threats to public health or safety, or the environment. Disclosable conduct generally excludes industrial concerns or individual workplace grievances. This typically means that the alleged conduct will be significant and have an effect beyond the discloser alone.

How are PIDs made?

A PID is a report, made by anyone, not necessarily a public official, regarding suspected wrongdoing in a public sector entity. The Commission is responsible for determining whether a report qualifies as a PID.¹⁶

The elements of making a disclosure under the PID Act are summarised below, with additional details in the pages following (see **Does the disclosure need to be in writing?** and **What kind of report is required for a PID?**).

¹⁴ Ibid s 30.

¹⁵ Ibid s 45.

¹⁶ With the exception of reports under s 27 of the 'PID Act' (n 2); ie where the report has been made to a MLA.

Table 1: The elements of making a PID

Report by anyone

- Anyone can make a report under the PID Act.

About ACT public sector wrongdoing

- Can relate to a public sector entity, contractor or public official.
- The wrongdoing must be about maladministration, threats to public safety and health, or a threat to the environment.

Made to the right person

- Disclosure officer;
- Minister; or
- If the discloser is a public official for a public sector entity:
 - The discloser's supervisor, manager or other specified senior leaders within the public sector entity they work for.

OR made to a journalist or MLA

- Where the PID has not been actioned or responded to within the required timeframes.

What kind of report is required for a PID?

The first element of a PID is a report made by a discloser. The PID Act provides that any person may report 'disclosable conduct'.¹⁷ Disclosable conduct is about:

- an action;
- a policy;
- a practice; or
- a procedure

of a public sector entity, or person who works for a public sector entity, that:

- is maladministration; or
- results in a substantial and specific danger to public health or safety, or the environment.¹⁸

A report may be about the conduct of employees, or those responsible for, a public sector entity. They can also be about the actions of contractors, sub-contractors, consultants, and volunteers working on ACT Government sponsored projects or on programs funded by the ACT Government. This includes not-for-profit or other non-government entities providing a public service to the community under a contract with a public sector entity.

A report might relate to events that are happening (or are reasonably suspected of happening) now, occurred in the past, or may happen in the future.

A discloser may make a report even if they are not able to identify who is responsible for the alleged conduct.

There is no requirement that a discloser say they are making a PID or even mention the PID Act. Disclosers may not even know they have made a PID.

¹⁷ Ibid s 14.

¹⁸ Ibid s 8(1).

Maladministration

'Maladministration' is conduct, a policy, practice or procedure that:

- results in a substantial mismanagement of public resources or public funds; or
- involves substantial mismanagement in the performance of official functions.¹⁹

Maladministration requires 'substantial mismanagement'. For example, should a manager be making poor decisions resulting in wastage of hundreds of thousands of dollars, it would amount to substantial mismanagement. Alternatively, where the report is about the limited private use of a government vehicle by a public official, this would be unlikely to amount to substantial mismanagement. Committing, or allowing another to commit, racial or sexual discrimination could well also amount to substantial mismanagement.

Amongst the matters which may be considered when deciding whether the alleged maladministration is substantial include assessing whether the conduct:

- is one-off or systemic;
- has caused significant financial damage;
- has caused significant personal damage or injury; or
- has created significant reputational or litigation risks.

This is an indicative, not exhaustive, list demonstrating the wide reach of the PID scheme.

Substantial and specific danger to public health or safety, or the environment

'Substantial and specific danger' refers to a situation where the conduct of a public official, or a policy, practice or procedure, risks damaging 'public health or safety' or the environment. 'Public health or safety' refers to the health or safety of people:

- under lawful care or control;
- using community facilities or services; or
- in workplaces.²⁰

As with maladministration, the report must relate to 'substantial' danger. Substantial in this context is determined not only by how likely it is to occur, but also by its potential consequences. For example, any conduct which puts even one person's life in danger or at risk of serious injury is substantial. Even where conduct puts many people at a risk of minor injury, this also may be substantial (for example, releasing a mild irritant into a communal waterway).

'Specific' requires that the conduct be capable of a reasonably precise description. This means that vague or imprecise reports of dangers to public health or safety, or the environment will probably not amount to disclosable conduct. For example, were a discloser to allege imminent unspecified dangers due to a proposed project but is unable to provide any useful information as to what those dangers are, this is unlikely to be disclosable conduct.

¹⁹ Ibid s 8(3).

²⁰ Ibid.

Who can a report be made to?

For a report to qualify as a PID, it must also be made to a person responsible for receiving reports. These people are called 'disclosure officers'. They are:

- for reports relating to a public sector entity:
 - the Auditor-General;
 - the Ombudsman; or
 - the Commission;
- for reports relating only to an ACTPS entity:
 - the Public Sector Standards Commissioner;
 - the Head of Service;
 - the Head of an ACTPS entity; or
 - a person nominated to be a disclosure officer for an ACTPS entity;
- for reports relating only to a Legislative Assembly entity:
 - the Clerk of the Legislative Assembly; or
 - a person nominated to be a disclosure officer for a Legislative Assembly entity.²¹

The websites of public sector entities must provide contact details for all nominated disclosure officers. The Commission's website also has a list of people that have been nominated as disclosure officers.

In addition to disclosure officers, disclosers can make reports to:

- a Minister; or
- if the discloser works for a public sector entity:
 - their supervisor or manager;
 - a member of the public sector entity's governing board (if applicable); or
 - someone at the public sector entity who deals with the issues the discloser's report raises.²²

The PID Act defines 'public officials' as a person who is, or has been:

- an employee of a public sector entity;²³ or
- a contractor, employee of a contractor or volunteer at a public sector entity.²⁴

²¹ Ibid s 11.

²² Ibid s 15.

²³ Ibid s 10(a)(i).

²⁴ Ibid s 10(a)(ii).

When can PIDs be made or referred to a third party?

Part 5 of the PID Act outlines when disclosures can be made or referred to 'third parties'. Third parties are defined as journalists or MLAs.

There are two broad situations where information or materials can be referred to third parties and retain the statutory protections:

- where a report of disclosable conduct has not been handled appropriately; or
- where a PID has not been handled appropriately.

The first of these is where a report, which the Commission has not yet assessed as a PID, has been mishandled. The second is where an investigating entity has mishandled the investigation of the information disclosed in a PID.

In both instances, the opportunity to give information about the disclosure to a third party arises where the discloser has not received updates within the required timeframe. Where this occurs, the discloser receives all the PID Act protections.²⁵

Making a report to a third party

A discloser who reports wrongdoing to a third party is entitled to the PID Act protections where they have already reported the alleged wrongdoing to an appropriate entity, is not anonymous and has not received within three months:

- a notice²⁶ that the report has been assessed as not being a PID; or
- a notice²⁷ confirming that an investigation will be undertaken.²⁸

A report made to a third party in accordance with these requirements is deemed to be a PID.²⁹ The discloser must, however, ensure they only report information reasonably necessary to show the conduct is disclosable conduct.³⁰

Where an existing PID may be provided to a third party

After the Commission has told a third party their report is a PID and it will be investigated,³¹ the discloser must be told about the progress (or outcome) of the investigation at least once every three months.³² Where the discloser is not updated, if the discloser gives the PID to a third party the protections will still apply.³³

Alternatively, where a discloser gives a PID to a third party following an investigation and:

- clear evidence was found that the wrongdoing alleged by the discloser has, or was likely to have, occurred; or
- the discloser is told that no action will be taken in relation to the wrongdoing,³⁴

the discloser will still be protected.

In both cases, the discloser must ensure that they only report information reasonably related to the disclosure.³⁵

²⁵ Ibid s 27.

²⁶ Ibid s 17B.

²⁷ Ibid s 19A.

²⁸ Ibid s 27(1).

²⁹ Ibid ss 7, 27(4).

³⁰ Ibid s 27(3).

³¹ Ibid s 19A.

³² Ibid s 23.

³³ Ibid s 27A.

³⁴ Note, should an investigating entity notify a whistle-blower that no action will be taken in response to disclosable conduct this would contravene section 24 of the PID Act.

³⁵ PID Act (n 2) s 27A(2).

What is not disclosable conduct?

A report about something that is not disclosable conduct does not qualify as a PID. An action, policy, practice or procedure of a public sector entity, or a public official for a public sector entity, that:

- relates to a discloser's personal work-related grievance; or
- is to give effect to a policy about amounts, purposes or priorities of public expenditure,

is not disclosable conduct for the purposes of the PID Act.³⁶

PIDs are generally not an appropriate vehicle to resolve individual workplace issues. The Public Sector Standards Commissioner has issued clear guidance regarding what is not likely to amount to a PID, which the Commission endorses:³⁷

Matters that affect only personal or private interests are unlikely to be a PID. Complaints relating to individual employment and industrial matters, isolated allegations of bullying or harassment, personnel matters, individual performance management concerns and individual workplace health or safety concerns would generally not be considered a PID and are best dealt with through other means...A PID is not a mechanism for solving a personal grievance. It is a process within government to deal with matters of a serious nature which if resolved would increase trust and confidence in the integrity and probity structures...[of government].

A good question to ask in determining whether the discloser's report is about disclosable conduct is whether their concerns have (or potentially have) a widespread impact. This does not mean issues which may be affecting the discloser personally are not PIDs, but if they affect only the discloser it is less likely they will be PIDs.

³⁶ Ibid s 8(2).

³⁷ Public Sector Standards Commissioner, *Public Interest Disclosure Guidelines 2019*, NI2019-281, 7 May 2019 8.

Table 2: Determining whether the discloser's concerns are likely to be a PID

Reports regarding **substantial maladministration** may be PIDs

Issues relating to the action, or inaction, of a public sector entity or public official that are of a serious nature, unjust, unreasonable, improperly discriminatory or involve dishonesty are likely to constitute substantial maladministration. This includes acts, decisions, advice or omissions, which:

- violate administrative fairness;
- contradict the principles of fairness or equity;
- are inconsistent with policies or procedures;
- demonstrate negligence, or the absence of proper care or attention; or
- involve excessive use of authority or where authority is used to intimidate, harass or subject someone to unreasonable conditions.

Reports regarding **substantial and specific dangers to the health or safety of the community or environment** may be PIDs

This is where the action, or inaction, of a public sector entity or public official puts either the community or the environment at risk of significant and clearly identified harm.

Reports regarding **workplace complaints or grievances** are unlikely to be PIDs

A report is unlikely to be a PID where the issue relates to:

- industrial matters such as overtime, workloads or working conditions;
- individual allegations of bullying, harassment or discrimination;
- the conduct of an individual and the consequences are not substantial, systemic or widespread;
- concerns arising from an underperformance or performance management process; or
- an official failing to exercise their duties without reasonable care or skill, and the consequences are localised.

Reports regarding conduct giving effect to ACT Government policy about **amounts, purposes or priorities of public expenditure** are unlikely to be PIDs

A report is unlikely to be a PID where the issue relates to:

- the budgeted or spent expenditure allocated to a function of the ACT Government; or
- the purposes or priorities of budgeted or spent expenditure relating to a function of the ACT Government.

What protections do PID disclosers get?

The protections for disclosers are split into three categories:

- certain limitations on liability;³⁸
- protection from detrimental action;³⁹ and
- protection against the misuse of protected information.⁴⁰

Important: The PID Act places no limitations on who may make disclosures. The protections apply to all those who make disclosures which qualify as PIDs. Detrimental action (described below) is not limited only to employment or contractual retaliation.

Important: Witnesses who assist investigations are protected from civil and criminal liability where they give information, produce documents or answer questions to assist the investigation of a disclosure.⁴¹

Immunity from liability

Disclosers do not, in making the PID, commit:⁴²

- a breach of confidence;
- a breach of professional etiquette or ethics;
- a breach of a rule of professional conduct; or
- if the disclosure is made in relation to a member of the Legislative Assembly—a contempt of the Assembly.

Important: The immunity protections of the PID Act **do not extend to breaches of legal professional privilege.**

In addition:

- disclosers do not incur civil or criminal liability only because of the making of a PID;⁴³ and
- where the discloser is a public official,⁴⁴ they are not liable to administrative or disciplinary action, or dismissal, only because of the making of a PID.⁴⁵

In summary, the PID Act supports disclosers by:

- protecting them from suffering legally or professionally;
- criminally penalising **any person**, including officials, who takes detrimental action against a discloser for making it;⁴⁶ or
- permitting the recovery of damages by civil action.

Disclosers are also protected from defamation claims that relate to their making of a PID.⁴⁷ This means that if disclosers make a PID about someone else, they are protected against claims of defamation.

Important: Typically, this immunity would apply to those with an employment or contractual nexus with a public sector entity (ie an official who reports wrongdoing within the public sector entity which employs them). However, it is equally applicable to those who do not have any such nexus.

Note: These protections relate only to the making of the PID. Liability arising from any other conduct of the discloser does not attract these protections.⁴⁸ This means that disclosers who have engaged in

³⁸ *PID Act* (n 2) s 35.

³⁹ *Ibid* s 40.

⁴⁰ *Ibid* s 44.

⁴¹ *Ibid* s 42A.

⁴² *Ibid* s 35(a).

⁴³ *Ibid* s 35(b).

⁴⁴ Defined in *PID Act* (n 2), ss 9-10.

⁴⁵ *Ibid* s 35(c).

⁴⁶ *Ibid* s 40.

⁴⁷ *Ibid* s 36.

⁴⁸ *Ibid* ss 35-36.

wrongdoing themselves may still be liable for that wrongdoing, despite having made a PID about that conduct.

Note: These protections may be lost if a court determines that the discloser has provided false or misleading information to the PID investigator, or where the discloser's report is vexatious.⁴⁹ However, the protection continues if the court determines that that conduct has not materially prejudiced the investigation and is of a minor nature.

Protection from 'detrimental action'

Disclosers are protected from 'detrimental action' being taken against them. Detrimental action includes any action undertaken by any person that involves:

- discriminating against a person by treating, or proposing to treat, the person unfavourably in relation to the person's reputation, career, profession, employment or trade;
- harassing or intimidating a person;
- injuring a person; or
- damaging a person's property;⁵⁰

in response to:

- a person making a PID;
- a person intending to make a PID;
- a belief that a person has made a PID; or
- a belief that a person intends to make a PID.⁵¹

Note: Persons who make bona fide disclosures which, in the result, are not assessed to be PIDs do not have the protections of the PID Act but will be entitled to their employment rights. If the disclosure is assessed to be a corruption report under the *Integrity Commission Act 2018* ('**IC ACT**') the protections afforded by that Act will apply.

Detrimental action is best understood broadly and refers to any conduct that is taken against a discloser with the intention of harming them. For example, conduct which proposes to treat a person 'unfavourably' could encompass a wide range of potential actions which vary in their impact and significance. It would include taking action against a person other than the discloser (for example, retaliating against the spouse of the discloser). Detrimental action may also be taken against those who are not public sector officials or contractors, for example, by harassing a discloser who is a member of the public.

Example: It would be detrimental action if a contractor has their contract with a public sector entity cancelled (or not renewed where it would typically be renewed) in response to their making a disclosure.

Example: It would be detrimental action to 'manage out' an official in response to their making a disclosure.

Example: It would be detrimental action to make threats to a member of the public (such as a representation that a licence application would be delayed or denied unreasonably) in relation to their making a disclosure.

⁴⁹ Ibid s 37.

⁵⁰ Ibid s 39.

⁵¹ Ibid s 39.



What is not detrimental action?

Administrative or related action taken to protect the discloser is not detrimental action. This would arise where, for example, it is necessary to transfer the discloser from their immediate work area to protect them. Such a situation may arise where the discloser has made a PID regarding their work area's practices or referred to the conduct of a colleague within their work area, and the identified risk is such that the only treatment available is to move them. It is important that this is communicated to the discloser to guard against any perceptions of victimisation or punishment.⁵²

In addition, it is not detrimental action to manage the conduct or performance of a discloser where there are unrelated performance or conduct concerns about the discloser (see **Where the discloser has performance or behavioural issues unrelated to the PID**).

Example: A's disclosure concerning B is assessed to be a PID, and the matter undergoes a risk assessment. A has performance issues, unrelated to the PID, and management strategies are implemented to address those issues – independently of the PID process. This is not detrimental action unless it can be established that the actions taken to manage A's underperformance were taken in response, or partial response, to their making a PID.

Further, where the discloser has made a disclosure which reveals or contains information which suggests wrongdoing or performance issues on the part of the discloser, taking action to correct these issues is not detrimental action.

Note: A discloser may request some form of immunity or liability shield when making their disclosure. Whether this is accepted or taken into account in any subsequent investigation or sanction, is a matter for the investigating entity (for example, if sanctioning an employee, the decision maker may take into account the cooperation of the discloser and/or their bringing to light the subject of the PID).

Consequences for taking detrimental action

A person (referred to in the PID Act as a 'retaliator') commits a criminal offence where they take, or threaten to take, detrimental action against a person who has, or they believe to have, made or intended to make a PID. A penalty of up to 1 year of imprisonment and/or a 100-penalty unit fine applies.⁵³

It is a serious offence to take detrimental action against a person as a result of them making a PID. Where it occurs, and if brought to the attention of the Commission, the matter will be referred to the ACT Director of Public Prosecutions to consider prosecuting the retaliator.

The prohibition of detrimental action is not limited to the person against whom a PID was, or intended to be, made. For example, where X makes a disclosure about Y and Z takes detrimental action against X in response, Z has committed an offence.⁵⁴

Those who suffer detriment because of detrimental action may recover damages.⁵⁵ This means if a discloser suffers losses as a result of detrimental action being taken against them, they may sue the person who has taken detrimental action and recover those losses.

The ACT Supreme Court can make orders, including injunctions, to either remedy any detrimental action already taken or prevent detrimental action from occurring.⁵⁶ The Commission, discloser, or person to whom the detrimental action is directed may apply for such an order. This means that if someone takes detrimental action, or is expected to take detrimental action, the ACT Supreme Court can intervene on the discloser's (or other relevant party's) behalf.

⁵² Ibid 73.

⁵³ Ibid s 40.

⁵⁴ Ibid s 40.

⁵⁵ Ibid s 41.

⁵⁶ Ibid s 42.



Protection from the misuse of protected information

Those with responsibilities under the PID Act (such as the Commission, public sector entities and disclosure officers) must not use or share ‘protected information’ recklessly.⁵⁷ Protected information is information obtained through the exercise of a function under the PID Act. This would include, for example, the discloser’s identity. Recklessly means not treating the information carefully and properly.

Subject to a lawful excuse (such as using the information to investigate the disclosure or where a court requires it), the reckless use or divulging of protected information carries a penalty of 6 months imprisonment, or a 50-penalty unit fine for the person who has been reckless.

This offence ensures that those who manage and investigate disclosures must be careful to do so confidentially.

Protection for witnesses

Individuals who help investigations of PIDs are protected against criminal and civil liability in relation to the help they provide.⁵⁸ However, as with disclosers, this protection does not extend to dealing appropriately with the conduct of the witness themselves (eg if their help reveals wrongdoing on their part).⁵⁹

⁵⁷ Ibid s 44.

⁵⁸ Ibid s 42A(1).

⁵⁹ Ibid s 42A(2).

THE OBLIGATIONS OF ENTITIES UNDER THE PID SCHEME

The following section provides an overview of the obligations that public sector entities have under the PID Act. Topics covered include:

- how public sector entities may delegate powers;
- the need for public sector entities to nominate disclosure officers;
- the need for public sector entities to follow these guidelines;
- the requirement that public sector entities have to investigate any disclosures referred to them by the Commission;
- protective arrangements;
- the need to raise awareness of the PID scheme; and
- the requirement that investigating entities keep the Commission updated regarding any ongoing investigations of disclosable conduct.

The delegation of powers under the PID Act

While not expressly dealt with in the PID Act, the PSM Act provides that a Director-General may delegate to a public employee or another person a function given to the Director-General under that Act or any other law applying in the ACT.⁶⁰

The *Legislation Act 2001* (ACT) (**'Legislation Act'**) deals with the formality and procedural requirements of making such delegations.⁶¹

It is recommended that heads of public sector entities delegate their powers under the PID Act to the Senior Executives with Responsibility for Business Integrity and Risk (**'SERBIR'**) for their entity (including arrangements relating to the nomination of disclosure officers), in accordance with the PSM Act and Legislation Act.

The nomination of disclosure officers

The PID Act requires that public sector entities:

- nominate at least one person to be a disclosure officer for disclosures of disclosable conduct;
- publish the contact details for all nominated disclosure officers on the public sector entity's website; and
- give the contact details of all disclosure officers to the Commission.⁶²

Who should be nominated as a disclosure officer?

It is recommended that at least one of the nominated disclosure officers be the public sector entity's SERBIR.⁶³ It is also recommended that public sector entities appoint more than one disclosure officer, preferably across various business lines and at differing classifications. While it is common that public sector entities appoint senior officials to hold the role of disclosure officer, disclosers may find discussing their concerns with such senior officials intimidating.

There is no specific or recommended number of disclosure officers, but public sector entities should ensure there is appropriate coverage across the business, so disclosers are not discouraged, nor nominated officers overwhelmed.

⁶⁰ s 20(1)(a).

⁶¹ Pt 19.4.

⁶² *PID Act*, (n 2) s 11(2).

⁶³ This is consistent with the former guidance issued by the Public Sector Standards Commissioner and appears to have been followed throughout the public sector.

Disclosure officers in small public sector entities

Where a public sector entity is small, it may not be practical to nominate disclosure officers across business lines and/or classification levels. In such agencies, the only practical solution may be to nominate the entity's SERBIR, CEO or similar.

Given this reality, the Commission recommends that such public sector entities make clear on either their intranet, or public facing internet pages, that disclosures can be made to others, in addition to their nominated disclosure officer(s), being:

- any disclosure officer within the ACT; or
- the Commission directly.

If this approach is taken, the public sector entity should provide a link or other direction to the relevant resource (typically, the Commission's webpage).

Disclosure officer networks

It is recommended that, where public sector entities have more than one disclosure officer, they establish an internal network or forum in which PID issues can be discussed frankly. These forums could, for example, consider whether the current administrative arrangements are working, what sorts of issues are being raised, and whether there are proactive measures that can be taken to improve operations (either in relation to the PID scheme or its business delivery). Such meetings need not be frequent or formal – it is, however, recommended that such meetings occur at least once per year.

Important: Where this option is pursued, public sector entities can notify the Commission of any meetings so that Commission staff will be able to attend (if desired) to answer questions that disclosure officers may have.

What information is required to be collected about disclosure officers?

Public sector entities are required to collect sufficient information about their disclosure officers, and make it readily available, to ensure that potential disclosers can easily make disclosures, and select whom they would feel most comfortable making their disclosure to. This would require, at a minimum, the collection of the nominated disclosure officer's:

- name;
- role;
- work location;
- phone number (ie their desk/office number);
- email address; and
- postal address.

It is recommended that public sector entities establish a PID group email address (ie PID.entityname@act.gov.au or similar) which includes all its nominated disclosure officers in a group. This will be particularly helpful where the discloser wishes to make an anonymous disclosure. Where an entity adopts a group email inbox, it should develop procedures to ensure that the inbox is regularly monitored and that reports are allocated to appropriate disclosure officers in a timely fashion.

Publishing the contact details on the public sector entity's website and notifying the Commission

Entity website

Where the public sector entity has a website, it must publish the contact details for all disclosure officers on it.⁶⁴ If an entity has established a group PID email account as recommended above, this should also be listed on the entity's website. Public sector entities must ensure that the contact details for all their disclosure officers remain current. The Commission will from time to time review public sector entities' websites and verify their currency against records the Commission holds.

⁶⁴ PID Act (n 2) s 11(2)(b).

Important: Even where a public sector entity has established a group PID email account, it is still obliged to ensure that all contact details for all disclosure officers are available online.

It is recommended that the entity also has a 'PID' page which provides some basic information regarding the PID Act to accompany disclosure officer details. This need not be a separate website section, but may reside on a 'complaints', 'integrity', 'contact us' or similar page. Information that would be expected on such a page includes (but is not limited to):

- contact details for disclosure officers;
- a brief overview of what a PID is, and how people may report wrongdoing; and
- contact details for the Commission.

Notifying the Commission of all disclosure officers

The PID Act requires the Commission to publish on its website the contact details for all nominated disclosure officers.⁶⁵ As soon as possible following a disclosure officer being nominated, public sector entities must provide the contact details of their disclosure officers to the Commission.

Public sector entities must notify the Commission of any changes to their nominated disclosure officer details as soon as possible (eg where individuals cease to be disclosure officers or where new disclosure officers are appointed).

Establishing systems to manage and report on disclosures of disclosable conduct and PIDs

Public sector entities must have appropriate systems in place to ensure that they can produce accurate reporting regarding disclosures of disclosable conduct and PIDs.

Public sector entities must have appropriate systems in place to manage and acquit all disclosures of disclosable conduct and PIDs they receive.

Public sector entities must ensure that their reporting and/or management systems have appropriate access controls and protocols to ensure that the privacy of all those involved is protected.

Suggestion: Where a public sector entity does not have a case management system that can be adapted for activities under the PID Act, the Commission recommends they make use of the ACT Government's document management system. The Commission also recommends that public sector entities develop a spreadsheet or similar to track all PIDs or disclosures of disclosable conduct for which that entity has responsibility. A suggested approach appears at **Appendix A: Records management structure**.

Investigating PIDs

The PID Act provides that public sector entities must investigate all disclosures which they receive, and that such investigations must comply with the rules of natural justice and procedural fairness.⁶⁶ Detailed guidance about the conduct of investigations is covered in **Investigating disclosures**.

Ensuring staff are aware of the PID scheme and understand their obligations and options

It is recommended that public sector entities have communication and education materials regarding the PID scheme. This could include wallpapers, all-staff emails and/or standard talking points for team meetings or similar. The Commission develops these types of materials from time and time for dissemination.

Public sector entities must have in place protocols and training to ensure that those with responsibilities under the PID scheme understand their obligations and the broad operation of the PID Act. This includes those with managerial or supervisory responsibilities, and those who may receive disclosures.

⁶⁵ Ibid s 11(2)(3).

⁶⁶ Ibid s 20(1).



Keeping the discloser and the Commission informed

The PID Act requires an investigating entity to keep the discloser informed about the status of any investigation at least once every three months.⁶⁷

Example: X's disclosure was assessed as being a PID on 1 January. Y was obliged to provide an update to X on 1 April. Y notifies X of a significant update on 1 February. Y is no longer obliged to notify X of an update on 1 April. Instead, Y is now obliged to provide another update to X **no later than 1 May**.

Note: Section 151 of the Legislation Act provides that this timing does not include the day on which the disclosure was made.

Detailed guidance regarding when and how to keep disclosers informed throughout the course of an investigation is available at **Keeping the discloser informed** below.

⁶⁷ Ibid s 23.

RECEIVING AND ASSESSING DISCLOSURES

The following section provides guidance about how those who may receive disclosures should:

- deal with disclosers;
- assess disclosures; and
- refer disclosures to the Commission.

Note: The Commission has prepared an assessment form template which disclosure officers may adapt for use in managing the receipt of disclosures (see **Appendix H: Public interest disclosure initial assessment form**).

Important: Disclosures may be received by those who are not nominated disclosure. The section **Who can a report be made to?** provides details of these. As the treatment of disclosures should be handled consistently regardless of who receives them, the following sections refer to ‘**receiving officers**’ – which covers all those who may receive disclosures.

Dealing with disclosers

When dealing with disclosers, it is important that sufficient information is obtained from them to identify whether the disclosure is about disclosable conduct. Receiving officers should obtain, at a minimum, the following information from the discloser:

- their name and contact details;
- the nature of the suspected wrongdoing;
- who they believe committed the suspected wrongdoing;
- when and where the suspected wrongdoing occurred;
- how they became aware of the suspected wrongdoing;
- whether the suspected wrongdoing has been reported to anyone else;
- if a report has been made, what that other person has done to fix, stop or prevent the wrongdoing; and
- whether the discloser is concerned about reprisal because of making a disclosure.

Where applicable, receiving officers should also seek 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.

It is also important that the receiving officer checks on the welfare of the discloser. The section **Supporting the discloser throughout the process** provides some guidance about how to do this.

Specific guidance for managers or supervisors

As stated in **Does the disclosure need to be in writing?** and **What kind of report is required for a PID?**, disclosures do not need to be in a particular format or expressed as being a disclosure by a discloser. The result of this is that many interactions between supervisors and their staff could in fact be disclosures (if they relate to disclosable conduct). The PID Act provides the following example, which indicates what sort of relatively informal statements may be disclosures and will need to be referred to a disclosure officer:

Example

Tranh comments to her supervisor during a coffee break that she believes there are a number of significant irregularities in the ordering of office supplies for her business unit. Tranh does not ask or infer that the irregularities should be investigated.⁶⁸

In the above example, the supervisor must make a written record of Tranh’s comments because it was an oral report.⁶⁹ The written record is then deemed to be the disclosure of disclosable conduct,⁷⁰ which

⁶⁸ Ibid s 16.

⁶⁹ Ibid s 16(2)(a).

⁷⁰ Ibid s 16(2)(b).



the supervisor must refer to a disclosure officer (where the supervisor is not themselves a disclosure officer).⁷¹

Specific guidance for members of public sector entity governing boards

Disclosures may be made to members of governing boards, where a public sector entity has a governing board.⁷² A link to a list of ACT government boards is in the **Related material**.

As with supervisors and managers, where a member of a public sector entity governing board receives a disclosure, they must refer it to a disclosure officer. Also, as above, where that disclosure was received orally, the board member must make a written record of the disclosure to provide to the disclosure officer.

Specific guidance for officials who oversee specific functions

Disclosers may also make disclosures to an official of a public sector entity who has the function of receiving information of the kind being disclosed or acting in relation to that kind of information.⁷³ This means that if X comes to Y and reports a problem (which may be a disclosure), and it is generally Y's job to deal with that type of problem, this may be a disclosure under the PID Act. If this is the case, the receiving officer must make a record of the disclosure and provide it to a disclosure officer as soon as possible.

Do the discloser's motivations matter?

The discloser's motive or intention is relevant but does not solely determine whether investigation is warranted. There can often be a history of conflict in a workplace, particularly if the person has tried to report wrongdoing in the past and they feel their concerns have been dismissed or ignored. This does not mean that their disclosure should be discounted.

It is common that disclosers may have reached the 'end of the line' after having made several attempts to express their concerns, and then identified the PID scheme as a potential resolution pathway. This must not be taken to mean that the issue is trivial, or otherwise frivolous. Merely because others, to whom the discloser may have directed their concerns, have decided the matter does not warrant further action does not impact whether the matter may be a PID.

It is also common that disclosers may be having their performance or professional conduct questioned and that they are currently subject to administrative review (for example, a code of conduct investigation or formal performance improvement process). Disclosers may make a disclosure in retaliation for such processes, or otherwise seek to direct attention away from them. Some disclosers mistakenly believe that the act of making the disclosure may stay or otherwise interrupt any such processes.

Regardless, receiving officers 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 important to emphasise to the person that they should try to remain factual and focus on the issues related to the suspected wrongdoing rather than being emotive about individuals.⁷⁴

Does the disclosure need to be in writing?

The PID Act places no limitations on the form of disclosure.⁷⁵ This means disclosers can make a disclosure orally or in writing. Disclosures can be made using any form of communication platform, including email, fax, letter, or phone. In short, any form of communication may amount to a disclosure.

Receiving officers should also encourage disclosers (where the disclosure was not made via electronic means) to keep their own records in relation to their disclosure. Such records may be of assistance to the discloser should they need to invoke any of the protections under the PID Act.

⁷¹ Ibid s 15(2).

⁷² Ibid s 15(1)(c)(ii).

⁷³ Ibid s 15(1)(c)(iii).

⁷⁴ Commonwealth Ombudsman, *Agency guide to the Public Interest Disclosure Act 2013* (April 2016) 26.

⁷⁵ *PID Act* (n 2) s 16.



Can disclosers be anonymous?

Disclosers can remain anonymous if they wish.⁷⁶ Receiving officers should however encourage the discloser (if the discloser made their disclosure orally or provided a method of return correspondence) to consent to receiving updates or be in communication.

Anonymous disclosures give rise to difficulties in the assessment and disposal of PIDs. This is because relevant information and clarification regarding the subject of the disclosure may not be available. It should be remembered that where a discloser has sought anonymity, and the investigating entity deems this to render any subsequent investigation impracticable, the investigating entity may discontinue the investigation without further action (see **When and how to end an investigation**).

Anonymous disclosures may also preclude the discloser from obtaining PID protections should they disclose either a PID or disclosure to a third party. This is because by making the disclosure anonymously, investigating entities and/or the Commission will be unable to provide the required updates.

Assessing disclosures

The disclosure officer's task is to assess whether a disclosure is about disclosable conduct and whether it was made in good faith.⁷⁷ If the disclosure officer is satisfied on reasonable grounds that it is, they must refer the disclosure to the Commission to assess whether it qualifies as a PID.⁷⁸

Exception: Where the disclosure relates to the conduct of the Commissioner, or staff of the Commission, the disclosure officer must refer the disclosure to the Inspector of the Commission ('Inspector').

Note: Only a disclosure officer may perform this assessment. Where the disclosure was received by a receiving officer who is not a disclosure officer, they must refer the disclosure to a disclosure officer.

Important: There is no need for a disclosure officer to consider whether the disclosure is, or may be, a PID. Only the Commission can determine whether a disclosure about disclosable conduct qualifies as a PID.

What if the report is about the Commission?

Where a report relates to the Commission, investigating entities must give it to the Inspector. All reports concerning the Commission will be treated as a complaint under the IC Act.⁷⁹

Is the disclosure officer satisfied on reasonable grounds the conduct refers to disclosable conduct and was made in good faith?

In substance, the disclosure officer must be satisfied on reasonable grounds that the disclosure, if true, is about disclosable conduct and is made in good faith.

The satisfaction required is the personal opinion or judgment of the disclosure officer, but the reasonableness of the grounds is an objective standard requiring consideration to be given to the information that has been disclosed. The assessment is to test whether it can reasonably be regarded as fulfilling the statutory description of disclosable conduct on the assumption that it is true.⁸⁰ As a practical matter, the test will be satisfied if the disclosure officer considers that there are reasonable grounds for concluding that the disclosure is about disclosable conduct and is made in good faith. The mere fact that there are also reasonable grounds for not so concluding will not mean that the conditions are not fulfilled.

Having been satisfied that the subject matter of the disclosure concerns disclosable conduct, it is necessary for the disclosure officer to then consider whether it has been made 'in good faith'. This is not directed to the motive for making the disclosure. The 'good faith' involved here is that the discloser

⁷⁶ Ibid s 16(1)(c).

⁷⁷ Ibid ss 17(1)(a)-b).

⁷⁸ Ibid s 17.

⁷⁹ *Integrity Commission Act 2018 (ACT)* ('IC ACT') s 257.

⁸⁰ *Pid Act* (n 2) s 8.

has a genuine belief or reasonable suspicion that the facts alleged are true. Disclosers will often have mixed motives for coming forward. Of course, where a discloser is motivated by malice, for example, the question whether they do actually believe or reasonably suspect that the information they disclose is true requires a close examination. Here again, the disclosure officer does not need to be certain that this requirement is fulfilled. They need only to be satisfied on reasonable grounds that it is. Put another way, if the disclosure officer thinks that it is reasonably possible that the disclosure is made in good faith, this would usually suffice.

Example: X discloses to disclosure officer Y that maladministration is occurring in entity Z. If X has used the correct terminology, and framed the disclosure appropriately, it would objectively be a disclosure about disclosable conduct. Y however must be satisfied on reasonable grounds that X's disclosure is in fact about disclosable conduct. Y queries X for further information, which tends to show that the disclosure is not about maladministration of the type contemplated by the PID Act. Following this line of inquiry, Y may not be satisfied that the disclosure concerns disclosable conduct (even if X disagrees with Y).

Example: X discloses to disclosure officer Y that Z is engaging in maladministration. Z had previously made allegations against X concerning unrelated conduct, which resulted in X being subject to disciplinary action. It is clear to Y that X is motivated by malice towards Z, due to the way Y described Z. However, X has provided a clear and compelling statement which leads to Y being satisfied, on reasonable grounds, that X genuinely believes Z to have engaged in maladministration. Y should assess the disclosure as having been made in good faith.

Conducting further enquiries to assist an assessment

Disclosure officers may conduct limited further enquiries to assist in their assessment as to whether a disclosure is about disclosable conduct. Disclosure officers may also seek guidance from the Commission should they need it.

This does not mean that disclosure officers should conduct an investigation (preliminary or otherwise). Limited further inquiries mean gathering basic additional facts which will allow the discloser's concerns to be more fully understood. In undertaking further enquiries, the disclosure officer should be careful not to prejudice any future investigation or breach the confidentiality requirements imposed by the PID Act.

Example: X discloses to Y that an unknown official is engaging in conduct which puts the environment at risk. X describes a uniform to Y, which X alleges to be that of a public sector entity. Y may conduct limited enquiries to determine whether the uniform is in fact that of a public sector entity. This may include internet searches or similar. Y discovers that the uniform does relate to a public sector entity. Y should not however, then go on to make enquiries about what the unknown official may or may not be doing. Y should provide this information to assist the Commission in determining how to respond to the allegations.

Where the discloser has performance or behavioural issues unrelated to the PID

The PID Act does not prevent supervisors and managers from addressing workplace behaviours that, for independent managerial or administrative reasons may need to change, or which require disciplinary action. In addition, the mere making of a PID does not absolve the discloser of their own wrongdoing where it is the subject of the PID.

However, the making of the disclosure may be considered a mitigating factor in the context of, for example, considering whether to sanction that employee who made the disclosure and, if so, the extent of the sanction. Further, disclosure officers may receive a request from a discloser to immunise or minimise their liability in return for making a disclosure. For example, a discloser may indicate that, while they have themselves been somehow involved in wrongdoing, they would be prepared to disclose significant or systemic wrongdoing should the public sector entity agree to take into account their making a disclosure. These are complicated issues, and a disclosure officer should not offer disclosers any guarantees, unless expressly authorised to do so by an officer with appropriate authority to give such guarantees. Investigating entities should be wary of making any promises or giving any

undertakings to disclosers about how the discloser's own conduct will be handled. Investigating entities may, at any point, seek guidance from the Commission when such issues arise.

Note, however, any form of disciplinary action or investigation which happens to closely follow a disclosure may be perceived by the discloser as a form of detrimental action (whether reasonably so or not). As such, when an investigating entity intends to take, or has taken, action in response to an employee's unrelated performance or behaviour concerns they must:

- clearly demonstrate the grounds on which the investigation or disciplinary action is founded;
- ensure that any proposed action to be taken in response is proportionate and reasonable;
- ensure that the proportionate and reasonable action proposed is not a response to the making of the disclosure (except in the sense that it may be moderated by the making of the disclosure); and
- ensure that the investigation and/or action proposed is conducted in accordance with the investigating entity's relevant procedures for dealing with misconduct or underperformance.

Timeliness of the assessment process

The PID Act is silent as to how long a disclosure officer has to assess a disclosure. However, the PID Act does require a disclosure officer to notify the Commission of a disclosure about disclosable conduct 'as soon as possible' after receiving the disclosure.⁸¹ This should be understood as being as soon as is practically possible. Further, the discloser is entitled to provide a disclosure of disclosable conduct to a third party if they do not receive a section 17B or 19A notice in the specified period (which either confirms or rejects the disclosure as a disclosure about disclosable conduct).⁸²

Therefore, the disclosure officer should assess the disclosure as a priority to ensure compliance with the PID Act, and to maintain confidence in the scheme.

Referring the disclosure of disclosable conduct to the Commission

The disclosure officer must, if the disclosure is found to be about disclosable conduct, refer the disclosure to the Commission who will assess whether it qualifies as a PID. This should be done in writing. This written referral must contain:

- the disclosure;
- the disclosure officer's assessment;
- contact details for the discloser (where not anonymous);
- all materials provided by the discloser in connection with their disclosure;
- any materials gathered by the disclosure officer that supports their assessment of the disclosure; and
- any other relevant information.

The Commission has prepared a template referral letter which public sector entities may adapt for this purpose at **Appendix C: Referral letter template**.

Notifying the discloser of the assessment

Disclosure officers must notify the discloser of the outcome of any assessment of their disclosure in writing. Disclosure officers must keep, for the relevant file, a copy of these notifications.

If the disclosure officer has assessed the disclosure as not being about disclosable conduct, they must provide reasons for their assessment. Merely restating the legislative criteria is insufficient; the factual basis for the disclosure officer's assessment is required. This need not be drawn out, however; a brief explanation will suffice. The disclosure officer should then consider whether an alternative resolution framework could address the discloser's concerns. At all events, the information supplied may need to be considered for management reasons and, if so, passed to a relevant officer for action.

⁸¹ *PID Act* (n 2) s 17(2).

⁸² *Ibid* s 27.



The Commission has prepared a template notification letter which public sector entities may adapt for this purpose at **Appendix D: Notification letter template.**

The assessment process

The following table outlines the process described above:

Step	Description						
1.	<p>A person makes a disclosure...</p> <table border="1"> <thead> <tr> <th>If the disclosure was made to...</th> <th>Then...</th> </tr> </thead> <tbody> <tr> <td>A disclosure officer...</td> <td>Proceed to step 2.</td> </tr> <tr> <td>A person other than a disclosure officer...</td> <td>Provide to an authorised disclosure officer. Important: If the disclosure was made orally, it must be reduced to writing by the receiving officer. No further action required of the receiving officer under the PID Act.</td> </tr> </tbody> </table>	If the disclosure was made to...	Then...	A disclosure officer...	Proceed to step 2.	A person other than a disclosure officer...	Provide to an authorised disclosure officer. Important: If the disclosure was made orally, it must be reduced to writing by the receiving officer. No further action required of the receiving officer under the PID Act.
If the disclosure was made to...	Then...						
A disclosure officer...	Proceed to step 2.						
A person other than a disclosure officer...	Provide to an authorised disclosure officer. Important: If the disclosure was made orally, it must be reduced to writing by the receiving officer. No further action required of the receiving officer under the PID Act.						
2.	<p>The disclosure officer considers whether they are satisfied on reasonable grounds that the disclosure is about disclosable conduct:</p> <table border="1"> <thead> <tr> <th>If satisfied the disclosure is...</th> <th>Then...</th> </tr> </thead> <tbody> <tr> <td>About disclosable conduct...</td> <td>Proceed to step 3.</td> </tr> <tr> <td>Not about disclosable conduct...</td> <td>Notify the discloser and provide them reasons. No further action required of the disclosure officer under the PID Act.</td> </tr> </tbody> </table>	If satisfied the disclosure is...	Then...	About disclosable conduct...	Proceed to step 3.	Not about disclosable conduct...	Notify the discloser and provide them reasons. No further action required of the disclosure officer under the PID Act.
If satisfied the disclosure is...	Then...						
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4.	<p>The disclosure officer forwards the disclosure, the discloser's contact details (if applicable), and all other relevant information to the Commission for assessment.</p> <p>The disclosure officer notifies the discloser (if applicable) that the disclosure has been referred to the Commission for assessment.</p> <p>No further action required of the disclosure officer under the PID Act.</p>						

INVESTIGATING DISCLOSURES

The following section outlines a recommended approach for investigating entities to follow when investigating PIDs. Investigating entities must investigate all PIDs referred to them by the Commission.

This section provides guidance relating to:

- the obligations of investigating entities to keep disclosers informed of the investigation's progress;
- the obligations of investigating entities to keep the Commission informed and updated;
- what to do if the disclosure relates to corrupt or criminal conduct;
- the conduct and outcomes of a typical investigation under the PID Act;
- the need to protect disclosers and witnesses;
- the need to respond to any investigation findings; and
- timeframes under the PID Act and the rights of disclosers to provide PIDs to third parties.

The obligation to keep the discloser and the Commission informed

Investigating entities have reporting obligations, outlined below, to the person who made the disclosure, and the Commission, regarding the progress of any investigations under their control.

Keeping the discloser informed

The PID Act obliges investigating entities to update the discloser (where the discloser is identifiable) about:

- whether the investigation has ceased and the allegation(s) dismissed, and if so, the reason(s);⁸³
- the progress of investigations at least every three months;⁸⁴
- whether their disclosure has been referred to the chief police officer;⁸⁵ and
- the outcomes of any concluded investigations (ie the findings of the investigation).⁸⁶

Note: The requirement to keep disclosers informed at least once every three months does not preclude an investigator from updating the discloser more often. Where updates are provided to disclosers prior to the three-month deadline, investigators are obliged to inform the discloser of any updates within the next three months. Information that might adversely affect the investigation should not be disclosed in the update.

Important: If the investigator fails to keep the discloser informed of the progress of an investigation, the discloser may be able to obtain PID Act protections by disclosing the PID to a third party.⁸⁷

Important: The obligation to keep the discloser informed does not apply where the discloser is anonymous or has asked to not be kept informed.

Keeping the Commission informed

The Commission is responsible for the administration of the PID Act. This includes overseeing all investigations under the PID Act.

To allow the Commission to satisfy its oversight functions, the PID Act requires investigating entities to notify the Commission of:

- the progress and outcome of any investigations;⁸⁸
- where a PID has been referred to the chief police officer;⁸⁹
- any action taken, or proposed to be taken, in response to the discloser's allegations;⁹⁰ and

⁸³ Ibid s 23(1)(d).

⁸⁴ Ibid s 23(1)(a).

⁸⁵ Ibid s 23(1)(c).

⁸⁶ Ibid s 23(1)(b).

⁸⁷ Ibid s 27A.

⁸⁸ Ibid s 25(1)(a).

⁸⁹ Ibid s 25(1)(b).

⁹⁰ Ibid s 25(1)(c).

- the cessation of an investigation and the dismissal of the allegation(s), including the s 20 grounds and reasons for the dismissal.⁹¹

Note: The Commission may seek information other than that listed above, pursuant to its oversight functions.

The Commission recommends that investigating entities include the Commission in any correspondence sent to the discloser under section 23 of the PID Act. Alternatively, investigating entities may write directly to update the Commission about relevant events.

How to investigate under the PID Act

The PID Act requires that investigating entities investigate in accordance with the principles of natural justice and procedural fairness.⁹² The following sections outline the procedural and administrative requirements for conducting an investigation under the PID Act.

The investigative approach or method adopted by an investigating entity is a matter for it. However, the following provides some important requirements unique to the PID Act, and recommendations to assist investigating entities avoid common investigative errors.

Note: The following sections use the terms ‘public sector entity’ and ‘investigating entity’, which are similar, but slightly different. The PID Act provides that a public sector entity (and the Commission) becomes an investigating entity when investigating disclosures.⁹³ As a result, where the following sections refer to an investigating entity, this is in relation to an entity which is investigating a disclosure.

What should an investigation seek to reveal?

The primary function of any investigation under the PID Act is to determine what, if any, disclosable conduct has occurred. A PID referred to an investigating entity by the Commission must be investigated. Should the investigation reveal additional instances of disclosable conduct these, too, should be examined and responded to either within the same investigation, or separately. It is not necessary to report the independent investigation to the discloser. Other conduct that does not qualify as disclosable conduct, but which is brought to light by the investigation, may also be examined by the investigating entity if justified.

Important: Should the investigating entity identify additional instances of disclosable conduct which were not raised by the discloser, the discloser still receives all the protections under the PID Act. Detrimental action relates to action taken in response to a disclosure being made, not the information disclosed.

What sort of investigation is required?

Investigating under the PID Act does not grant any particular powers to investigate the subject of the disclosure. It instead provides protections to disclosers or those who assist with investigations.

An investigation under the PID Act requires the investigation to be conducted in accordance with the principles of natural justice and procedural fairness. That means that those whose rights or interests may be affected by the investigation, particularly the respondent(s), are given an opportunity to be heard on those issues before a relevant decision is made (see **Procedural fairness**).

Investigating entities may refer to the *Australian Government Investigation Standards 2011*⁹⁴ for guidance as to the proper conduct of an internal government investigation (see **Related material**). While developed for the Commonwealth in relation to the investigation of fraud, it provides material which could be adapted for an investigation under the PID Act.

⁹¹ Ibid s 25(1)(d).

⁹² Ibid s 20(1)(b).

⁹³ Ibid s 18.

⁹⁴ Attorney-General's Department, *Australian Government Investigation Standards* (August 2011).



As with any type of investigation, investigating entities must ensure they maintain adequate records, and at the end, produce a report which clearly outlines its findings, with reasons, and the reasons for taking, or not taking, any action in response to the findings.

Natural justice requires that investigations be conducted by an unbiased person, free of any conflict of interest. Mere apprehension of bias is technically immaterial but should be avoided if it is practical to do so.

Where it is clear or later discovered that a different investigation is required

Where the investigation reveals or otherwise indicates corrupt or criminal conduct, the investigating entity must pause the investigation and refer the disclosure to the entity which is most appropriate to investigate such claims (see **When and how to end an investigation**).

Where the investigation reveals a threat to health or safety, or the environment, which may require redress under a separate legislative head (for example, the *Work Health and Safety Act 2011* (ACT) or the *Environment Protection Act 1997* (ACT)),⁹⁵ investigating entities must also ensure they satisfy any other existing legislative obligations (for example, mandatory reporting requirements). However, in doing so, they must adhere to their PID Act obligations, including the need to protect the identity of the discloser and/or the fact of a disclosure being made.

The appointment of an investigator

The investigating entity must appoint a suitable officer to investigate the allegations within the PID. This must be a person who is sufficiently removed from the work area in question, and must not be involved, mentioned or otherwise involved in the subject of the PID. Further, the investigator must not have any real, perceived, or potential conflicts of interest with any of the parties mentioned or otherwise involved in the subject of the PID. An independent private investigator may be appropriate where there are no suitable internal people (ie a law or workplace investigations firm).

While the investigator need not be a person trained in the conduct of investigations, the investigator must, for obvious reasons, have sufficient competence to carry out the investigation and the investigating entity's obligations under the PID Act. For example, where the PID relates to the alleged mismanagement of a project it would likely be appropriate to appoint as investigator a person with knowledge of such projects.

The investigator must be aware of the investigating entity's obligations under the PID Act (for example, to notify the discloser at least every three months of the investigation's progress) and comply with them.

Delegating the investigation function to a contractor

The PID Act does not prohibit the delegation of an investigation function to a contractor or other party external to the investigating entity. Indeed, this may be necessary where, for example, the scope of the investigation is beyond the resources of the investigating entity to acquit. Should the investigating entity be a small public sector entity, and it would be impossible to investigate the matter due to conflicts of interest, it may be appropriate to appoint an external investigator.

Typically, the need to appoint an external investigator or similar will have been identified at the referral stage of the PID (ie following a consultation between the Commission and the receiving investigating entity). However, it is possible that, through the course of the investigation, it becomes apparent that is no longer appropriate for the investigating entity to continue its investigation, and an external investigator ought to be appointed.

Note: Prior to deciding to commit resources for external investigation, the Commission recommends the investigating entity consult with the Commission to see if there is another public sector entity (or the Commission itself) which has the resources and/or expertise to conduct the investigation.

⁹⁵ Should the PID be better resolved under these legislative frameworks, the relevant dismissal ground is PID Act (n 2) s 20(2)(d)(iii).

Advising the discloser of the investigation

Section 19A of the PID Act requires the Commission to notify the discloser:

- that the disclosure will be investigated;
- which investigating entity will investigate the disclosure; and
- relevant dates and other particulars.

Thus, the investigating entity is not obliged to notify the discloser that the investigation will take place (as they will have already been notified by the Commission). However, the Commission recommends that the investigator contact the discloser shortly after the referral to introduce themselves and provide the discloser an opportunity to ask any questions they may have.

The legal powers of the investigator to obtain information

Investigations of disclosable conduct do not provide any form of compulsory or other coercive powers by which information may be obtained. Further, the PID Act does not impose an obligation on anyone to assist or participate in an investigation – even when requested to do so by an investigating entity.

Note: The PID Act gives protections to witnesses from any civil or criminal liability resulting from their assistance to an investigation. Reminding witnesses of this may encourage them to provide information they would otherwise be reluctant to provide.

Investigating entities may direct relevant staff to participate in and cooperate with an investigation in accordance with their duties as employees. Such a direction may well be a reasonable and lawful direction. Should an employee fail to follow a reasonable and lawful direction, they may be engaging in misconduct. Standard considerations as to whether a professional standards investigation should proceed may be applied.

When to notify the respondent of the investigation

The respondent must be notified where decisions are contemplated such that procedural fairness would require them to have an opportunity to be heard before a decision is made (see **Procedural fairness**). The obligation of procedural fairness is imposed on the relevant decision-maker in relation to any action that might be taken against a person whose conduct has been impugned. An investigator, as such, does not have an obligation for reasons of procedural fairness to inform a person of a potential adverse finding. However, it would be usually part of the investigation to seek explanation from a person whose conduct is or might be impugned as to that conduct and matters relevant to it. Whenever an investigation suggests or otherwise points to wrongdoing on the part of the respondent, it is critical that the respondent be provided the opportunity to respond before any such information is acted on.

The only circumstance in which the respondent need not be notified of the investigation (and the allegation(s) underpinning it) is one in which no adverse findings are contemplated and the alleged conduct is found to be unsubstantiated. This is not suggesting as a matter of law that some managerial or administrative action (of course, not detrimental to the discloser) should not be taken if it is considered desirable to do so. In such an event, standard protocols about notice should be complied with. Public sector entities should also proceed with caution if that managerial/administrative action may be perceived as adverse to the 'respondent', and the respondent later finds out about an investigation of which they were not notified.

More details concerning notifying the respondent are below in **Notifying the respondent**.

Interviewing witnesses, the discloser and respondents

Interviewing witnesses, the discloser and respondents will often form a crucial part of the investigation process. Interviewing need not be a formal process and may be conducted over the phone or via video-conferencing facilities. The PID Act does not specify how an interview ought to be conducted. However, an investigating entity should ensure:

- they explain to the interviewees why they are conducting the interview;
- the interviewee understands the role of the interviewer, and the PID Act in a general sense;



- they emphasise the need for confidentiality and the prohibition on detrimental action against an actual or suspected discloser; and
- the interviewee is told about any employment obligations requiring them to cooperate and the consequences of refusing to do so, but otherwise that they have no legal obligation to cooperate.
- in some cases, a refusal to answer questions may reasonably be regarded as adversely affecting credibility.

When interviewing a witness or discloser, the interviewer must ensure they notify the interviewee that any answers they provide are protected under the PID Act. Doing so will hopefully encourage the interviewee to provide accurate and comprehensive responses to the interviewer's queries.

The investigator must ensure they make a record of any interviews they undertake. This can take the form either of a written record (eg a file note) or, where the consent of the subject is given, an audio or audio-visual recording. Investigators must seek the consent of interviewees to make an audio or audio-visual recording of any interviews, so as to comply with prohibitions on surveillance devices.

It is best practice that the interviewees be invited, at the end of the interview, to provide any final statements or views which the interviewee considers relevant or important.

Important: When interviewing subjects, it is important to remind them of the need for confidentiality and not to tell anyone about their participation in an investigation. This applies also, where applicable, to any support persons who may be present.

Note: Part 3 of the Commonwealth *Public Interest Disclosure Standard 2013* provides guidance which may be of assistance to investigating entities in conducting interviews (see **Related material**).⁹⁶

Procedural fairness

The investigating entity must ensure that a person against whom possible adverse findings are to be made is accorded procedural fairness (also known as 'natural justice'). If adverse information becomes known about others during the investigation, and that information may inform an adverse finding or outcome for them, those people are also entitled to procedural fairness. This could include the discloser.

What procedural fairness requires varies with the circumstances, but it means, in substance, that the person is entitled to:

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

The investigator is not a decision-maker for the purposes of the rules of procedural fairness. However, as already mentioned, an adequate and fairly conducted investigation should involve obtaining from any person whose conduct may be impugned an explanation of the relevant facts or their version of events.

Where an adverse decision is being contemplated, the applicable employment arrangements may well mandate a process that includes giving the employee an opportunity to be heard. This process will suffice where it is followed. In the absence of such an arrangement (as where the person affected is not covered by such arrangements) procedural fairness must be nevertheless afforded before a decision is made.

⁹⁶ Commonwealth Ombudsman (n 62) 47.



Ensuring confidentiality of the investigation

The PID Act provides for the offence of recklessly using or divulging protection information.⁹⁷ Protected information under the PID Act is information about a person that is disclosed to, or obtained by, a person because of the exercise of a function under the PID Act.⁹⁸ In short, where someone obtains information about another person in relation to a PID by exercising a function under the PID Act, they must ensure they treat that information carefully and confidentially. In addition, much of the risk of detrimental action can be minimised if the fact of the investigation and identities of those involved are kept as confidential as possible.

The PID Act allows for protected information to be shared where the information is used or divulged:

- under the PID Act or another Territory law;⁹⁹
- in relation to the exercise of a function under the PID Act or another Territory law;¹⁰⁰
- in a court proceeding;¹⁰¹ or
- with the consent of the person to whom the information relates.¹⁰²

To satisfy these confidentiality requirements, and to minimise the possibility of detrimental action being taken against the discloser (or general detriment to witnesses), investigating entities should establish a secure record keeping system. Investigating entities should ensure that:

- all paper and electronic documents and files are secure and only able to be accessed by those with a need-to-know and authority to do so;
- other materials, such as interview tapes, are stored securely with access only by those with a need-to-know and authority to do so; and
- communications and documents relating to the investigation are not sent to an email address to which other staff have access, or to a printer or fax machine in an unsecured area.

The identity of a person who is the subject of allegations or an investigation should be protected as much as is 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 detrimental action being taken against the discloser).¹⁰³ However, there may be legitimate reasons why the identity of persons involved may have to become known (see **The need to protect the identity of disclosers**).

Investigation time limits

The PID Act does not dictate a maximum time in which an investigation must conclude. The only time limitation relevant to an investigation are the quarterly notification obligations that investigating entities have to disclosers (see **Keeping the discloser and the Commission informed**). Despite there being no statutory time frame in which to complete an investigation, it is obvious that investigations should be completed in as timely a fashion as practicable.

Note: While the PID Act specifies updates at least quarterly, nothing prevents the investigating entity from providing them more frequently. Research shows that disclosers may become dissatisfied if they feel nothing is happening in response to their report.¹⁰⁴ Where disclosers are dissatisfied, there may be a heightened risk that negative workplace issues may arise (ie underperformance). The Commission recommends that investigating entities maintain regular contact with disclosers to prevent their dissatisfaction. This would include notifying them as soon as possible following significant events – like the Commission’s recommendation to notify the discloser of the appointment of an investigator (see **The appointment of an investigator**).

⁹⁷ PID Act (n 2) s 44.

⁹⁸ Ibid s 45(6).

⁹⁹ Ibid s 44(3)(a).

¹⁰⁰ Ibid s 44(3)(b).

¹⁰¹ Ibid s 44(3)(c).

¹⁰² Ibid s 44(4).

¹⁰³ Commonwealth Ombudsman (n 62) 51.

¹⁰⁴ Peter Roberts, A. J. Brown and Jane Olsen, *Whistling While They Work*, (ANU E-Press, 2011) 88.

Minimising impacts arising from the investigation

It is common that other staff within a work area will become aware of an investigation. This is particularly the case when parties external to the work area begin asking questions and/or conducting interviews. It is difficult to predict how staff will react in this situation. It is, however, to be expected that tensions may arise, which may have adverse consequences on the workplace if ignored.¹⁰⁵

While it may be appropriate for an investigator or manager to reveal, at a team meeting or similar, that an investigation is underway, no information which could identify the discloser should be shared in such a forum. The 'need-to-know' principle should be borne in mind at all times.

Those involved in the investigation (eg witnesses) must be warned that they must not discuss the details of the investigation and that taking detrimental action against a discloser (or suspected discloser) is an offence.

The investigation report

The product of an investigation of disclosable conduct should be an investigation report. The investigation report should outline:

- the allegations;
- the subject of the PID (if different to the allegations);
- the investigation approach;
- the evidence collected;
- analysis of the evidence collected;
- the findings of the investigator; and
- the recommended response to the findings dealing with the impugned conduct, if any (but not as to any potential disciplinary action).

The investigation report must be a complete document which permits the reader to understand the issues and the findings without needing to refer to external material or confer with the investigator. Outlined below are some additional considerations to be borne in mind when preparing an investigation report. Aside from being necessary to fulfil the ultimate purpose of the PID Act, there are also essential to enable the Commission to perform its supervisory function.

Findings of fact

The primary task of an investigation is to determine what, if any, disclosable conduct occurred. Therefore, an investigation report must contain findings that disclosable conduct did or did not occur or cannot be determined. All findings must be explained by reference to the evidence.¹⁰⁶

It is also critical that findings regarding any detrimental action be included in the investigation report. While the discloser (or the Commission) may seek redress independently of the investigating entity, the investigation report must outline any detrimental action risks which are likely to have occurred. Further suggestions about this are below.

Recommendations and actions

Investigation reports that make findings of disclosable conduct must contain recommendations, outlining suggested actions to be taken in response to the disclosable conduct (but not as to any potential disciplinary action). This will assist investigating entities to satisfy their obligations to take action in response to any findings.¹⁰⁷

Any recommendations made must be proportionate and relevant to the disclosable conduct. For example, where it is revealed that a system failure enabled the conduct to occur (eg a lack of controls or other design flaw) a relevant and proportionate recommendation would be to have the system failure addressed.

¹⁰⁵ Commonwealth Ombudsman (n 62) 55.

¹⁰⁶ *Ibid.*

¹⁰⁷ *PID Act* (n 2) s 24.



Detrimental action against the discloser

The investigation report should outline how the investigating entity managed the risk of detrimental action being taken against the discloser.¹⁰⁸ It should also state whether detrimental action allegations were made, either by the discloser or another party, and how the investigating entity responded.

While managing the risk of detrimental action is an ongoing obligation, which extends beyond the conclusion of the investigation, it is critical that a record of any alleged detrimental action and the response to it is made. This will assist the discloser in seeking redress should detrimental action occur and enable the investigating entity grounds to deal with suggestions they did not act to prevent detrimental action occurring or minimise it as much as reasonably practicable.

Disciplining of those responsible for the disclosable conduct

Those found to be responsible for disclosable conduct must be disciplined.¹⁰⁹ This is scarcely surprising considering the nature of disclosable conduct, which involves matters significantly detrimental to the public interest. Given that most, if not all, options for disciplining public officials reside within the PSM Act and/or relevant enterprise agreement, a defensible recommendation would usually be to have the matter referred to the Public Sector Standards Commissioner for consideration.

However, it is in the discretion of the head of a public sector entity to determine what will constitute sufficient and appropriate disciplinary action. Where, for example, disclosable conduct was found but, as it happened, considered minor, it may be appropriate to discipline the responsible individual internally. This could, for example, take the form of a warning or placing restrictions on the responsible officer's work. The Commission recommends that the investigating entity engage with the Public Sector Standards Commissioner for advice as to what course would be appropriate.

Providing copies of the investigation report

While the PID Act does not impose an obligation to provide the investigation report to a discloser, the Commission recommends that disclosers be provided with a copy, unless there are good reasons, such as privacy or the protection of investigative methods, which need confidentiality to be preserved. In all other cases where the respondent(s) are aware of the investigation, the Commission also recommends they be provided a copy of the investigation report. By providing those involved in the process copies of the investigation report, it will raise confidence in the investigation process and may address concerns regarding the conduct of the investigation. It will also discharge the investigating entity's procedural fairness obligations.

Note: While it is the usual position that investigation reports be provided to the discloser and/or respondent(s), in some circumstances redactions of personal information may be required. For example, where the identified risk of detrimental action being taken against the discloser is high. The Commission recommends that where such risks may be present, the investigating entity seek advice from its legal team, as well as its internal freedom of information or privacy teams.

¹⁰⁸ Ibid 54.

¹⁰⁹ Ibid s 24(1)(b).

The need to protect the identity of disclosers

Investigating entities and disclosure officers must take reasonable steps to protect the identity of disclosers. The PID Act provides that the reckless misuse of protected information is a criminal offence, for which either the disclosure officer, or person responsible for misusing the discloser's information, is personally liable. Protected information would include information that identifies, or could readily identify, the discloser.¹¹⁰

Important: The reckless use of protected information carries a penalty of six months imprisonment, a 50-penalty unit fine, or both.¹¹¹

However, the offence of using or divulging protected information does not apply if the information is used or divulged:

- under the PID Act or another Territory law;¹¹²
- in relation to the exercise of a function (by those with functions) under the PID Act or another Territory law;¹¹³
- in a court proceeding;¹¹⁴ or
- with the consent of the person about whom the protected information relates.¹¹⁵

Example: Disclosure officers are required to provide to the Commission the discloser's name and contact details when referring a disclosure of disclosable conduct to the Commission.¹¹⁶ This is not an offence, as the sharing of the discloser's contact details are expressly required by the PID Act.¹¹⁷

Further, to effectively investigate some disclosures it may be necessary that the identity of the discloser be communicated to third parties. For example, where it is feared that it would be unsafe for the discloser to continue working in their current workplace because of the disclosure and/or the nature of the alleged conduct it will be necessary to inform relevant others. In such circumstances the investigating entity or disclosure officer should liaise with the discloser to discuss appropriate options. In addition, to afford a respondent procedural fairness, the circumstances of the matter might require the identity of the discloser to be revealed to them. The discloser should be warned about this.

Finally, in addition to the protections specified in the PID Act, all public officials performing functions under the PID Act have additional obligations to ensure their use of personal information is consistent with the principles in the *Information Privacy Act 2014* (ACT).

Protection for witnesses

Individuals who assist in the investigation of PIDs are protected against criminal and civil liability resulting from assistance they give to that investigation.¹¹⁸ However, as with disclosers, this indemnification does not extend to the conduct (aside from their assistance to the investigation) of the witness (eg if the assistance reveals misconduct on the part of the witness).¹¹⁹

¹¹⁰ Ibid s 44 (example 3).

¹¹¹ Ibid ss 44(1), 44(2).

¹¹² Ibid s 44(3)(a).

¹¹³ Ibid s 44(3)(b).

¹¹⁴ Ibid s 44(3)(c).

¹¹⁵ Ibid s 44(4).

¹¹⁶ Ibid s 17(2)(b)(i).

¹¹⁷ Ibid ss 44(3)(a), 44(3)(b).

¹¹⁸ Ibid s 42A(1).

¹¹⁹ Ibid s 42A(2).



When and how to end an investigation

An investigating entity may end an investigation where it is reasonably satisfied:

- it is impractical to investigate the matter due to the discloser's anonymity;¹²⁰
- it is impractical to continue investigating the disclosure where the discloser fails to help the investigation;¹²¹
- the information disclosed is wrong and an investigation is not warranted;¹²²
- the age of the disclosed information is such that it is impractical to investigate the disclosure;¹²³ or
- there is a more appropriate way to address the alleged conduct which is the subject of the disclosure.¹²⁴

An investigating entity may invoke any of the above at any point throughout the course of an investigation in the appropriate circumstances.

The investigating entity may also end an investigation where the discloser withdraws the disclosure, and nothing remains which warrants investigation.¹²⁵

Where an investigating entity is considering ending an investigation, the investigating entity should provide to the discloser (where the discloser is not anonymous) the opportunity to correct the defect(s) which the investigating entity considers provide a reasonable basis for ceasing the investigation.

An investigating entity must provide to the discloser notice where a decision to end the investigation has been taken.¹²⁶ The notice cannot merely restate the legislative basis on which the investigation has ended but must also include the factual basis for the discontinuance.

Note: Investigating entities must notify the discloser and the Commission of where an investigation has ended (see **Keeping the discloser and the Commission informed**).

Withdrawal of the disclosure

Where the discloser has expressed either an:

- explicit retraction of their disclosure; or
- otherwise represented that they do not wish the disclosure they made be investigated;

and the investigating entity is reasonably satisfied there is nothing remaining which warrants investigation, the investigating entity may end the investigation.¹²⁷

A disclosure withdrawal may occur where, for example, a disclosure was made unintentionally by an official to their supervisor, manager or person who has functional responsibility for addressing the type of conduct (see **Dealing with disclosers**). Two common reasons why a discloser may seek to withdraw a disclosure include the discloser fearing their own misconduct being revealed and/or perceived reprisal action.

Although the PID Act contemplates the possibility of withdrawal, it does not specify a process by which a disclosure is to be withdrawn. Withdrawal does not have the automatic effect of stopping an investigation. Instead, the investigating entity must focus on whether there is anything remaining which warrants investigation. The proper question to ask is whether the investigation should continue despite withdrawal of the disclosure. As the Commission has already assessed the disclosure to qualify as a PID, in most cases there will be something which warrants investigation.

¹²⁰ Ibid s 20(2)(b).

¹²¹ Ibid s 20(2)(c).

¹²² Ibid s 20(2)(d)(i).

¹²³ Ibid s 20(2)(d)(ii).

¹²⁴ Ibid s 20(2)(d)(iii).

¹²⁵ Ibid s 20(2)(a).

¹²⁶ Ibid s 23(1)(d).

¹²⁷ Ibid s 20(2)(a).

Important: The withdrawal of a disclosure does not change the qualification of the disclosure as a PID, and the discloser retains all statutory protections.

Impracticability due to discloser's anonymity

Where the investigating entity is reasonably satisfied that, due to the discloser making an anonymous disclosure, it would be impractical to investigate the disclosure, the investigating entity may end the investigation.¹²⁸

It should be noted the PID Act expressly permits anonymous disclosures. The mere fact that a disclosure was made anonymously does not indicate that a less than comprehensive investigation is warranted. In considering whether to discontinue an investigation due to the anonymity of the discloser, the investigating entity will need to consider the practicality of commencing, or continuing, an investigation without the assistance of the discloser. The considerations are similar to where a disclosure may need to end due to the non-cooperation of the discloser (see **The discloser fails to cooperate with the investigation**).

Impracticability does not arise where the discloser, despite claiming anonymity, has provided an alternative method of communication (eg a pseudonym or temporary email account).

Accordingly, before deciding to not investigate, or stop investigating on the ground of impracticability, the investigating entity should consider the adequacy of the information provided and whether the discloser's involvement in the investigation is essential. If other witnesses can be identified, or an investigation can be conducted by, for example, examining documents or electronic records, this should occur, so long as that type of investigation is practicable.

The discloser fails to cooperate with the investigation

An investigating entity may decide not to investigate a disclosure (or stop investigating it) if an investigation is impracticable because the discloser refuses, fails or is unable to give the investigator relevant information or assistance.¹²⁹ To rely on this ground, the investigating entity must have actually requested information or assistance from the discloser, and the lack of information or assistance must make it impractical to investigate the disclosure. It is not sufficient to presume the non-cooperation of a discloser.

As in instances where the anonymity of the discloser hinders any proposed or current investigation, the investigating entity must consider whether the discloser's involvement in the investigation is essential or whether there are other sources of information reasonably available to the investigation.

Where the information disclosed is wrong and an investigation is unwarranted

An investigating entity may decide to discontinue or not commence an investigation where the information provided by the discloser is wrong, and an investigation (or further investigation) is not warranted.¹³⁰ This ground is mostly self-explanatory. Of course, where X has disclosed that a certain form of conduct had occurred, but enquiries establish that the conduct did not, or could not, have occurred, the investigation is complete.

It will usually be necessary to raise with the discloser the matters that indicate that the information provided was wrong, or not established to be correct, in order to ensure that this was not the result of some omission or misunderstanding before regarding the investigation as completed.

The age of the information renders an investigation impracticable

The investigating entity may decide not to investigate a disclosure (or stop investigating it) if an investigation is impractical because of the age of the information.¹³¹ There is no time limit for making a disclosure. However, if the disclosure relates to matters that occurred a long time ago, it may be difficult to locate and interview witnesses and relevant records may have been destroyed. Mere difficulty in

¹²⁸ Ibid s 20(2)(b).

¹²⁹ Ibid s 20(2)(c).

¹³⁰ Ibid s 20(2)(d)(i).

¹³¹ Ibid s 20(2)(d)(ii).



investigating would not generally be sufficient to meet this ground. The investigating entity should consider what evidence is required and whether it is practical to access it.

Where a more appropriate framework exists to resolve the discloser's concerns

An investigating entity may dismiss an investigation where it is reasonably satisfied that there is a better way to resolve the conduct of concern.¹³² This may arise, for example, where the conduct related to a workplace dispute involving systemic issues and mediation could resolve them. Alternatively, where the conduct reveals criminal or corrupt conduct, it would not be appropriate to continue the investigation as a PID, and it must be referred to an appropriate entity with the relevant investigative powers (for example the chief police officer, or the Commission).

If the PID is referred to another entity which is better placed to address the alleged conduct, the discloser must be notified.

In practice, these circumstances are only likely to arise during an investigation where further information comes to light. This is because, prior to an investigating entity receiving a PID for investigation, the Commission will have assessed it and decided the appropriate investigative entity.

The need to notify the Commission that the investigation has been discontinued

Investigating entities must notify the Commission where an investigation has been discontinued and the reasons for it. This must be accompanied by a PID acquittal template (see **Appendix F: Final investigation report summary sheet**), which provides the Commission with the necessary information to complete its annual reporting requirements under the PID Act (see **Keeping the Commission informed**).

¹³² Ibid s 20(2)(d)(iii).

CONCLUDING AN INVESTIGATION AND ADMINISTRATIVE PROTOCOLS

The following sections outline the obligations that investigating entities have following the conclusion of an investigation. These include:

- notifying the parties involved that the matter has been concluded;
- the obligations of the investigating entity to take action in respect of any findings;
- how to acquit investigations that do not make any findings or fail to substantiate the discloser's allegations;
- the options available to disclosers who are displeased with the investigating entity's conduct in relation to the investigation, and how the investigating entity may assist them;
- the requirement to create, keep and maintain adequate records of the investigation,
- how to manage freedom of information ('FOI') applications in relation to investigations; and
- best practice suggestions regarding how investigating entities may monitor PIDs within their business lines to enhance their operations.

Notifying the discloser, the respondent, and the Commission of the conclusion of the matter

Investigating entities are always required to notify the discloser and the Commission that an investigation has concluded. In certain circumstances, the investigating entity is also obliged to notify the respondent of the conclusion of an investigation. The following part provides guidance regarding how to notify interested parties that an investigation has concluded.

Notifying the discloser

Investigating entities must notify the discloser in writing once an investigation has concluded. This notice must include any information regarding any action taken or proposed to be taken in response to the PID.¹³³ Notifying the discloser of the outcome of an investigation must occur within three months of the last update provided to the discloser.¹³⁴ Failure to do so may permit the discloser to obtain the protections of the PID Act by disclosing the contents of their PID to a third party (see **Making a report to a third party**).

The Commission recommends that, as part of the investigation finalisation process, investigating entities implement a workflow that ensures the discloser is notified as required. The Commission recommends that the discloser be notified as soon as possible after a decision is taken to conclude an investigation.

Notifying the respondent

Where a person's conduct has been impugned, the investigator will almost invariably seek, in one way or another, information from that person about the questioned conduct. Where an investigation report contains adverse findings, the affected person should be notified, and their response considered before any process is undertaken that may have adverse consequences for them. This will usually be by, or at the direction of, the relevant decision-maker making a relevant decision. This is a core requirement of procedural fairness and was discussed earlier (see **Procedural fairness**). The following paragraphs focus on notifying the respondent where findings were or are not being made against them, and the relevant considerations concerning whether they require notification of the investigation.

Whether to notify a respondent that an investigation has concluded will be influenced by whether the respondent (or the workplace more generally) is aware of the allegations about them, and that an investigation took place. There are no strict policy or legislative obligations outlining when it is appropriate to notify a respondent that allegations were made about them where the investigation does not bear them out. While it is not a matter of public policy, common courtesy and general employment principles (ie an expectation that a person is made aware of complaints concerning them) may require

¹³³ *PID Act* (n 2) s 23(1)(b).

¹³⁴ *Ibid* s 23(1)(a).



an investigating entity to notify a respondent of an investigation, despite no adverse findings being made.

Investigating entities should consider the ongoing ramifications of notifying (or not) a respondent that allegations were made about them to which no action will be taken. The discussion below reflects the same principles which would be considered by the Commission in determining whether to notify a respondent of allegations which did not result in findings (regardless of whether the alleged conduct was disclosable or corrupt conduct).

In some circumstances there may be no obligation to notify the respondent of an investigation's conclusion. This could occur where the investigation did not make or require findings against the respondent and where the investigation was conducted:

- covertly;
- without the need to consult witnesses; and
- in such a way that it is improbable that the respondent (or others, apart from the discloser) are aware of the investigation.

Example: An anonymous discloser made allegations pertaining to X on Y date regarding Z conduct. A preliminary inquiry reveals it is impossible for X to have engaged in Z on Y date (for example, X was on leave at the relevant time or similar). The investigation may be discontinued (see **When and how to end an investigation**). If X were never interviewed, or notified of the investigation, it may be appropriate not to notify X of the allegations put against them. This is because to put unsubstantiated and false allegations may cause stress for X, or potentially put the discloser at risk of detrimental action being taken.

However, there is no strict rule regarding circumstances in which it would be appropriate not to notify a respondent of an allegation made against them. At all times, it is the judgement of the investigating entity that will determine whether a respondent, who may not be aware of allegations being made about them, is to be notified that an investigation took place and those investigating found no case to answer. A relevant factor to consider in determining whether to notify such a respondent is whether fairness would require that they be notified.

Example: X discloses that Y (X's supervisor) is engaged in maladministration. X's disclosure contains many personal observations which indicate X's strong dislike for Y. A subsequent investigation finds no evidence of maladministration on the part of Y – which was ended without the need to interview witness or otherwise make Y or any witnesses aware that an investigation took place. However, the investigating entity considers the personal observations of X to be such that it is no longer appropriate for X and Y to work together. The investigating entity, as part of its general management responsibilities, has X transferred to a new division (with X's consent). Here, it may be appropriate to notify Y that an investigation (which did not find any wrongdoing on Y's part) took place and the reason for X's transfer. In doing so, the investigating entity must be careful to exercise judgement in how much information they provide Y.¹³⁵

Where the respondent is, or reasonably likely to be, aware of an investigation, investigating entities should provide the respondent with formal notification that the matter has concluded, that no findings were made, and that no further action will be taken in respect of the allegations. Investigating entities should ensure they have adequate supports in place for the respondent when providing this formal notification. Such supports could include:

- directing the respondent to any available support networks within the workplace (such as an Employee Assistance Program or similar);
- providing miscellaneous paid leave for a period to the respondent; and
- where the workplace is no longer appropriate for the respondent, offer to move the respondent to a new work area.

¹³⁵ Ibid ss 43, 44(3)(a)-(b).

The Commission publishes reputational repair protocols in respect of actions taken pursuant to the IC Act which may be of assistance (see **Related material**).

Notifying the Commission

The PID Act obliges investigating entities to notify the Commission of:

- any action taken, or proposed to be taken, in relation to a PID;¹³⁶ and
- a decision to end the investigation of a PID.¹³⁷

Therefore, investigating entities must notify the Commission of any investigations which have concluded, regardless of the reason for their conclusion. In notifying the Commission of a concluded investigation, investigating entities must use the template at **Appendix F: Final investigation report summary sheet** and follow its instructions. This template is required to enable the Commission to fulfil its annual reporting requirements.

In addition, investigating entities must provide the Commission with a copy of the finalised investigation report. Investigating entities may adapt the example report template available at **Appendix G: Example investigation report template**. However, investigating entities may use any form of investigation report suitable for their purposes – if it provides a defensible and comprehensive overview of the investigation. The Commission will review investigation reports to identify:

- whether the PID was adequately investigated;
- systemic issues within the ACT public sector; and
- potential improvements to the administration of the PID Act.

The requirement for a public sector entity to take action

The PID Act requires heads of public sector entities to act in response to findings of disclosable conduct made following an investigation. Specifically, the head of a public sector entity must:

- discipline any person(s) responsible for the conduct the subject of the PID;¹³⁸ and
- take action to prevent the conduct from continuing or occurring in the future.¹³⁹

Typical examples of action that could be taken include:¹⁴⁰

- commencing disciplinary proceedings under the PSM Act;
- mediation or conciliation to resolve workplace conflicts;
- undertaking an internal audit or other review of the work area to which the PID related;
- implementing policy or procedural changes to prevent the issue arising again; and
- conducting relevant training to prevent the issue arising again.

Note: The PID Act speaks of disclosable conduct which is 'likely to' occur, indicating that action must be taken in response to disclosable conduct which has not yet occurred, but may do so in the future.¹⁴¹

Important: Investigations may reveal conduct which does not meet the disclosable conduct threshold (ie maladministration; or a substantial and specific danger to public health or safety, or the environment) but still requires some form of response. This might arise, for example, where the conduct of a respondent nevertheless breaches an applicable workplace policy or code of conduct. In these circumstances, the head of a public sector entity may still take action, indeed, may be obliged, to respond to such conduct.

The action required to be taken by the head of a public sector entity should largely be informed by the investigation report. In many cases it will suffice to endorse the recommendations of the investigator.

¹³⁶ Ibid s 25(1)(c).

¹³⁷ Ibid s 25(1)(d).

¹³⁸ Ibid s 24(1)(b).

¹³⁹ Ibid s 24(1)(a).

¹⁴⁰ Commonwealth Ombudsman (n 62) 56.

¹⁴¹ PID Act (n 2) s 24.

Note: While it is open to the head of a public sector entity to take actions not recommended in the investigation report, there must be a justified and reasonable basis for doing so. The head of the public sector entity must document the basis on which they acted.

How to manage an investigation where the allegations are not substantiated

There may be several reasons why the allegations within a disclosure are not substantiated, including insufficient evidence to find that disclosable conduct occurred. Where a conclusion of this kind is reached, the discloser should be given as much information as possible about the outcome of the investigation, consistent with 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 relevant public sector entity aware of gaps in its policies or procedures or lead to consideration of how to prevent similar issues in the future.¹⁴² It may also be relevant if a similar allegation is made in the future by another discloser.

In many cases it may not be possible to positively conclude that disclosable conduct did not occur. Where it is reasonably suspected that disclosable conduct did occur, but the relevant decision-maker is not satisfied that it did, it is not necessary to disregard the suspected possibility. It may still be appropriate to take steps to obviate the risk posed by the possibility. In short, the public sector entity is entitled to use any information uncovered by the investigation. What is done in response to the suspicion is a matter for the public sector entity.

In some circumstances, failure to substantiate the allegations may be a reflection of a misunderstanding on the discloser's part as to what sort of conduct is, and is not, able to be resolved under the PID Act. Investigating entities should consider this possibility in concluding their investigations and, where appropriate, revise any communication or training materials relevant to the PID Act. In addition, this type of situation should be brought to the Commission's attention, to enable it to tailor its communication and education products accordingly.

Regardless of the outcome, the discloser should be assured that they will still be protected.¹⁴³

However, where a failure to substantiate the allegations occurs because the disclosure was frivolous or vexatious a court may find the discloser forfeits any protections under the PID Act¹⁴⁴ and the investigating entity may consider whether taking action against the discloser is appropriate, having regard to all the relevant circumstances.

How to assist a discloser who is displeased with the outcome of an investigation

Disclosers may be unhappy with the outcomes of the investigation. This will often arise where the investigation has either:

- failed to substantiate the discloser's allegations;
- taken no action in relation to any findings; or
- recommended actions which the discloser considers inadequate.

Note: Where an investigating entity makes findings, yet proposes to take no action in response, the discloser may refer the PID to a third party (see **Making a report to a third party**). The PID Act is clear that action must be taken in relation to any findings made following an investigation.

Should a discloser express concerns following an investigation, the investigating entity should consider (where appropriate) how to accommodate or otherwise respond to the discloser's concerns. Ensuring that the discloser is kept updated throughout the investigative process, and clearly explaining that process to the discloser, should assist in managing the expectations of the discloser (see **Keeping the discloser informed**). It is critical that investigating entities make clear to the discloser that the

¹⁴² Commonwealth Ombudsman (n 62) 56.

¹⁴³ Ibid.

¹⁴⁴ PID Act (n 2) s 37(2).

actions taken, or proposed to be taken, are the responsibility of the head of a public sector entity, based on the available evidence. It is also only necessary to keep the discloser updated in a broad sense – there is no requirement to notify them of every detailed step of the investigation, and there may be good reasons for keeping certain details confidential. Public sector entities should, however, have in place internal review options, and advise the discloser of these, to allow for their concerns to be considered.

When presenting the outcomes of the investigation to the discloser, investigating entities must ensure that (subject to any confidentiality or privacy considerations) an adequate account of the investigation is given.

In short, investigating entities should ensure that:

- they present a report to the discloser which adequately deals with allegations raised by the discloser;
- they demonstrate the seriousness with which they treated the allegations; and
- they value the discloser having come forward with their concerns.

Should the discloser continue to be unhappy with the investigating entity's conduct of the investigation, the PID Act provides two review options which disclosers may pursue:

- complaining to the Commission; and
- complaining to the ACT Ombudsman.

Investigating entities must provide details on how a discloser may complain to either the Commission or the ACT Ombudsman should the discloser wish to have the investigation reviewed.

The necessity of maintaining adequate records

Good records ensure that all action taken regarding the receipt and handling of a PID is reviewable and justifiable. In addition, good records enable investigating entities and the Commission to analyse trends and/or themes, which may allow for proactive measures to improve government administration (see **The need for entities to monitor PIDs and improve their administration**).¹⁴⁵

Investigating entities must keep the following records in a secure place:

- details of the disclosure;
- where the disclosure was received orally, a written record of that disclosure;
- details about how and when the disclosure was made;
- any risk assessments made;
- any allegations of detrimental action raised by any party;
- details of when the PID was received by the investigating entity from the Commission; and
- details as to the conduct of the investigation, and who conducted it.

The Commission also recommends that investigating entities assign all investigations and/or disclosures a unique reference number.

Note: The Commission will provide its own reference number when referring PIDs for investigation.

Can FOI applicants seek access to investigation reports?

Certain aspects of an investigating entity's handling of PIDs may be subject to FOI requests under the *Freedom of Information Act 2016* ('**FOI Act**'). In deciding whether to release information under the FOI Act, investigating entities should follow established procedures for dealing with such requests, subject to the exceptions below.

Exception: Section 1.9(a) of Schedule 1 of the FOI Act deems information that would, or reasonably could, disclose the identity of a person who has made a PID as being not in the public interest to disclose.¹⁴⁶ Therefore, information which could or would identify a discloser should not be released.

¹⁴⁵ Ibid s 58.

¹⁴⁶ *Freedom of Information Act 2016* (ACT), sch 1, s 1.9(a).

Exception: Disclosing the identity of a discloser (defined as protected information) may be an offence under the PID Act – regardless of whether it is in response to a FOI Act application.¹⁴⁷ This is because, despite the PID Act making provision for the release of ‘protected information’ under ‘another Territory law’,¹⁴⁸ the FOI Act expressly provides (as described above) it is not in the public interest to disclose information which could, or would, identify a discloser.

Important: Refer to **The need to protect the identity of disclosers** for additional information.

The need for entities to monitor PIDs and improve their administration

Public sector entities should put in place an effective system for recording:

- the number and types of PIDs they receive;
- the number of investigations conducted;
- the outcomes (including action taken in response to investigation report findings and recommendations);
- details of any support provided to a discloser; and
- allegations of detrimental action.

Capturing data about instances where a person has disclosed information falling short of the PID criteria will also assist public sector entities to measure the extent of PID activity within their entity.

Much of this information will be needed to satisfy the public sector entity’s obligation to provide information to the Commission for its annual report on the operation of the PID Act (see **Notifying the Commission**). It will also help investigating entities to evaluate the effectiveness of their procedures and identify any systemic issues.

Important: Public sector entities are not required to notify the Commission of disclosures which do not amount to disclosable conduct unless, of course, they are mandatory disclosures under the IC Act.¹⁴⁹

The public sector entity may also wish to monitor the resources (financial and human) allocated to handling PIDs, 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 public sector entity’s processes, so that improvements can be made.¹⁵⁰

¹⁴⁷ *PID Act* (n 2) s 44.

¹⁴⁸ *Ibid* s 44(3)(a).

¹⁴⁹ *IC Act* (n 79) *Div* 3.1.2.

¹⁵⁰ Commonwealth Ombudsman (n 62) 59.

RISK ASSESSMENTS, PRACTICAL SUPPORT AND PREVENTING DETRIMENT

A key, arguably the principal, purpose of the PID Act is to ensure that those who make disclosures do not suffer detrimental action.

The protections for disclosers (and witnesses) are expressly provided for by the PID Act and were discussed previously in these guidelines (see **What protections do PID disclosers get?** and **Protection for witnesses**). Respondents too, while not receiving any specific PID Act protections, should be treated with all due respect and should not suffer detriment which is disproportionate or unwarranted in response to a PID.

In all cases, the most effective way to deal with the detrimental effects which may apply to those who make, assist or respond to disclosures that qualify as PIDs is to make a risk assessment. Risk assessments take account of the specific behaviour and circumstances that may constitute or result in detriment. Further, an accurate and objective risk assessment enables the investigating entity to put suitable strategies in place to control identified risks and defend itself against allegations of having failed those who may suffer detriment.¹⁵¹

As such, public sector entities should have procedures and processes that:

- assess and manage the risk of detrimental action being taken against disclosers;
- support witnesses who may assist investigations of disclosable conduct; and
- ensure that respondents do not suffer undue detriment (that is, detriment which is not related, or proportionate, to any wrongdoing committed by the respondent).

The following sections outline recommended approaches in dealing with the above. In the main, this guidance is drafted in respect of protecting disclosers against detrimental action.¹⁵² However, the concepts and suggestions below (adapted significantly from the approach recommended by the Commonwealth Ombudsman) may be applied to others who may suffer detriment (ie conduct which is not detrimental action within the meaning of the PID Act but nevertheless may result in undue harm to a person). For example, the process of making a risk assessment concerning the risk of detrimental action being taken against a discloser can often be used to assess the risk of reprisal being taken against a witness who assists an investigation.

Important: Responding to the wrongdoing of a respondent is, for obvious reasons, not a relevant detriment.

Risk assessments and disclosers

The PID Act does not require a public sector entity to have any formal risk assessment processes, templates or similar – its obligations are to ensure that any risks associated with detrimental action (conduct directed toward a discloser) are effectively managed.

Public sector entities may already have in place a risk assessment framework (sometimes referred to as a risk assessment matrix or similar). A basic example which may be adapted is available at **Appendix B: Risk Reprisal Management Plan Template**. These typically employ likelihood and significance axes, which produce a standardised and objective measure of the relative risk of a given activity. Such tools can be readily adapted or used by investigating entities to manage the risk of detrimental action occurring to the discloser.

¹⁵¹ Ibid.

¹⁵² PID Act (n 2) s 40.

The Commonwealth Ombudsman provides a four-step approach to assess the risks that disclosers may face:¹⁵³

- Identifying risks – are there reprisals or related workplace conflict problems in the workplace, or do they have the potential to be problems?
- Assessing risks – what is the likelihood and consequence of detrimental action or related workplace conflict?
- Controlling risks – what strategies should be put in place to prevent or contain detrimental action or related workplace conflict?
- Monitoring and reviewing risks – have the strategies been implemented and were they effective?

Important: This guidance was developed in the context of the *Public Interest Disclosure Act 2013* (Cth) under which disclosures may only be made by public officials. As such, its focus is principally on risks which arise in an employment related context (ie detriment which attaches to the discloser's status as an employee). The PID Act is not so limited, and where applicable, consideration will need to be given to assessing risks to individuals who do not have any employment or contractual nexus with a public sector entity.

Note: While the below refers to risks which relate to detrimental action being taken against a discloser, the concepts and strategies can easily be made use of in the context of others (eg witnesses or respondents).

Identifying risks

A risk assessment should be completed as soon as possible after a PID is received from the Commission.¹⁵⁴ The protections to which the discloser is entitled begin from the day of the disclosure. Investigating entities therefore should implement measures to guard against the risk of detrimental action being taken against the discloser from that date. While it may be impossible to take specific proactive measures prior to becoming aware of the PID (ie prior to receiving it from the Commission), it is prudent that investigating entities act promptly to protect the discloser from the outset against the possibility that the disclosure will be determined to be a PID.

Further, the risk of detrimental action may increase or change as the investigation progresses, and more people become aware of the disclosure. Even after the investigation has been completed, the risk of detrimental action may persist, or even increase, particularly if action has been recommended to address the investigation findings.¹⁵⁵ It is therefore necessary for an investigating entity to review the risk assessment when circumstances change to identify and manage any new risks which may arise.

The best sources of information about potential risks are those involved in the particular workplace, especially the discloser and their supervisor or manager (provided that person is not involved in the alleged wrongdoing).¹⁵⁶ Asking the discloser why they are reporting wrongdoing and who they might fear detrimental action from can be helpful in:

- assessing perceptions among 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; and
- identifying the motives of staff who potentially might become involved in detrimental action.

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

¹⁵³ Commonwealth Ombudsman (n 62) 68.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid* 68.

The person doing the risk assessment should clearly define the individual factors affecting the discloser and the specific workplace when assessing if there are factors that make detrimental action or related workplace conflict likely.

Important: While each case will be different, public sector entities should develop a list of risk factors that can alert those dealing with the PID, and managers, to problems. **Appendix E: Indicators of a higher risk of reprisal or workplace conflict** includes some indicators of a higher risk of possible detrimental action being taken against the discloser, or workplace conflict.

Assessing risks

Having identified the risks that a discloser may face, the investigating entity should assess those risks to identify:

- the likelihood of detrimental action or related workplace conflict occurring – this may be high if:
 - there have already been threats;
 - there is already conflict in the workplace; or
 - a combination of circumstances and risk factors indicate detrimental action or related workplace conflict are likely; and
- the potential consequences if the risks eventuate, both to the discloser’s immediate and long-term wellbeing and the cost to the investigating entity.

One aspect of the risk assessment is assessing the likelihood of the discloser’s identity becoming known. Disclosers will often be anxious about the prospect of their identity being revealed. The disclosure officer must assure the discloser that their identity will always be protected as much as possible, and of the procedures that are in place to ensure confidentiality of the investigation process. The specific legal protections in the PID Act for the discloser’s identity are discussed in **Ensuring confidentiality of the investigation**.

Important: The discloser should be given candid information about the investigating entity’s capacity to prevent their identity becoming known as the source of the disclosed information. The discloser must be made aware that, where the disclosure is investigated, their identity might well become apparent. For example, if the discloser is one of a very small number of people who have access to the relevant information, or if the information they have disclosed was something they were told privately and in confidence, others may guess they were the source of the information. A thorough investigation may require, implicitly or explicitly, disclosure of the discloser’s identity. In addition, procedural fairness may require that the identity of the discloser be revealed.

Controlling risks

Once those risks have been assessed, the investigating entity needs to consider 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 even result in serious injury to someone who has made a disclosure. The risk assessment should include not only the risk of detrimental action being taken against the discloser, but also the risk of related workplace conflict or difficulties.¹⁵⁷

If the risk is assessed as sufficiently high, the investigating entity should prepare a plan to prevent and contain detrimental action against the discloser or related workplace conflict. If it is considered that a

¹⁵⁷ Ibid 67.



discloser is likely to need support, the investigating entity should develop a strategy for providing an appropriate level of support, including appointing a support person.

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

Important: It is important that risks of detrimental action are prevented from being realised if this is practicable, rather than leaving rectification to occur late via legal or compliance means. The assessment of reprisal risks must aim at preventing the conduct occurring in the first place. Thus, when a decision is made that a disclosure qualifies as a PID, the Commission or the investigating entity must make a risk assessment at the outset before actively commencing an investigation. This will permit protective measures to be taken to avoid, if practicable, foreseeable detrimental action as the investigation proceeds.

Important: A failure to prevent detrimental action may expose the public sector entity to serious civil liability under workplace safety laws.

Monitoring and reviewing risks

Problems in the workplace can arise at any point after a disclosure has been made. This includes during an investigation, afterward, and when action is being taken to address any findings. The risk assessment should be monitored and reviewed as necessary, including by checking with the discloser to see if they have experienced detrimental action or been threatened. Records must be made whenever the risk assessment is reviewed or revised.

Risk assessments where the discloser is anonymous

If an anonymous disclosure is made, it may be difficult for an investigating entity to protect the discloser and other staff from detrimental action or workplace conflict. However, a risk assessment should still be conducted, to assess whether the discloser's identity can be readily ascertained or may become apparent during an investigation.¹⁵⁸

Staff may speculate, correctly or otherwise, about who made the disclosure and that person may be at risk of detrimental action. If the discloser's identity becomes known, the risk of detrimental action may escalate and require prevention or mitigation strategies to be implemented. These include raising the issue with staff, reminding them of the investigating entity's commitment to the PID process and reminding them that taking detrimental action is a criminal offence.¹⁵⁹

Risk assessment for those who do not have an employment or contractual nexus with a public sector entity

Any person may make a disclosure of disclosable conduct.¹⁶⁰ Therefore, it is possible that disclosures will be made by members of the public who do not have any employment or contractual nexus with a public sector entity, for example, an employee of a company tendering for work in the public sector who becomes aware of misconduct by a public official managing the process. The making of a risk assessment for such a person is like that which would be made for those who do have an employment nexus with a public sector entity, namely, by following the four steps outlined above.

However, consideration will need to be given to the unique character of the risks which may apply to such disclosers. For example, querying whether the respondent and the discloser are known to each other in a non-professional context (and whether they have a history of negative interactions). Another example would be where a discloser who has no contractual or employment nexus with a public sector entity may develop one in the future.

¹⁵⁸ Ibid.

¹⁵⁹ *PID Act* (n 2) s 40.

¹⁶⁰ Ibid s 14.

Note: The prohibition against taking detrimental action because of a PID applies to anyone who does so, whether a public official or not.

Example: A, a member of the public, makes a disclosure concerning B – a senior official of C, a public sector entity. A is employed by D (who is not a contractor to C or have any employment nexus with C). D is good friends with B. The Commission assesses that A's disclosure qualifies as a PID and refers it to C for investigation. C should, in assessing the reprisal risk to A, ensure that measures are implemented to guard against reprisal against A by D (for example, employment termination).

In summary, while the analytical task of assessing and managing the risk of reprisal for those who are not public officials remains the same as that for public officials, investigating entities should ensure that when making a risk assessment (in consultation with the discloser or relevant party) they adapt their assessment to take account for the different types of risk which are likely to arise. It is also important to take account of the individual circumstances of the discloser.

Risk assessments not limited to the discloser

It is prudent that investigating entities do not limit risk assessments to the discloser alone. These should cover, for example, any risks that witnesses could face were it revealed that they assisted an investigation. In addition, investigating entities should consider any risks that those who are subject to allegations may face, because of allegations made against them.¹⁶¹

In relation to witnesses, it is important to remember that the protections attach to the assistance provided by the witness. For example, should a witness confirm that a particular practice (the subject of the PID) does in fact occur within their workplace, the witness receives protection from civil or criminal liability that may attach to the revelation. If, however, the witness reveals or discloses serious criminal conduct on their part, in response to a request for assistance, that conduct may be responded to in the usual manner (ie a referral to the Chief Police Officer).

In assessing risks to the respondent, the same process as that used for a discloser(s) and witness(s) may be applied. The focus of such a risk assessment is to manage the effects of the investigation on the respondent, regardless of its outcome. This form of risk assessment requires that consideration be given both to an outcome where the information within the disclosure is not substantiated (ie the respondent was found not to have engaged in wrongdoing) and where it is.

Where an investigation does not find wrongdoing on the part of the respondent, it should identify what adverse consequences may continue for the respondent following the investigation. These could include, for example, damage to the respondent's reputation or stress on the respondent's part. Some advice regarding how to manage these risks are discussed below at **Supporting the respondent throughout the process**.

Where the respondent is found to have engaged in wrongdoing, it is important to remember that responding to the respondent's wrongdoing is not detriment. Indeed, heads of public sector entities are obliged to discipline the individuals (ie respondent(s)) responsible for disclosable conduct. However, care should be taken to ensure any action taken in response is reasonably justifiable. This means limiting any discipline or punishment resulting from the respondent's wrongdoing to that which is proportionate and necessary to correct it. Any proposed discipline must not be drawn out, or otherwise adversely affect the respondent beyond that which is directed by the public sector entity head. For example, should a respondent suffer bullying and/or harassment after being disciplined, this would amount to misconduct on the part of those responsible and require the investigating entity to respond.

¹⁶¹ Ibid s 33(b)(2)(b)(ii).

Practical support

The following section provides guidance to investigating entities about practical mechanisms to support those involved in an investigation. The Commission recommends investigating entities consider the following when managing an investigation.

Supporting the discloser throughout the process

Disclosers frequently experience stress and anxiety following the making of a disclosure and throughout the course of any related investigation.¹⁶² The subject of the disclosure will probably be significant to the discloser, who will likely be emotionally invested in the outcome of any investigation. As such, the Commission recommends that public sector entities have procedures in place which:¹⁶³

- acknowledge the discloser for coming forward with their disclosure;
- provide support and information regarding support options available:
 - within the public sector entity (if the discloser is a public official); and
 - freely available within the community (if the discloser is either a public official, or a member of the public); and
- assures the discloser that they will take all reasonable steps to protect them.¹⁶⁴

Although an investigator may be able to provide general information about the investigation process, they are unlikely to be 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.

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

- peer support officers;
- family and friends; and
- Employee Assistance Programs that provide access to professional counselling services.

Throughout the course of the investigation, investigating entities should regularly check in with disclosers regarding their welfare and ensure they are not being, or threatened with being, subjected to any detrimental action. The Commission recommends this occur, at a minimum, when the investigating entity notifies the discloser of the progress of the investigation (see **Keeping the discloser informed**).

Important: Where the investigator or another party has a genuine and reasonable fear that harm (whether physical or mental) may threaten the discloser, the investigator must ensure they comply with any workplace health and safety legislation that applies. If a referral to a doctor or the police is required, the investigator must only disclose what is reasonably necessary to ensure the discloser's safety.

Important: While the above refers to disclosers, the same principles apply in supporting witnesses.

Supporting the respondent throughout the process

The investigating entity must comply with the rules of natural justice and procedural fairness in relation to investigating the disclosure. In substance, this means ensuring the investigator is unbiased and the respondent has an opportunity to be heard before adverse findings are made or adverse actions taken. Where the investigating entity complies with the principles of procedural fairness and natural justice, this will likely meet the minimum expected threshold in terms of 'supporting' the respondent(s).

The Commission recommends that investigating entities take additional steps to support respondent(s). This is because the investigation process, no matter how administratively proper and procedurally fair, will be a stressful experience for the respondent(s). It is always possible that the investigation might make no findings of wrongdoing on the part of the respondent(s). It may in fact show the respondent in a positive light.

¹⁶² Commonwealth Ombudsman (n 62) 50.

¹⁶³ Ibid 72.

¹⁶⁴ Ibid.



Many of the recommended strategies for supporting disclosers and/or witnesses may easily be applied to respondents as well. It is important that support options be available to the respondent(s) where findings are made against them.

The Commission also recommends that respondent(s) be offered the opportunity to secure a support person, for example, when being interviewed. The respondent may disclose to their support person the nature of the allegations which are being investigated. The support person does not represent the respondent and should not be permitted to contribute or participate in the investigative process.¹⁶⁵ The role of the support person is to listen and provide emotional support to the respondent, not to be their advocate. The support person must be cautioned that they are not to discuss the matter with anyone external to the investigation (eg colleagues, friends etc). Support persons should also be reminded that detrimental action taken against a discloser is a criminal offence, for which significant penalties apply.

Important: While offering a support person is not a positive obligation held by the investigating entity, an unreasonable failure to accommodate a request for a support person may make a subsequent dismissal harsh, unjust or unreasonable.¹⁶⁶

¹⁶⁵ *Victorian Association for the Teaching of English Inc v de Laps* (2014) 241 IR 1 [52].

¹⁶⁶ See *Fair Work Act 2009*, s 387(d).

THE ROLE OF THE OMBUDSMAN AND THE COURTS

The following section provides a summary of the roles which the Ombudsman and courts have under the PID Act.

The role of the Ombudsman

The Ombudsman can receive complaints regarding actions or decisions taken in respect of PIDs and/or disclosures of disclosable conduct by the:

- Head of a public sector entity;¹⁶⁷
- Head of service;¹⁶⁸ and
- Public Sector Standards Commissioner.¹⁶⁹

The Ombudsman, in response to complaints, may:

- provide advice to the complainant;¹⁷⁰
- monitor the public sector entity the subject of the complaint regarding its treatment of disclosures of disclosable conduct;¹⁷¹
- review the treatment of the complainant's PID and/or disclosure of disclosable conduct by the public sector entity;¹⁷² and
- intervene to provide just outcomes to those affected by detrimental action in response to the making of a disclosure of disclosable conduct and/or PID.¹⁷³

Important: The Ombudsman cannot review decisions and/or actions taken by the Commission. Should a complainant have concerns with the way the Commission has dealt with a PID, this must be made to the Inspector, where it will be dealt with as a complaint under the IC ACT.¹⁷⁴

Access to courts

Those who have suffered, or are threatened with, detrimental action can seek judicial remedies. These include:

- Supreme Court injunctions to prevent detrimental action occurring, or remedy detrimental action that has already happened;¹⁷⁵ and
- being awarded damages to recompense the victim of the detrimental action.¹⁷⁶

Note: Nothing prevents an applicant from seeking both remedies (ie injunctions and damages), and applicants may maintain any other cause of action, independent of the PID Act, which may be available to them.

Fair Work Commission

Those who suffer detriment because of making a PID (or those who are unjustly treated as subjects of a PID) may have remedies available to them under the Fair Work Commission's jurisdiction to administer the *Fair Work Act 2009* (Cth).

These could arise where, for example, the discloser alleges they have suffered bullying and harassment, or where a respondent claims to have been unfairly dismissed. In such instances, the Fair Work Commission has a broad jurisdiction to impose remedies. It should be noted that the Fair Work Commission is unlikely to hear an application where the applicant is simultaneously seeking redress

¹⁶⁷ *PID Act* (n 2) s 34(1)(a).

¹⁶⁸ *Ibid* s 34(1)(b).

¹⁶⁹ *Ibid* s 34(1)(c).

¹⁷⁰ *Ibid* s 34(4)(a).

¹⁷¹ *Ibid* s 34(4)(b).

¹⁷² *Ibid* s 34(4)(c).

¹⁷³ *Ibid* s 34(4)(d).

¹⁷⁴ *IC Act* (n 79) s 257.

¹⁷⁵ *PID Act* (n 2) s 42.

¹⁷⁶ *Ibid* s 41.

under the PID Act in another jurisdiction. However, should the discloser's suit under the PID Act fail, they may then seek a remedy under the *Fair Work Act 2009* (Cth).

Judicial review

Decisions made under the PID Act that adversely affect the rights of a person may be subject to judicial review, in accordance with the *Administrative Decisions (Judicial Review) Act 1989* (ACT) ('**ADJR Act**'). Applications for review under the ADJR Act can include either a decision to act, or a decision not to act. Further, applicants under the ADJR Act may seek orders obtaining reasons for any decisions taken, or not taken, in relation to the handling of a PID.

GETTING HELP WITH THE SCHEME

The Commission can be contacted at any time to provide confidential advice and information to assist public sector entities and disclosure officers with the operation of the scheme.

In addition, all other Australian jurisdictions have similar PID schemes and there is substantial information available about them. Links to these are available in **Related material**.



RELATED MATERIAL

The following related material is available on the Commission’s website:

- Assessments and investigations under the *Public Interest Disclosure Act 2012* (the Commission’s internal policy for dealing with PIDs)
- Contact details for all disclosure officers within the ACT
- Receiving public interest disclosures as a member of the Legislative Assembly
- See something, say something (guidance for PID disclosers)

The following related material is available on the internet:

- ACT Government Boards, Commissions, Advisory Councils and Committees
- Agency guide to the *Public Interest Disclosure Act 2013* (the Commonwealth Ombudsman’s guidance for the Commonwealth PID scheme)
- Inspector of the ACT Integrity Commission (Webpage)
- *Integrity Commission Reputational Repair Protocols 2020* (ACT)
- *Public Interest Disclosure Act 2012* (ACT)
- *Public Interest Disclosure Act 2013* (Cth)
- *Public Interest Disclosure Guidelines 2019* (the Public Sector Standards Commissioner’s former PID guidelines)
- *Public Interest Disclosure Standard 2013* (Cth)

The following related material provides links to relevant Australian agencies’ public interest disclosure Webpages:

- [Victoria \(Independent Broad-based Anti-Corruption Commission\)](#)
- [NSW \(NSW Ombudsman\)](#)
- [SA \(Independent Commissioner Against Corruption\)](#)
- [Tasmania \(Ombudsman Tasmania\)](#)
- [QLD \(Queensland Ombudsman\)](#)
- [NT \(Office of the Independent Commission Against Corruption\)](#)
- [WA \(Public Sector Commission\)](#)
- [Commonwealth \(Commonwealth Ombudsman\)](#)

DOCUMENT INFORMATION

The following table contains administrative metadata.

Integrity Commissioner document ID	Document owner
TBA	Chief Executive Officer – ACT Integrity Commission

VERSION HISTORY

The following table details the published date and amendment details for this document.

Version	Date	Amendment details
1	23 June 2021	First publication of this document.

APPENDIX A: RECORDS MANAGEMENT STRUCTURE

The following structure is based on the ACTPS's HPE Content Manager (formerly known as TRIM) document management system. It is highly likely that public sector entities will have internal guidance regarding naming conventions, access controls and similar functionality which is not reproduced here.

The Commission recommends that a central file be created in which individual PIDs are assigned sub-files. In practice this would look like:

- Public sector entity name – Public Interest Disclosures – YEAR (eg ACT Audit Office – Public Interest Disclosures – 2021)
 - Public Interest Disclosure 001 (use the established naming convention – for example PID001)
 - Public Interest Disclosure 002 (use the established naming convention – for example PID002)
 - Etc.

All material relevant to the individual PID should be placed in the relevant sub-file. For example, any correspondence, investigation reports, evidence etc. should be located centrally within the relevant file.

In addition, the Commission recommends that public sector entities establish a spreadsheet that tracks all relevant details. This would include columns which clearly record the number of the PID, the officer responsible for its investigation, relevant dates and the corresponding file number in which all relevant material is located.

Important: Entities must ensure these files have appropriate access controls. It is an offence to recklessly misuse protected information under the PID Act. Failing to protect relevant information could be considered reckless.

APPENDIX B: RISK REPRISAL MANAGEMENT PLAN TEMPLATE

Risk Reprisal Management Plan

PID Ref #: *<if your agency adopts a number system, use this reference number>*

Date of Disclosure: Click or tap to enter a date.

Disclosure Officer: *<insert the Disclosure Officer's name>*

Risk Reprisal Assessment

Do the discloser and the subject of the disclosure...	Response	Details	Treatment
work together?	Choose an item.		<i><insert an initial (ie quick) recommendation as to how the risk may be treated. This need not be complicated. It is usually sufficient in general circumstances to state 'The confidentially provisions and general protections under the Act provide adequate treatment.'></i>
work within the same reporting line?	Choose an item.		
have staff or managers in common?	Choose an item.		
work together in the same physical location/s?	Choose an item.		
socialise together outside of work?	Choose an item.		

have a history of either physical or mental abuse?	Choose an item.		
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Summary

<Insert a summary of your initial risk assessment. Typically, this will be along the lines of ensuring the investigating entity is aware of the risks and their obligations to manage them. >

Endorsement

<insert the disclosure officer's signature block>

Click or tap to enter a date.

APPENDIX C: REFERRAL LETTER TEMPLATE

Instructions: Complete all fields highlighted in yellow. Select appropriate text from colours and delete that which is unnecessary. Delete the heading and this text.

Our ref: XXXX
Your ref: XXXX

Street Address
SUBURB STATE POSTCODE

Contact officer: XXXX
Contact XXXX
phone: XXXX

Postal Address
SUBURB STATE POSTCODE

tel: XXXX
ENTITY WEBSITE ADDRESS

Click or tap to enter a date.

Name

Title

ACT Integrity Commission
3/55 Wentworth Avenue
KINGSTON ACT 2604

Via email: email address

Referral of disclosure of disclosable conduct

I refer to our discussion on Click or tap to enter a date.. I write to refer a disclosure of disclosable conduct to the Commission. I have assessed this disclosure as referring to disclosable conduct concerning Choose an item.. I am satisfied on reasonable grounds that this disclosure was made in good faith. I refer this disclosure pursuant to section 17 of the *Public Interest Disclosure Act 2012* ('PID Act').

All materials relevant to the disclosure are **enclosed**.

The discloser's details

As I received this disclosure anonymously, I am not able to provide identification details for the discloser. I have notified the discloser that this may limit any subsequent investigation into their disclosure.

As the discloser has requested anonymity, I am not able to provide identification details for them. I have notified the discloser that this may limit any subsequent investigation into their disclosure. I have notified the discloser that I would refer their disclosure to you.

Although I received this disclosure anonymously, the discloser has consented to be contacted via the following means [INSERT MEANS OF COMMUNICATION]. I have notified the discloser that I would refer their disclosure to you.

Although the discloser requested anonymity, the discloser has consented to be contacted via the following mean [INSERT MEANS OF COMMUNICATION]. I have notified the discloser that I would refer their disclosure to you.

The discloser's details are:

Name:	
Email:	
Phone number:	
Position:	

Agency:	
----------------	--

I have notified the discloser that I would refer this disclosure to the Commission.

The subject of the disclosure

<insert a short paragraph summarising the discloser's concerns>

If you require any further information or assistance, please do not hesitate to contact me.

Yours sincerely

Name

Title

Entity

Enclosures

XXXX

APPENDIX D: NOTIFICATION LETTER TEMPLATE

Instructions: Complete all fields highlighted in yellow. Delete the heading, any irrelevant fields and this text.

Our ref: XXXX
Your ref: XXXX

Street Address
SUBURB STATE POSTCODE

Contact officer: XXXX
Contact XXXX
phone:

Postal Address
SUBURB STATE POSTCODE

tel: XXXX
ENTITY WEBSITE ADDRESS

Click or tap to enter a date.

Name
Title
Street Address
SUBURB STATE POSTCODE

Via email: email address

Assessment of your disclosure

I refer to your disclosure made on [Click or tap to enter a date.](#) to [\[insert disclosure recipient\]](#) that [\[insert subject of disclosure\]](#) and our discussion on [Click or tap to enter a date.](#) I write to notify you that I am satisfied on reasonable grounds that your disclosure as referring to disclosable conduct concerning [Choose an item.](#) I am satisfied on reasonable grounds that your disclosure was made in good faith.

I have referred your disclosure to the Integrity Commission ('**Commission**') in accordance with section 17 of the *Public Interest Disclosure Act 2012* ('**PID Act**') on [Click or tap to enter a date.](#) The Commission will assess whether your disclosure is a public interest disclosure ('**PID**') as defined by section 7 of the PID Act.

The Commission's assessment

Section 17A of the PID Act requires the Commission to assess your disclosure to determine whether it is a PID. This requires the Commission to assess whether your disclosure:

- is about disclosable conduct;
- was disclosed in the public interest; and
- is not vexatious or frivolous.

If your disclosure is assessed to be a PID you will receive all the protections under the PID Act. The Commission will either investigate it or refer it to another public sector entity for investigation.

If your disclosure is assessed to not be a PID, the Commission will either take no further action or refer it to another body for resolution. Where this occurs, the protections under the PID Act do not apply to you in relation to your disclosure. However, the conditions of your employment may provide some worthwhile protections and it may be useful for you to contact your employer's human resources or staff support team.

Regardless of the Commission's assessment of your disclosure, you will be notified of the outcome and what has happened to your disclosure.

If the Commission does not complete its assessment of your disclosure by [<insert a date three months from the disclosure>](#) [Click or tap to enter a date.](#) you may be permitted to disclose it to either a member

of the Legislative Assembly or a journalist and still receive the PID Act protections. This is known as a 'disclosure to a third party' (outlined in section 27 of the PID Act). The permitted circumstances may arise where you have not received a notice under:

- section 17B (that your disclosure **does not** qualify as a PID); or
- section 19A (that your disclosure **does** qualify as a PID)

of the PID Act within three months of making your disclosure.

Next steps

You should be contacted by the Commission soon regarding your disclosure. If you have any queries regarding the Commission's assessment you should contact them directly on:

phone: (02) 6205 9899

email: complaints@integrity.act.gov.au

post: GPO Box 1949 CANBERRA ACT 2601

Yours sincerely

Name
Title
Entity

APPENDIX E: INDICATORS OF A HIGHER RISK OF REPRISAL OR WORKPLACE CONFLICT

The following table has been adapted from the Commonwealth Ombudsman's Agency Guide:¹⁷⁷

Threats or past experience	<ul style="list-style-type: none"> • Has a specific threat against the discloser been made? • 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 motivation 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?

¹⁷⁷ Commonwealth Ombudsman, *Agency guide to the Public Interest Disclosure Act 2013* (April 2016) 70.

APPENDIX F: FINAL INVESTIGATION REPORT SUMMARY SHEET

Public Interest Disclosure – Final Report summary sheet

To be provided to the Commission at the conclusion of an investigation into a public interest disclosure (PID). Completing this form will satisfy the investigating entity's section 25(1) Public Interest Disclosure Act 2012 (ACT) obligations to keep the Commission informed of any PID investigations. Completing the relevant fields will also ensure the Integrity Commissioner can report on PIDs in its annual report.

ALWAYS ATTACH THE INVESTIGATION REPORT (WHERE APPLICABLE) TO THIS SUMMARY

IN COMPLETING THE FIELDS PLEASE ENSURE ATTENTION IS PAID TO THE DESCRIPTIVE ADVICE

ALWAYS DELETE THE HIGHLIGHTED TEXT AND THE APPENDIX F HEADING PRIOR TO SUBMISSION

Public interest disclosure summary for provision to the Integrity Commission

Table 1: Investigating entity details

Public sector
entity
responsible for
investigating the
PID

Investigating
officer name

Relevant decision maker *This would be whomever is responsible for considering the investigating officer's report.*

Table 2: Key dates

Date discloser made disclosure Click or tap to enter a date.

Date Integrity Commission referred PID to you for investigation Click or tap to enter a date.

Date investigation finalised Click or tap to enter a date.

Date decision maker approved investigation finalisation Click or tap to enter a date.

Date discloser was notified of investigation outcome/s Click or tap to enter a date.

Table 3: Investigation outcome details

What was the investigation outcome?	Allegations confirmed/Allegations not confirmed/PID rejected/PID referred
Brief description of investigation, including any recommended actions or actions already taken.	<p><i>This would likely be a copy paste from the investigation report conclusion and include:</i></p> <ul style="list-style-type: none"> • <i>brief synopsis of investigation;</i> • <i>the reason for the outcome (eg no evidence to support the allegations);</i> • <i>any remedial actions proposed or already taken (eg education, IT controls etc); and</i> • <i>even where the investigation was discontinued, this section will require completion – particularly where the investigation concluded that a more appropriate resolution pathway was available</i>

Table 4: Metadata for annual reporting

Which PID category did the investigation conclude the PID related to?	Choose an item.
What category of conduct did the investigation conclude the PID related to?	
If the PID investigation was discontinued, the reason for discontinuance	Where discloser withdrew the disclosure (s 20(2)(a) / where discloser anonymous and impractical to investigate (s 20(2)(b) / where discloser failed to aid investigation (s 20(2)(c) / the disclosed information is materially wrong (s 20(2)(d)(i) / more appropriate resolution to address the disclosable conduct (s 20(2)(d)(iii) / not applicable
If the PID was referred, who was it referred to?	
Details of action/s taken or proposed to be taken in response to the PID	Person/s responsible for disclosable conduct being disciplined / actions taken, or recommended to be taken, to prevent the disclosable conduct occurring in the future / person/s responsible for disclosable conduct being disciplined AND actions taken, or recommended to be taken, to prevent the disclosable conduct occurring in the future

Table 5: Form completion particulars

Completing officer's name *Insert the name of the officer responsible for completing this form*

Completing officer's signature *Insert a digital signature if possible.*

Date *Click or tap to enter a date. <if using a digital signature, you can delete this row>*

APPENDIX G: EXAMPLE INVESTIGATION REPORT TEMPLATE

Remove the heading 'Appendix G: Example investigation report template'

PUBLIC INTEREST DISCLOSURE – INVESTIGATION REPORT

Public Interest Disclosure Act 2012

To: **INSERT HEAD OF YOUR ENTITY**

Via: **INSERT DETAILS OF ANYONE WHO CLEARED THIS DOCUMENT**

From: **INSERT NAME AND TITLE OF INVESTIGATOR**

Re: **INSERT INVESTIGATION NUMBER**

Date: **DATE OF INVESTIGATION REPORT**

Executive summary

1. This report documents the findings and recommendation(s) of the public interest disclosure ('PID') investigation, conducted under Part 4 of the *Public Interest Disclosure Act 2012* ('PID Act'), into information disclosed [that/of **INSERT**],.
2. It recommends that **[INSERT/CHOOSE [insert summary of recommendations]]**the PID be dismissed under s 20(2) of the PID Act/the PID be referred to **[insert]** under s 20(2)(d)(iii) of the PID Act]. The reasons for this recommendation are set out below.

Background

3. *[Identify how, when and from whom the matter was referred or reported. This will be included in the referral documentation you receive from the Integrity Commission. If there are issues relating to the assessment process as conducted by the Integrity Commission or determination of jurisdiction, include them here]*

The information disclosed

4. The following disclosed information was the subject of this investigation:

(a) Disclosed information 1: ***[INSERT disclosed information]***

(b) Disclosed information 2:
[add or delete as necessary]

Involved persons/entities

5. The following table identifies witnesses approached for information during the investigation:

Name	Position/relevance	Information/material supplied

Facts established

Disclosed information 1

6. This information disclosed appears to be [substantiated/unsubstantiated] *[include as required in part]*.

7. *[This section details how the conduct described in the information disclosed occurred and what facts were established. You are required to provide a narrative in a simple chronological order. Be mindful of your audience and avoid investigator terminology or jargon. This narrative will include facts uncovered during the investigation. Where issues are contested/unclear (for example because of competing witness versions) please note that. This should include*

any response an affected person has given to the disclosed information. For more detailed/lengthy information that needs to be include, consider using an Annexure/Appendix to include that.]

Disclosed information 2

8. This information disclosed appears to be [substantiated/unsubstantiated] [*include as required* in part].
9. [*Repeat as above.*]

Procedural fairness steps

10. [*Detail steps taken to afford affected person(s) the opportunity to respond to facts obtained. eg was a record of interview or record of conversation conducted (or offered but declined?), a written response obtained, additional comments sought, or an offer made to respond to adverse conclusions if there are any, etc? If you have not been able to approach the affected person(s) by this point, please explain that here.*]

Conclusions

11. [*The conclusion should be relatively short and concise paragraph or two of what it was you found, or a summary of the key findings/your overall view of the matter.*]

Recommendations

12. In light of the above, [I/we] recommend that: [*add or delete as necessary*]
 - (a) [*Insert recommendations here – eg what processes ought be improved, who in the agency will be responsible for actioning the recommendations, who will be referred for disciplinary investigation etc*]
 - (b) This matter be discontinued under s 20(2) of the PID Act under the following provision(s): (*delete irrelevant provisions*)

- a. s 20(2)(a) – the discloser for the public interest disclosure has withdrawn the disclosure and there are no further matters in relation to the disclosure that warrant investigation
 - b. s 20(2)(b) – due to the anonymity of the discloser it is impractical to investigate the disclosure
 - c. s 20(2)(c) – the discloser failed without reasonable excuse to assist the investigation making it impractical to investigate further
 - d. s 20(2)(d)(i) – the information provided by the discloser is wrong in a material way
 - e. s 20(2)(d)(ii) – the age of the disclosed information makes it impractical to investigate the disclosure
- (c) This matter be discontinued under s 20(2)(d)(iii) of the PID Act as it is better resolved via *(insert the receiving entity)*

13. The reasons for the above recommendation(s) are that **[INSERT]**. *[Note – if you are recommending that individuals be disciplined or controls be implemented, state why (eg because the matter clearly revealed wrongdoing on the part of the respondent). If you are recommending that the matter be dismissed, state why (eg because there are no other viable evidentiary avenues to pursue), and the specific legislative basis in s 20 you are relying upon. If you are recommending that a s 20 referral be made, please justify the basis for your recommendation.]*
14. *[Note – if your recommendation is that different disclosed information be treated differently, please provide the above information in relation to each piece of disclosed information and explain your reasons why.]*

XXXXXXXXXX

Investigator title

Date

[INSERT DATE]

Annexures:

- *[INSERT annexure name]*

	Endorsed: Yes/No
Approving Officer Name Approving Officer Title Investigating Entity	Comments:
	Date:

APPENDIX H: PUBLIC INTEREST DISCLOSURE INITIAL ASSESSMENT FORM

PUBLIC INTEREST DISCLOSURE INITIAL ASSESSMENT FORM¹⁷⁸

Disclosure Details	
Name of Discloser	
Address	
Phone	
Mobile	
Email	
How was the disclosure received	
Date disclosure Received	
Received by Disclosure Officer / Receiving Officer (include name)	
Name of Disclosure Officer Handling Matter	
Date acknowledgement letter sent to the discloser	
Record number	
Details of initial assessment by Disclosure Officer	
<p>There has been a disclosure about 'xxx':</p> <p>Issues</p> <ol style="list-style-type: none"> 1. Xx 2. Xx 3. Xx 4. Xx 5. Xx 6. Xx 7. Xx 	
Definition of Disclosable Conduct	
<p>(1) For this Act, disclosable conduct means an action or a policy, practice or procedure of a public sector entity, or public official for a public sector entity, that—</p> <p>(a) is maladministration; or</p>	

¹⁷⁸ The Commission thanks Transport Canberra and City Services Directorate for providing this template.

(b) results in a substantial and specific danger to public health or safety, or the environment.

(2) However, "disclosable conduct" does not include an action or a policy practice or procedure of a public sector entity, or a public official for a public sector entity, that—

(a) relates to a personal work-related grievance of the person disclosing the conduct; or

(b) is to give effect to a policy of the Territory about amounts, purposes or priorities of public expenditure.

Assess if the disclosure falls within the ambit of the PID Act (section 8).

Document how you reached this decision, referencing the assessment criteria.

Name:

Disclosure Officer **SERBIR** *(tick delegated role)*

Signature:

Date: