

## Productivity Commission

### Public Interest Disclosure Procedures

I, **Michael Brennan**, Chair, Productivity Commission, acting in my capacity as Principal Officer of the Productivity Commission (the Commission), establish these Procedures under section 59 of the Public Interest Disclosure Act 2013 (PID Act).

Signed:



Dated:

5/8/21

### Statement of Commitment

The Commission is committed to the highest standards of ethical and accountable conduct. To this end, the Commission encourages people to report suspected wrongdoing, and will ensure that those who report are properly supported and protected from any adverse consequences relating to the reporting. These procedures set out how the Commission will give effect to this commitment.

To uphold the good reputation of the Commission and to provide a safe and ethical workplace, public officials who are aware of wrongdoing in the Commission (or elsewhere in the APS) are encouraged to report such instances in accordance with the provisions set out in these procedures.

These procedures may be amended from time to time to ensure their continued compliance with the PID Act.

## Introduction

The *Public Interest Disclosure Act 2013* (PID Act) prescribes a framework for the disclosure and investigation of serious wrongdoing and maladministration in the Australian public sector (APS). In accordance with the intent of the Act, the Commission encourages people to report suspected serious wrongdoing, and will ensure that those who report, or who are considering making a report, are properly supported and protected from any adverse consequence relating to the reporting.

## What is a Public Interest Disclosure?

A disclosure of information is considered a 'public interest disclosure' if the disclosure is made by a current or former public official and the information tends to show, or the official believes on reasonable grounds that the information tends to show, one or more instances of 'disclosable conduct'.

'Disclosable conduct' includes a wide range of wrongful conduct engaged in by an agency or a public official in connection with his or her position as a public official. It includes (but is not limited to) conduct that:

- is corrupt;
- contravenes a law;
- perverts the course of justice;
- results in the wastage of public funds or property;
- is an abuse of public trust;
- unreasonably endangers the health and safety of others;
- is maladministration including conduct that is unjust, oppressive or negligent;
- involves the public official abusing their position as a public official.

Disclosable conduct does not include disagreement with a government policy, action or expenditure.

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

In addition, there are provisions in the Act which allow the Commission to not investigate frivolous or vexatious disclosures.

## Application of these procedures

These procedures apply to disclosures made to Commission Authorised Officers as internal disclosures, or those disclosures which are subsequently allocated to the Commission.

These procedures do not apply to external disclosures, emergency disclosures or legal practitioner disclosures, unless subsequently allocated to the Commission.

## Who can make a public interest disclosure?

A person who is a current or former 'public official' may make a public interest disclosure. A public official includes:

- APS employees (either current or former employees);
- a statutory office holder;
- another person who exercises power under a Commonwealth Law; or
- people or bodies providing services under a contract to the Commonwealth, including subcontractors.

## Who can receive a public interest disclosure?

A public interest disclosure, internally within the Commission, can be made to:

- the Chair;
- a discloser's current manager; or
- an Authorised Officer.

The Authorised Officers in the Productivity Commission are the persons occupying the positions of:

- Head of Office
- Assistant Commissioner Corporate Services.

In certain circumstances, a disclosure may be made to an external body such as the Ombudsman. For more information please refer to the Commonwealth Ombudsman's [Agency Guide to the PID Act](#).

A disclosure must be made to an appropriate person to gain the protection available under the PID Act.

## How can a public interest disclosure be made?

A disclosure relating to the Productivity Commission may be made to an Authorised Officer either directly, or through the person's manager. These disclosures may be made orally or in writing.

**Authorised Officers can be contacted in writing by email at [PID@pc.gov.au](mailto:PID@pc.gov.au).**

If the disclosure is made orally, a record will be made of what is said and the discloser will be asked to sign the record as being correct.

Disclosers are encouraged to provide as much information as possible to assist an Authorised Officer to deal with a public interest disclosure appropriately and promptly.

A discloser may make a public interest disclosure anonymously. Anonymous disclosures will be acted on wherever possible. However, it should be noted that there are a range of reasons why a discloser should consider identifying themselves to an Authorised Officer, or at the least providing a means of contact. These include that the Authorised Officer who receives an anonymous report must have reasonable grounds to suspect the disclosable conduct has occurred to allocate the matter for investigation. If they cannot contact the person to seek necessary information, the matter may not proceed.

## Protection under the PID Act

If a public interest disclosure is made in accordance with the PID Act, the discloser will receive the following protections:

- the discloser's identity will be kept as confidential as reasonably practicable;
- the discloser will be immune from civil, criminal, or administrative liability;
- no contractual or other remedy may be enforced, or sanction imposed on the discloser on the basis of making the disclosure;
- a contract to which the discloser is a party must not be terminated on the basis that the public interest disclosure constitutes a breach of the contract; and
- a discloser will have legal protection from reprisals through relevant criminal offences, a right to apply for an injunction and a right to apply for compensation for loss damage or injury due to a reprisal.

## Confidentiality

The PID Act requires agencies to keep a discloser's identity confidential, subject to limited exceptions.

Agencies are also bound by obligations under *the Privacy Act 1988* in relation to storing personal information securely and limiting its use and disclosure.

The Commission will make every reasonable effort to protect a discloser's identity.

The discloser's identity or information that would effectively identify them may, however, need to be disclosed to certain other people, including to investigate the disclosure effectively or protect them against reprisals. Accordingly, the PID Act cannot provide absolute protection of a discloser's identity in all situations. If it is necessary or highly likely that the discloser's identity will be revealed, an Authorised Officer will discuss this with them before proceeding.

Disclosers should not discuss the details of their disclosure with anyone who does not need to know. Discussions with these people are not covered by the protections of the PID Act.

## Roles and responsibilities

### Chair, Productivity Commission

The Chair is the principal officer under the PID Act. The responsibilities of principal officers under the PID Act include:

- establishing procedures for facilitating and dealing with public interest disclosures;
- ensuring appropriate systems and strategies are in place to provide support to a person who makes a disclosure and minimise any risks of detrimental action against them; and
- ensuring disclosures are properly investigated.

### Authorised Officers

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

- receiving disclosures from current or former public officials about disclosable conduct;
- deeming a person to be a public official to facilitate the making of a public interest disclosure;
- informing a person who may be unaware of the PID Act requirements that information that the Authorised Officer reasonably believes could concern disclosable conduct could be treated as an internal disclosure;
- explaining the requirements of the PID Act and advising the person of any designated publication restrictions that may affect disclosure;
- assessing reported information to determine if there are no reasonable grounds to believe the information could be considered to be a public interest disclosure;
- making any preliminary inquiries necessary to make an allocation decision;
- allocating all or part of the disclosure to the Principal Officer of their agency and/or another agency, with that agency's consent;
- informing the Principal Officer of each relevant agency, and the Ombudsman or Inspector General of Intelligence and Security (IGIS), as appropriate, of allocation decisions and associated information;
- informing the discloser of the allocation decision;
- consenting to the allocation of a disclosure by an Authorised Officer of another agency; and
- advising the discloser of a decision not to allocate, the reasons why and any other course of action that may be available under Commonwealth law.

## Managers

Managers are responsible for receiving public interest disclosures made to them by their staff. If a manager receives information that concerns, or could concern, disclosable conduct, they must give that information to an Authorised Officer as soon as reasonably practicable. A manager must seek the consent of the discloser to pass on their personal information.

## Investigation Officers

The Chair is responsible for investigating disclosures received and assessed in accordance with the PID Act. The Chair may delegate this function to an officer within the Commission (Investigation Officer) on a case-by-case basis. The Investigation Officer will not be appointed to undertake an investigation if it is considered that they have an actual or perceived conflict of interest in relation to the disclosure.

## Risk assessment

When a public interest disclosure is received, the risk of reprisals being taken against the discloser will be assessed. This assessment involves considering the specific behaviour and circumstances that may result in reprisals and then putting appropriate strategies to prevent or contain them.

The risk assessment will be undertaken as soon as possible after a disclosure is received.

If a disclosure is made to a manager and the discloser wishes their identity to remain anonymous, the manager will conduct the risk assessment.

The risk assessment should, at a minimum, cover the following four steps:

- **identify:** the risks of reprisals or workplace conflicts;
- **assess:** the likelihood and consequence of reprisals or related workplace conflict;
- **control:** have strategies in place to prevent or contain reprisals or related workplace conflict; and
- **monitor and review:** the implementation and effectiveness of the strategies.

For further information, refer to the section on Risk Assessment in the [Agency Guide to the PID Act](#).

## Investigating a public interest disclosure

If an Authorised Officer determines that the disclosure is in fact a public interest disclosure, the matter must be allocated for investigation.

An Authorised Officer must notify the Principal Officer and the discloser of their decision to allocate the matter for investigation. At this stage, the discloser should also be notified of an Investigation Officer's powers to:

- a. decide not to investigate the disclosure; and
- b. decide not to investigate the disclosure once it has commenced.

## Investigation

The Investigation Officer may decide not to investigate, or may discontinue an investigation, only on the following grounds:

- the discloser is not a current or former public official;
- the information does not to any extent concern serious disclosable conduct;
- the disclosure is frivolous or vexatious;
- the disclosure is the same, or substantially the same, as another disclosure which has been or is being investigated under the PID Act;
- the disclosure is the same, or substantially the same, as a disclosure already investigated or currently being investigated under Commonwealth law and:
  - it would be inappropriate to conduct another investigation at the same time; or
  - the Chair/Investigation Officer is reasonably satisfied that there are no matters that warrant further investigation;

- the discloser has advised the Investigation Officer that they do not wish the investigation to be pursued, and the Chair/Investigation Officer is reasonably satisfied that there are no matters that warrant further investigation; or
- it is impracticable for the disclosure to be investigated because:
  - of the age of the information;
  - the discloser has not revealed their name and contact details; or
  - the discloser refuses or fails, or is unable, to give the Investigation Officer the information or assistance they requested.

The Investigation Officer must, as soon as reasonably practicable, inform the discloser whether the disclosure will be investigated. The discloser will also be advised of the estimated time the investigation is likely to take.

If the disclosure will not be investigated, the Investigation Officer will inform the discloser the reasons for deciding not to investigate and other courses of action that might be available to the discloser under other Commonwealth laws.

The Investigation Officer must also notify and provide their reasons not to investigate a disclosure to the Ombudsman.

An Investigation Officer must ensure that a person against whom allegations are made is accorded procedural fairness.

### **Investigation report**

An Investigation Officer must complete an investigation (including the investigation report) within 90 days of the disclosure allocation.

If more time is needed, the Investigation Officer may seek an extension of time from the Ombudsman in advance of the 90-day expiry period. If the Ombudsman grants an extension, the Investigation Officer must notify the discloser, as soon as reasonably practicable after the extension is granted and provide an update about the progress of the investigation.

An investigation report must include the following information:

- the matters considered during the investigation;
- the duration of the investigation;
- the Investigation Officer's findings (if any);
- the action (if any) that has been, is being, or is recommended to be taken;
- any claims made about, and any evidence of, detrimental action taken against the discloser, and the Commission's response to those claims and that evidence;
- whether there have been one or more instances of disclosable conduct;
- any regulations, rules, administrative requirements, or similar matters to which the disclosable conduct relates;
- an explanation of the steps taken to gather evidence; and
- a summary of the evidence, as well as any findings and recommendations made based on the evidence.

The discloser must be provided with a copy of the final investigation report (with specified material omitted if necessary (s 51(5)), within a reasonable time.

### **Conclusion of investigation**

Any action (if any) that the Commission may undertake will depend on the circumstances of each investigation.

The Chair is responsible for taking appropriate action in response to recommendations and other matters contained in the investigation report. These actions might include but are not limited to:

- commencement of Code-of-Conduct proceedings under the Public Service Act 1999 or another disciplinary process;
- referral of the matter to the police or another body that can take further action;

- mediation or conciliation of a workplace conflict;
- an internal audit or other review of an issue or the operations of a particular unit;
- implementing or changing policies, procedures or practices; and/or
- conducting training and awareness sessions for staff.

For further information, refer to the section 'After the Investigation' in the [Agency Guide to the PID Act](#)

If a discloser is not satisfied with the Commission's decisions relating to their disclosure, they may raise this with the Ombudsman.

## Record-keeping

### Record of allocating the handling of a disclosure

When an Authorised Officer allocates the handling of a disclosure to one or more agencies (including the Commission), an appropriate written record is to be kept of:

- the decision (including the name of each agency to which the disclosure is to be allocated);
- the reasons for the decision; and
- the consent provided by the agency to which the allocation is made.

### Records of the discloser being informed of the allocation decision

Appropriate records must be kept of whether the discloser was notified of the decisions set out in these procedures. Those records should include:

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

Detailed records should be kept throughout the disclosure, investigation, and post investigation process.

Public interest disclosure records must be kept in a secure place.

## Further Information and resources

[Public Interest Disclosure - Commonwealth Ombudsman](#)

[Speaking up Against Wrongdoing - Commonwealth Ombudsman](#)

[Public Interest Disclosure Act 2013 \(legislation.gov.au\)](#)

[Agency Guide to the PID Act](#)