

Procedures for dealing with public interest disclosures

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Intent

The *Public Interest Disclosure Act 2013* (PID Act) creates a public interest disclosure scheme that promotes the integrity and accountability of the Commonwealth public sector by:

- > encouraging and facilitating the disclosure of information by public officials about suspected wrongdoing in the public sector
- > ensuring that public officials who make public interest disclosures are supported and protected from adverse consequences;
- > ensuring that disclosures by public officials are properly investigated and dealt with.

Section 59 of the PID Act requires an agency head (the Principal Officer) to make procedures for facilitating and dealing with disclosures under the Act. This document sets out those procedures for the ACMA made by the Chair as the Principal Officer of the ACMA.

Detailed information on the public interest disclosure scheme, including legislation and guidance for agencies and disclosers is available on the [Commonwealth Ombudsman's website](#).

The ACMA supports the reporting of disclosable conduct

The ACMA supports the reporting of wrongdoing by public officials in accordance with the PID Act.

The ACMA will take all reasonably practical steps to support and to protect people who make disclosures under the PID Act.

The ACMA recognises that it is important to have an effective system for reporting and investigating disclosable conduct. Some of the potential benefits of such a system are reducing the work health and safety risks to our workers, saving money and making our programs and processes more efficient. Another potential benefit is increasing the confidence of our workers in the way the ACMA is managed.

The ACMA also recognises that a decision by the ACMA not to deal with a disclosure as a disclosure under the PID Act, when as a matter of law that is how the disclosure should have been dealt with, could be seriously detrimental to the discloser and to the effective operation and the good reputation of the ACMA.

What is a public interest disclosure?

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

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

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

What is disclosable conduct?

The full definition of disclosable conduct is set out in section 29 of the PID Act (see Appendix A: Disclosable conduct). That definition applies for the purposes of these procedures.

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

- > contravenes a law of the Commonwealth, a State or a Territory
- > occurs in a foreign country and contravenes a law in force in that country that applies to the agency or public official and that corresponds to a law in force in the Australian Capital Territory
- > perverts, or attempts to pervert, the course of justice or involves corruption of any other kind
- > constitutes maladministration, including conduct that:
 - > is based on improper motives
 - > is unreasonable, unjust or oppressive
 - > is negligent
 - > is an abuse of public trust
- > fabrication, falsification, or deception in relation to scientific research, or misconduct in relation to scientific work
- > results in the wastage of public money or public property or of the money or property of an authority covered by the PID Act
- > unreasonably results in a danger to the health and safety of a person or unreasonably results in or increases the risk of a danger to the health and safety of a person
- > results in a danger to the environment or results in or increases the risk of a danger to the environment
- > is prescribed by the PID Rules
- > is engaged in by a public official that:
 - > involves abuse of the public official's position
 - > could, if proved, give reasonable grounds for disciplinary action against the public official.

It does not matter whether disclosable conduct occurred before or after 15 January 2014, the date the PID Act came into effect.

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

The disclosure process

The PID Act places certain responsibilities on supervisors and managers and Authorised Officers with regard to the actions they must take if a public official makes a disclosure.

Making a disclosure under the PID Act

All public officials and former public officials are entitled to make a disclosure under the PID Act. For the purposes of the PID Act, a 'public official' is a broad term which includes a Commonwealth public servant, member of the Defence Force, appointee of the Australian Federal Police, Parliamentary Service employee, director or staff member of a Commonwealth company, statutory office holder or other person who exercises powers under a Commonwealth law. Individuals and organisations that provide goods or services under a Commonwealth contract and their officers or employees are also included. This includes subcontractors who are responsible for providing goods or services for the purposes of the Commonwealth contract.

A public interest disclosure may be made anonymously or openly.

A public interest disclosure may be made orally or in writing.

Where a public official makes a public interest disclosure, they do not have to state or intend that they are doing so under the PID Act.

Where a public official is considering making a disclosure, they should, in the first instance, contact one of the ACMA's Authorised Officers to get information about making a public interest disclosure under the PID Act. The names and contact details of the ACMA's Authorised Officers are set out on the ACMA's [intranet](#) and external website.

Employees in the ACMA may make a disclosure of disclosable conduct to their supervisor or their manager, or to an Authorised Officer, or in certain circumstances, to the Commonwealth Ombudsman.

Employees or former employees or officers of contracted service providers may make a disclosure of disclosable conduct to an Authorised Officer or, in certain circumstances, to the Ombudsman.

Where possible, an employee in the ACMA should make their public interest disclosure to an Authorised Officer rather than their supervisor or manager. Authorised Officers in the ACMA have been trained in receiving public interest disclosures and they can provide information about how to make a public interest disclosure and about the protections given to disclosers under the PID Act.

The information contained in a disclosure should be clear and factual, and should, as far as possible, avoid speculation, personal attacks and emotive language. It should contain supporting evidence where that is available to the discloser and should, where possible, identify any witnesses to the disclosable conduct. Where possible, a person making a public interest disclosure should cover as many of the following matters as possible in their disclosure, to assist the ACMA to determine how to proceed:

- > their name and contact details
- > the nature of the wrongdoing
- > who they think committed the wrongdoing
- > when and where the wrongdoing occurred
- > relevant events surrounding the issue
- > if they did anything in response to the wrongdoing
- > others who know about the wrongdoing and have allowed it to continue
- > whether they believe the information is a public interest disclosure under the PID Act

- > if they are concerned about possible reprisal as a result of making a disclosure.

A potential discloser should not investigate a matter themselves before making a disclosure.

A person who knowingly makes a false or misleading disclosure will not have any protections under the PID Act.

A person who is considering making a disclosure should be aware that making a disclosure does not entitle them to protection from the consequences of their own wrongdoing.

Once a public interest disclosure has been made, it cannot be withdrawn. But a discloser may state that they do not wish the disclosure to be investigated and they may refuse to consent to their name and contact details being provided to the Chair.

A person who has made a disclosure under the PID Act should not discuss the details of their disclosure with anyone who does not have a need to know about it. Discussions with these people will not be protected by the PID Act.

A supervisor or manager or Authorised Officer who receives a disclosure of disclosable conduct from a public official must deal with the disclosure in accordance with the PID Act, the Ombudsman's Standard and these procedures.

Protections and support for disclosers

Protection

The PID Act provides a means for protecting public officials, and former public officials, from adverse consequences of disclosing information that, in the public interest, should be disclosed. The PID Act provides for:

- > protection of the disclosure's identity
- > immunity from civil, criminal or administrative liability
- > protection from reprisal including express or implied threats.

The employee's workplace rights are also protected under the *Fair Work Act 2009*.

Even if the report of wrongdoing turns out to be incorrect or unable to be substantiated, the public official is still protected under the PID Act, provided they reasonably believe, or reasonably believed at the time of the disclosure that the information tends to show disclosable conduct.

Support

The ACMA will take all reasonably practical steps to support a public official who makes a public interest disclosure.

Information about the PID Act and investigation process is available from Authorised Officers, the Manager or Assistant Manager, People and Workplace Section.

It is acknowledged that making a disclosure, and an investigation process, may be stressful. A discloser is encouraged to seek support from the ACMA's Employee Assistance Program (EAP). Whilst a discloser can discuss their general situation and the process with support people, such as an EAP counsellor or family member, they should not provide information that would identify those alleged to have committed wrongdoing or other information that they have a duty to keep confidential. They may also disclose information to a lawyer for the purposes of seeking legal advice or

professional assistance in relation to making a disclosure, as such a disclosure is authorised under the PID Act.

Responsibilities of all staff

The PID Act requires all public officials to use their best endeavours to assist in the conduct of an investigation under the PID Act. Their role includes:

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

Responsibilities and Procedures for supervisors and managers

A supervisor for the purposes of the PID Act includes any public official who supervises or manages the discloser. If a supervisor or manager believes that information given to them concerns, or could concern, disclosable conduct, they must give that information to an authorised officer as soon as reasonably practicable.

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

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

Where a public official in the ACMA discloses information to their supervisor or manager and that supervisor or manager has reasonable grounds to believe that the information concerns, or could concern, disclosable conduct, the supervisor or manager must, as soon as practicable, give the information to an Authorised Officer in the ACMA. In line with confidentiality requirements, the supervisor or manager should get the person's consent before passing on their identifying information.

Where such a disclosure is made to a supervisor or manager, that person must make a written record of the fact of the disclosure, and if the disclosure is not in writing, they must make a written record of the substance of the disclosure and of the time and date of the disclosure.

The person to whom the disclosure has been made must ask the discloser to sign the record of the disclosure, where this is practicable.

At the time a supervisor or manager gives information to an Authorised Officer, they must also give the Authorised Officer their written assessment of any risks that reprisal action might be taken against the person who disclosed the information to the supervisor or manager. Further information about undertaking a risk assessment is available at **Appendix C: Assessing risk of reprisal**.

Where a supervisor or manager has given information to an Authorised Officer, and where the supervisor or manager is able to contact the discloser, they must inform the discloser that they have given the information to an Authorised Officer in the ACMA and advise the discloser of the name and contact details of that Authorised Officer.

Procedures for Authorised Officers

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

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

The Authorised Officer must:

- > inform the person that the disclosure could be treated as an internal disclosure under the PID Act, and explain to the person what the PID Act requires for a disclosure to be an internal disclosure;
- > explain to the person the protections provided by the PID Act to persons who make disclosures under the Act;
- > advise the person of any orders or directions that may affect disclosure of the information.

Authorised Officer must decide whether or not to allocate a disclosure

Where a public official, a former public official or a person who has been a declared a public official, makes a disclosure of disclosable conduct directly to an Authorised Officer, the Authorised Officer must make a written record of the fact of the disclosure and, if the disclosure is not in writing, they must make a written record of the substance of the disclosure and of the time and date of the disclosure.

The Authorised Officer must ask the discloser to sign the written record of the disclosure, where this is practicable.

Where a disclosure has been given to or made to an Authorised Officer, the Authorised Officer must use their best endeavours to decide on the allocation of the disclosure within **14 days** after the disclosure is given to or made to the Authorised Officer.

An Authorised Officer who receives a disclosure must decide whether they are satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure.

The bases on which an Authorised Officer could be satisfied of this include:

- > that the disclosure has not been made by a person who is, or was, a public official
- > that the disclosure was not made to an authorised internal recipient or supervisor
- > that the disclosure is not about disclosable conduct
- > that the person who is alleged to have carried out the disclosable conduct was not a public official at the time they are alleged to have carried out that conduct
- > that the disclosure is not otherwise a public interest disclosure within the meaning of the PID Act.

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

Where an Authorised Officer decides that a disclosure that has been made to them is not to be allocated, they must, where the discloser's contact details are known to the Authorised Officer, advise the discloser in writing as soon as reasonably practical that the disclosure is not to be allocated, by sending to them a completed Form PID-1. The Authorised Officer must keep a record of the day and time the discloser was notified, the means of notification, and the content of the completed Form PID-1.

Where the Authorised Officer is aware of the contact details of the discloser, they must, as soon as practicable after receiving the disclosure and before allocating the disclosure, ask the discloser whether the discloser:

- > consents to the Authorised Officer giving the discloser's name and contact details to the Chair
- > wishes the disclosure to be investigated.

The Authorised Officer must make a written record of the discloser's responses (if any) to the questions referred to above. Where a discloser does not respond within seven days to the question of whether they give their consent to the Authorised Officer giving the discloser's name and contact details to the Chair, the discloser is taken not to have consented.

Where a discloser does not respond within seven days to the question of whether they wish the disclosure to be investigated, the discloser is taken to wish the disclosure to be investigated.

Where an Authorised Officer allocates an internal disclosure

An Authorised Officer must obtain the consent of an Authorised Officer in another agency before the first Authorised Officer can allocate an internal disclosure to that agency.

Where an Authorised Officer in the ACMA allocates a disclosure to an agency (including to the ACMA) they must complete Form PID-2 and send it to the Chair.

The Authorised Officer must copy the completed Form PID-2 to the relevant contact officer in the Ombudsman's Office.

Where the Authorised Officer is aware of the contact details of the discloser, the Authorised Officer must inform the discloser of the allocation as soon as is reasonably practical using completed Form PID-3, and keep a record of the day and time the discloser was notified, the means of notification, and the content of the completed Form PID-3.

Where an Authorised Officer in the ACMA allocates a disclosure, they must conduct a risk assessment based on a checklist of risk factors and having regard to any assessment of risk provided under these procedures by the discloser's supervisor or manager.

Further information on assessing risks is available at **Appendix C: Assessing the risk of reprisal**.

Anonymous disclosures

Disclosures do not have to identify themselves and may remain anonymous.

Remaining anonymous means disclosers do not identify themselves at any stage to anyone, including the authorised officer who receives the disclosure. If the disclosure comes from an email address from which the person's identity cannot be determined, it should be treated as an anonymous disclosure.

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

ACMA staff may make a disclosure anonymously and all anonymous disclosures will be acted on whenever possible. A person who has made an anonymous disclosure may come forward at a later stage to disclose their identity and seek the protections of the PID Act.

Investigating a disclosure

When a decision is made to investigate a disclosure, procedures based on the PID Act and Ombudsman's Standard should be followed.

Deciding whether or not to investigate

Where an Authorised Officer allocates an internal disclosure to the ACMA, and the Chair has been given the contact details of the discloser, the Chair must, within 14 days after the disclosure was allocated to the ACMA, inform the discloser in writing using Form PID-3A that the Chair may decide:

- > not to investigate the disclosure
- > not to investigate the disclosure further.

The Chair must also inform the discloser of the grounds on which that decision may be taken.

The Chair must, as soon as practicable after receiving an allocation of a disclosure from an Authorised Officer (whether from within or outside the ACMA) consider whether to exercise the discretion under section 48 of the PID Act not to investigate the disclosure under the PID Act.

Reasons for not investigating a disclosure

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

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

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

Decision not to investigate

Where the Chair decides under section 48 of the PID Act not to investigate a disclosure under Division 2 of Part 3 of the PID Act, the Chair must, as soon as reasonably practicable, inform the Ombudsman of that decision, and of the reasons for that decision, by completing Form PID-6 and sending it to the relevant contact in the Ombudsman's Office.

Where the Chair decides under section 48 of the PID Act not to investigate a disclosure, and where they have been given the name and contact details of the discloser, the Chair must, as soon as reasonably practicable, inform the discloser of that decision, of the reasons for that decision and of other courses of action that may be available to the discloser under other laws of the Commonwealth, by completing Form PID-4 and sending it to the discloser.

Decision to investigate

Where the Chair has considered exercising the discretion under section 48 of the PID Act and has decided that the ACMA is required to investigate the disclosure, and where the Chair has been given the name and contact details of the discloser, the Chair must inform the discloser that the ACMA is required to investigate the disclosure, and inform the discloser of the estimated length of the investigation by completing Form PID-5 and sending it to the discloser.

If the Chair decides to investigate the disclosure and starts to investigate the disclosure but then decides not to investigate the disclosure further under section 48, the Chair must inform:

- > the discloser of that decision, and the reasons for the decision and any other courses of action that might be available to the discloser under other laws of the Commonwealth by completing Form PDI-4A and sending it to the discloser, and
- > the Ombudsman of that decision and the reasons for it by completing Form PID-6A and sending it to the relevant contact in the Ombudsman's office.

Investigators

The Chair may appoint an investigator to assist with an investigation of a disclosure. The appointee may be from inside or outside the ACMA.

Procedures for investigators

Where the Chair has decided to commence an investigation into an internal disclosure, the Chair may conduct the investigation as they think fit. However, they must comply with:

- > the Ombudsman's Standard
- > to the extent they are relevant to the investigation

- > the Commonwealth Fraud Control Guidelines
- > these procedures
- > the procedures established under s 15(3) of the PS Act.

The Chair must be independent and unbiased in the matter and must not have an actual or perceived conflict of interest.

The Chair may, for the purposes of the investigation, obtain information from such persons, and make such inquiries, as they think fit.

When conducting an investigation, the Chair must ensure that a decision whether evidence is sufficient to prove a fact is made on the balance of probabilities.

Interviewing witnesses

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

- > the identity and function of each person conducting the interview
- > the process of conducting an investigation
- > the authority of the investigator under the PID Act to conduct an investigation
- > the protections provided to the person by section 57 of the PID Act
- > the person's duty:
 - > if they are a public official—to use their best endeavours to assist the investigator in the conduct of an investigation under the PID Act (subject to the public official's privilege against incriminating themselves or exposing themselves to a penalty)
 - > not to take or threaten to take reprisal action against the discloser
 - > subject to the PID Act, not to disclose the identity of the person who made the disclosure.

Where the investigator conducts an interview as part of an investigation, at the end of the interview, the interviewee must be given an opportunity to make a final statement or comment or express a position. The investigator must include any final statement, comment or position in the record of the interview. The investigator must ensure that an audio or visual recording of the interview is not made without the interviewee's knowledge.

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

Procedural fairness

Procedural fairness does not require that a person against whom allegations are made must be advised as soon as the disclosure is received or as soon as an investigation is commenced.

Procedural fairness may require that the discloser's identity be revealed to the person who is the subject of the disclosure.

Where the investigator, in preparing the report of their investigation, proposes to make a finding of fact, or express an opinion that is adverse to the discloser, to a public official who is the subject of the disclosure or to another person, the investigator or delegate must give the person who is the subject of that proposed finding or opinion a copy of the evidence that is relevant to that proposed finding or opinion and must give the person a reasonable opportunity to comment on it.

The requirement to provide a copy of relevant evidence will not apply where the investigator does not make substantive findings or express adverse opinions but instead simply recommends or decides that further investigation action should or should not be taken or will or will not be taken.

The investigator must ensure that a finding of fact in a report of an investigation under the PID Act is based on logically probative evidence.

The investigator must ensure that the evidence that is relied on in an investigation is relevant.

In broad terms, evidence is relevant to an investigation if it is of consequence to the matter under investigation and makes the existence of a fact more probable or less probable than it would be without the evidence.

Time limits

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

It is possible to seek one or more extensions of time from the Ombudsman.

A request to the Ombudsman for an extension of time must be made where an investigation has not been completed within 70 days of the date the disclosure was allocated.

The Ombudsman has indicated that an application for extension should include reasons why the investigation cannot be completed within the time limit, the views of the discloser on the question of an extension of time, and an outline of action taken to progress the investigation.

An investigation that is not completed within time does not become invalid.

Reports of investigations

In preparing a report of an investigation under the PID Act, the investigator must comply with the PID Act, the Ombudsman's Standard and these procedures. The report is the Agency's record of the investigation of the disclosure and the action to address any disclosable conduct that was found to have occurred. Additionally, the investigation report is a record of the Agency's response to any claims of detriment against the discloser.

A report of an investigation under the PID Act must set out (where relevant):

- > the matters considered in the course of the investigation
- > the duration of the investigation
- > the steps taken to gather evidence
- > a summary of the evidence
- > the principal officer's findings (if any)
- > any action taken, or currently in train to address those findings
- > recommendations about other action to address those findings.

The action to address the findings of the investigation could include a different type of investigation or referral of the matter to the police.

If the investigation was inconclusive in any respect, the report should say so and explain why.

If parts of the disclosed information were not investigated, the report should explain the reasons for the decision not to investigate those matters.

The PID investigation report must also detail whether there were any claims, or evidence, of detrimental action against the discloser, and how the Agency responded to them.

Where an investigator has completed a report of an investigation under the PID Act, and where they have been given the discloser's contact details, the investigator must, as soon as practicable, advise the discloser in writing by completing Form PID-7:

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

The investigator must, within a reasonable time of preparing a report of an investigation under the PID Act, give a copy of the report to the discloser. However, the investigator may delete from the copy of the report given to the discloser any material:

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

The investigator must also delete from the copy of a report given to the discloser any material which would result in the report contravening a designated publication restriction.

If an investigator suspects that information disclosed as part of an internal disclosure, or obtained during their investigation of a disclosure, is evidence of an offence against a Commonwealth, state or territory law, they may disclose that information to a member of a relevant police force. Police notification is mandatory if the suspected offence is serious (that is, punishable by imprisonment for two years or more).

Confidentiality

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

It is an offence for a person who has information obtained in the course of conducting a disclosure investigation or in connection with their powers and functions under the PID Act to disclose or use the information (s 65(1)) unless one of the following exceptions apply (s 65(2)):

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

Public officials are privy to a great deal of private and sensitive information about individuals and government matters. Maintaining strict confidentiality is an important part of a public official's role and this obligation is often backed up by criminal sanctions.

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

A public official will not receive these protections if they give the information to someone outside government like a journalist, Member of Parliament or union representative, unless the conditions for an external or emergency disclosure are met. The official may be in breach of their duty to maintain appropriate confidentiality in relation to official information they have gained in the course of their work, or be subject to other civil, criminal or disciplinary action. For example, the official could be in breach of the Crimes Act 1914, s 79 (official secrets), or the secrecy/confidentiality provisions in the legislation under which the information was collected. If the disclosing official is an APS officer, they could be subject to disciplinary procedures under the APS Code of Conduct.

The investigation should be conducted in as confidential a manner as is possible. In particular, the identity of both the discloser and the person alleged to have engaged in the disclosable conduct should not be revealed except where this is reasonably necessary for the effective investigation of the disclosure (including because of the need to afford procedural fairness). Before commencing the investigation, the investigator should become familiar with the PID Act, especially the confidentiality requirements and the protections for disclosers.

The person being interviewed must be informed of confidentiality requirements and protection of the discloser's identity.

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

Any interviews with the discloser should be arranged so as to avoid the identification of the discloser by other staff of the Agency.

Record keeping

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

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

To satisfy confidentiality requirements, and to minimise the possibility of detrimental action against the discloser and others, including witnesses, a secure record system to deal with internal disclosures includes ensuring that:

- > all paper and electronic documents and files are secure and only able to be accessed by authorised officers, investigators and other officers involved in managing the disclosure
- > other materials such as interview tapes are stored securely with access only by officers involved in handling the disclosure
- > communications 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 open area.

Where an Authorised Officer is required to keep a record under these procedures, the record may be kept in hard copy or in an electronic form or in both.

Access to these records must be restricted to the Authorised Officers, delegates (including investigators) or other employees in the ACMA who require access in order to perform some function under the PID Act or for the purposes of another law of the Commonwealth (for example, under the *Work Health and Safety Act 2011* or the *PS Act*).

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

All records made for the purposes of the PID Act in accordance with these procedures must be marked as 'in-confidence' and hard copies stored in the appropriate storage container.

Any email messages sent by Authorised Officers or delegates that contain identifying information must be clearly marked 'to be read by named addressee only'.

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

In addition to the requirement to notify the Ombudsman whenever a disclosure is allocated, or a decision made not to investigate or to stop investigating a disclosure, agencies are required to provide to the Ombudsman certain information about disclosures they have handled for the purposes of the annual report under the PID Act (s 15, PID Standard).

Monitoring and evaluation

Regular reporting to the Ombudsman is required to monitor PID Act activity.

Each Authorised Officer must advise the General Manager, Corporate and Research of any public interest disclosures received by the Authorised Officer and the nature of the disclosable conduct for each disclosure (by reference to the relevant item or paragraph in the definition). Authorised Officers must also report any disclosures that have been allocated to the ACMA by another agency's Authorised Officer.

The General Manager, Corporate and Research will maintain a record of disclosures, along with details of any investigations undertaken and the outcomes of those investigations.

The General Manager, Corporate and Research will assist the Chair in providing information to the Ombudsman as required to meet statutory reporting requirements.

Appendix A: Disclosable conduct

Section 29 Public Interest Disclosure Act (PID Act) defines Disclosable Conduct

Division 2, Subdivision B – Disclosable conduct

29 Meaning of *disclosable conduct*

- 1) **Disclosable conduct** is conduct of a kind mentioned in the following table that is conduct:
 - a) engaged in by an agency
 - b) engaged in by a public official, in connection with his or her position as a public official
 - c) engaged in by a contracted service provider for a Commonwealth contract, in connection with entering into, or giving effect to, that contract.

Table 1: Disclosable conduct

Item	Kinds of disclosable conduct
1	Conduct that contravenes a law of the Commonwealth, a State or a Territory.
2	Conduct, in a foreign country, that contravenes a law that: <ol style="list-style-type: none"> a) is in force in the foreign country b) is applicable to the agency, public official or contracted service provider c) corresponds to a law in force in the Australian Capital Territory.
3	Conduct that: <ol style="list-style-type: none"> a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice b) involves, or is engaged in for the purpose of, corruption of any other kind.
4	Conduct that constitutes maladministration, including conduct that: <ol style="list-style-type: none"> a) is based, in whole or in part, on improper motives b) is unreasonable, unjust or oppressive c) is negligent.
5	Conduct that is an abuse of public trust.
6	Conduct that is: <ol style="list-style-type: none"> a) fabrication, falsification, plagiarism, or deception, in relation to: <ol style="list-style-type: none"> i. proposing scientific research ii. carrying out scientific research iii. reporting the results of scientific research

	b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice.
7	Conduct that results in the wastage of: a) public money (within the meaning of the <i>Public Governance Performance and Accountability Act 2013</i>) b) public property (within the meaning of that Act) c) money of a prescribed authority d) property of a prescribed authority.
8	Conduct that: a) unreasonably results in a danger to the health or safety of one or more persons; or b) unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons.
9	Conduct that: a) results in a danger to the environment; or b) results in, or increases, a risk of danger to the environment.
10	Conduct of a kind prescribed by the PID rules.

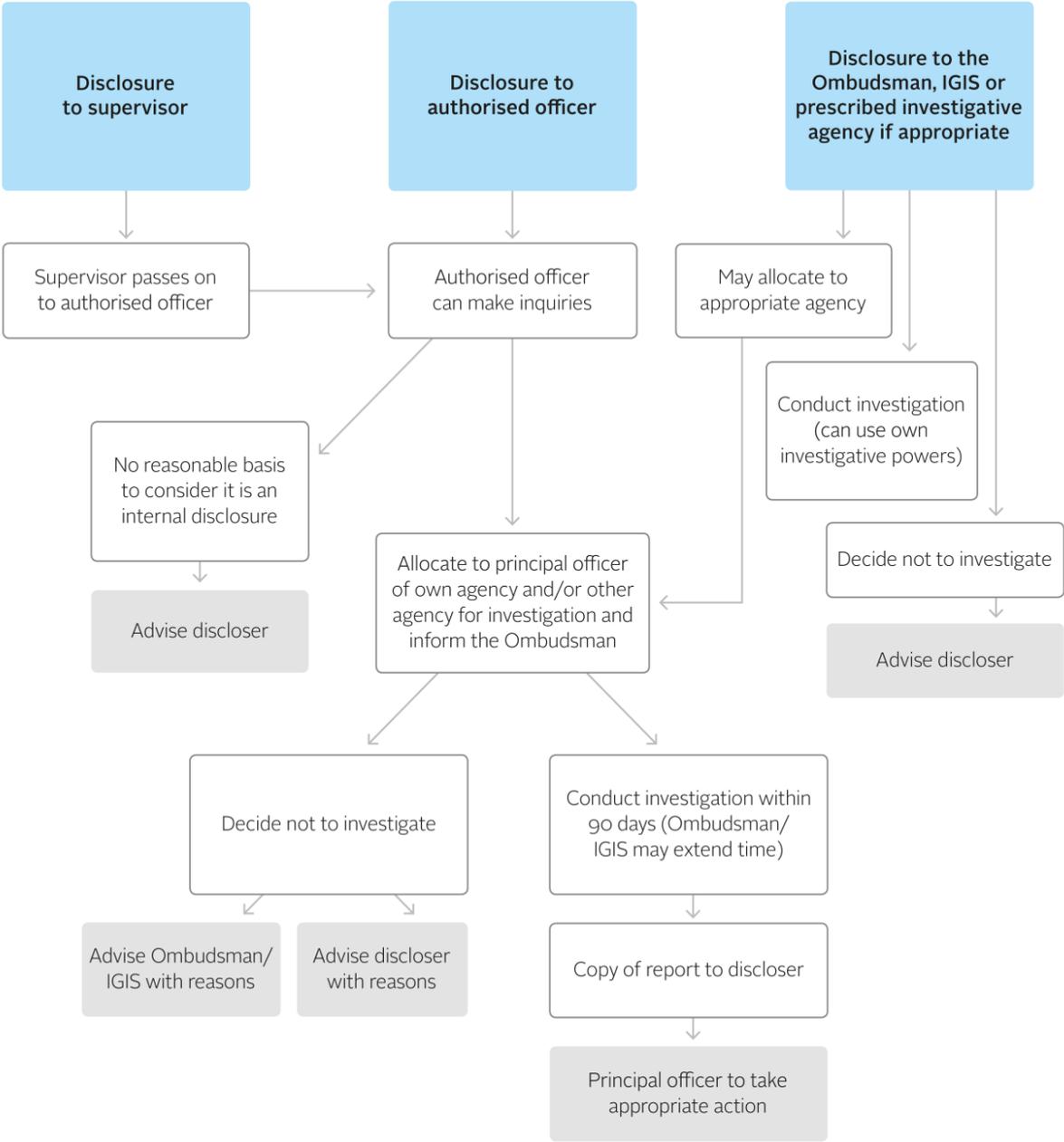
(2) Without limiting subsection (1), the following are also disclosable conduct:

- a) conduct engaged in by a public official that involves, or is engaged in for the purpose of, the public official abusing his or her position as a public official
- b) conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official.

(3) For the purposes of this section, it is immaterial:

- a) whether conduct occurred before or after the commencement of this section
- b) if an agency has engaged in conduct—whether the agency has ceased to exist after the conduct occurred
- c) if a public official has engaged in conduct—whether the public official has ceased to be a public official after the conduct occurred
- d) if a contracted service provider has engaged in conduct—whether the contracted service provider has ceased to be a contracted service provider after the conduct occurred.

Appendix B: PID Act internal disclosure process



Appendix C: Assessing risk of reprisal

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

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

When should a risk assessment be done?

The risk assessment should be completed as soon as possible after a disclosure is received. This provides the best chance of recognising any risk of reprisals or associated workplace conflict.

Who should be involved?

The risk assessment should be undertaken by whoever the disclosure was made to.

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

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

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

How should a risk assessment be conducted?

The following approach is consistent with the ACMA's framework for managing organisational risks:

- > **identifying** potential reprisals, or related workplace conflict
- > **assessing** the likelihood and consequence of reprisals or related workplace conflict
- > **controlling** strategies put in place to prevent or contain reprisals or related workplace conflict

- > **monitoring and reviewing** strategies that been implemented and their effectiveness.

Identifying risks

Each disclosure poses its own risk, however there are some risk factors that can alert authorised officers and managers to problems. The person doing the risk assessment should clearly define the individual factors affecting the particular discloser and the specific workplace when determining if there are factors that make it likely that reprisals or related workplace conflict will occur.

Indicators of a higher risk of reprisals or workplace conflict include:

Threats or past experience

- > a specific threat against the discloser has been received
- > there is a history of conflict between the discloser and the subjects of the disclosure, management, supervisors or colleagues
- > there is a history of reprisals or other conflict in the workplace.

Confidentiality unlikely to be maintained

- > Who knows that the disclosure has been made or was going to be made?
- > Has the discloser already raised the substance of the disclosure or revealed their identity in the workplace?
- > Who in the workplace knows the discloser's identity?
- > Is the discloser's immediate work unit small?
- > Are there circumstances, such as the discloser's stress level, that will make it difficult for them to not discuss the matter with people in their workplace?
- > Will the discloser become identified or suspected when the existence or substance of the disclosure is made known or investigated?
- > Can the disclosure be investigated while maintaining confidentiality?

Significant reported wrongdoing

- > Are there allegations about individuals in the disclosure?
- > Who are their close professional and social associates within the workplace?
- > Is there more than one alleged 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?
- > Are these people likely to take reprisals—for example, because they have a lot to lose?
- > Do these people have the opportunity to take reprisals—for example, because they have power over the discloser?

Vulnerable discloser

- > Is or was the reported wrongdoing directed at the discloser?
- > Are there multiple subjects of the disclosure?
- > Is the disclosure about a more senior officer?
- > Is the discloser employed part-time or on a casual basis?
- > Is the discloser isolated—for example, geographically or because of shift work?

- > Are the allegations unlikely to be substantiated—for example, because there is a lack of evidence?
- > Is the disclosure being investigated by persons outside the ACMA?

Assessing risks

The person assessing the risk should consider:

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

Controlling risks

The actions adopted to control the risk of reprisal are dependent upon a number of factors, as indicated above. Any decision should be made in consultation with the discloser.

If the risk is assessed as sufficiently high, the manager or authorised officer should prepare a plan to prevent and contain reprisals against the discloser, or related workplace conflict. If it has been determined that a discloser will require support, the Agency should develop a strategy for providing an appropriate level of support, such as appointing a support person (a person responsible for checking on the wellbeing of the discloser regularly) or referring the discloser to the EAP.

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

Monitoring and reviewing risks

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