

SPEAKING UP ABOUT WRONGDOING

A guide to making a disclosure under
the *Public Interest Disclosure Act 2013*

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Foreword

The *Public Interest Disclosure Act 2013* (PID Act) facilitates disclosure and investigation of wrongdoing across the Commonwealth public sector. This guide provides an overview of how the public interest disclosure scheme works and your rights and obligations if you are considering making a disclosure.

The PID Act is not intended to replace existing processes for dealing with workplace grievances and misconduct, such as suspected breaches of the APS Code of Conduct, bullying and harassment, but to supplement them. Nor does it replace professional standards, integrity or mandatory reporting regimes.

In preparing this guide, my office has had regard to the content of the guidelines of the NSW Ombudsman and the guide issued by the Queensland Ombudsman, Crime and Misconduct Commission and Queensland Public Service Commission, *Thinking about blowing the whistle?* (2011). I wish to thank the authors of those guidelines and guide.



Colin Neave
Commonwealth Ombudsman

KEY TERMS

authorised officer	agency head or officer appointed by the agency head
disclosable conduct	wrongdoing you can report under the PID Act
IGIS	Inspector-General of Intelligence and Security
PID Act	<i>Public Interest Disclosure Act 2013</i>
PID rules	rules made by the minister under the PID Act
principal officer	agency head



Understanding the public interest disclosure scheme

WHY SHOULD I SPEAK UP?

Staff who are prepared to speak up about public sector misconduct, wastage of public funds, suspected illegal activity or danger to health, safety or the environment are often the most important and accurate sources of information to identify and address problems in administration.

How, where and what you disclose will determine whether your disclosure is protected under the *Public Interest Disclosure Act 2013* (PID Act), as outlined in this guide. The PID Act safeguards your confidentiality, protects you from reprisals and requires agencies to take action.

If you make a disclosure, you may help to:

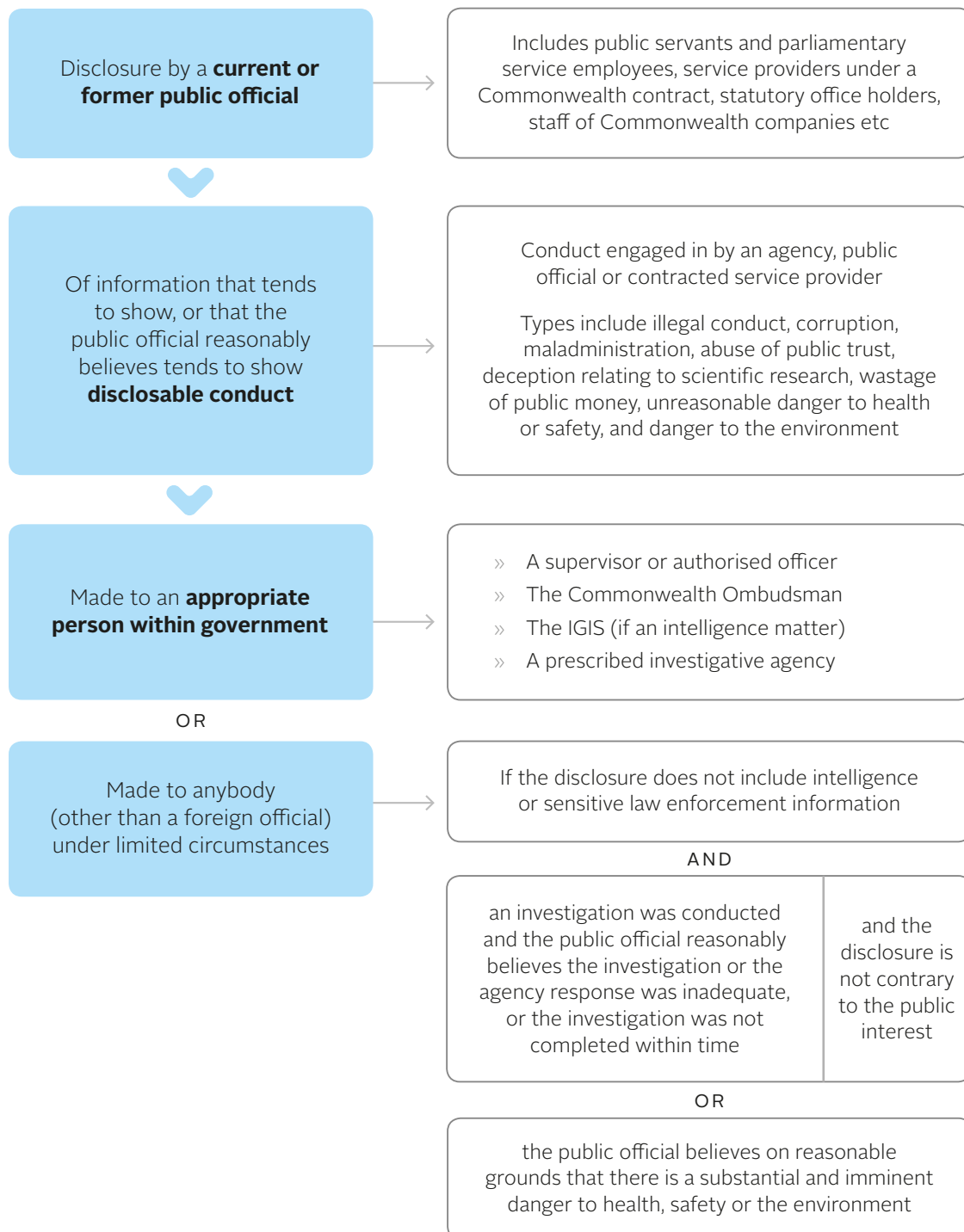
- » stop the wrongdoing or bring it to the attention of people who can stop it
- » prevent disadvantage to other people from the wrongdoing
- » prevent danger to health and safety or damage to the environment
- » create an opportunity to implement better work procedures to prevent wrongdoing or maladministration in the future
- » bring to account the people responsible for wrongdoing.

You will also know that you did what you could to improve the situation.

Even if you decide that you do not wish to make a public interest disclosure, you should consider whether there is some other action you should take to speak up about workplace matters that concern you. There are other avenues for advice and action, including in relation to harassment and other breaches of the APS Code of Conduct, and your agency should ensure that you are supported.

WHAT IS A PUBLIC INTEREST DISCLOSURE?

Essentially it is a disclosure by a current or former public official of suspected wrongdoing in the Commonwealth public sector. The emphasis of the scheme is on disclosures being made and investigated within government, but in limited circumstances a disclosure outside government is permitted. The elements of making a disclosure under the PID Act are summarised below, with more detail on the following pages.



WHO CAN MAKE A PUBLIC INTEREST DISCLOSURE?

You must be a current or former 'public official', as defined in s 69 of the PID Act, to make a public interest disclosure. Essentially this means 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. Organisations or individuals who provide services under a Commonwealth contract and their officers or employees are also included.

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

If you are not sure whether you are a public official for the purposes of the Act, talk to an authorised officer. These are people in each agency who are appointed by the agency head to take disclosures.

WHAT CAN I DISCLOSE?

You can disclose information that you believe, on reasonable grounds, tends to show 'disclosable conduct'. Disclosable conduct is conduct by:

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

if that conduct:

- » contravenes a Commonwealth, state or territory law
- » in a foreign country, contravenes a foreign law that applies to the agency, official or service provider
- » perverts the course of justice
- » is corrupt

- » constitutes maladministration, including conduct that is based on improper motives or is unreasonable, unjust, oppressive or negligent
- » is an abuse of public trust
- » involves fabrication, falsification, plagiarism or deception relating to scientific research, or other misconduct in relation to scientific research, analysis or advice
- » results in wastage of public money or public property
- » unreasonably endangers health and safety
- » endangers the environment
- » is prescribed by the PID rules (s 29(1)).

An agency is broadly defined. It means:

- » a department
- » an executive agency under the *Public Service Act 1999* (that is, an agency established by the Governor-General rather than by legislation)
- » a statutory agency under the *Public Service Act 1999*
- » a Commonwealth authority (within the meaning of the *Commonwealth Authorities and Companies Act 1997*) or a Commonwealth company
- » the Australian Federal Police
- » intelligence and security agencies: the Australian Security Intelligence Organisation, Australian Secret Intelligence Service, Office of National Assessments, Defence Imagery and Geospatial Organisation, Defence Intelligence Organisation and Defence Signals Directorate
- » the Australian Prudential Regulation Authority
- » the High Court, Federal Court and any other court created by parliament
- » the Office of Official Secretary to the Governor-General
- » the Commonwealth Ombudsman
- » the Inspector-General of Intelligence and Security (IGIS)
- » a prescribed entity established by a Commonwealth law
- » a prescribed person holding an office established by a Commonwealth law (s 71).

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

WHAT IS NOT DISCLOSABLE CONDUCT?

It is not disclosable conduct just because you disagree with:

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

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

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

The conduct of members of parliament is not covered by the PID Act.

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

A report of wrongdoing in an Australian Public Service agency made before 15 January 2014 may be covered by the whistleblower provisions of the *Public Service Act 1999*. You should consult www.apsc.gov.au (see Circular 2013/08 *APS whistleblowing scheme and public interest disclosures*).

WHO CAN I MAKE A PUBLIC INTEREST DISCLOSURE TO?

You must make your disclosure to an appropriate person in order to gain the protections available under the PID Act. There is a range of options inside and outside your agency. The PID Act focuses on the reporting and investigating of wrongdoing within government, but allows for reporting outside government in specified limited circumstances.

Your own agency – an internal disclosure

You can report suspected wrongdoing either to your current supervisor or manager, or an authorised officer of your agency or the agency to which you last belonged. Authorised officers are the agency head and officers they appoint under the PID Act (s 36).

Each agency must have procedures for dealing with public interest disclosures, and you should consult these. Your agency may set out in its procedures how a disclosure should be made.

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

Supervisors can be a strong source of support if you are considering making a disclosure. However, there may be reasons to choose to speak to someone else – for example, you may suspect your supervisor knows about the wrongdoing and has allowed it to continue, your supervisor may not have an appropriate security clearance, or you may feel more comfortable talking to an authorised officer.

Other government agencies – an internal disclosure

If you have information about suspected wrongdoing in another public sector agency, you can make a disclosure to an authorised officer in that agency. This is also known as an 'internal disclosure'.

If the agency has ceased to exist since the suspected wrongdoing took place, the appropriate agency is generally the agency that has taken over its functions (s 35(3)). If you are in any doubt, seek advice from an authorised officer.

If the matter involves an intelligence agency or intelligence-related information, you have two options: you can make a disclosure to the intelligence agency, or to an authorised officer of the Inspector-General of Intelligence and Security (IGIS) if you believe on reasonable grounds that it would be appropriate for the IGIS to investigate (see www.igis.gov.au).

For matters that do not concern an intelligence agency or intelligence related information, you can also make a disclosure to an authorised officer of the Commonwealth Ombudsman, if you believe on reasonable grounds that it would be appropriate for the Ombudsman to investigate (ss 26(1), 34).

The PID Act also allows for agencies with separate investigative powers under other laws to be prescribed under PID rules as 'investigative agencies'. If one of those investigative agencies has the power to investigate the type of wrongdoing you are reporting, you may make your disclosure directly to them (ss 26(1), 34).

The PID Act extends to individuals and entities that provide goods or services under a contract with the Commonwealth, concerning wrongdoing related to entering into or giving effect to the contract. If you are concerned about their wrongdoing, you should report those concerns to the agency that is the principal beneficiary of the contract.

Other people – external and emergency disclosures

You can make a public interest disclosure to other people, including people outside government, in limited circumstances set out below. In addition to the conditions outlined below, two restrictions apply to such disclosures:

- » The matter must not include intelligence information or sensitive law enforcement information (as defined in s 41) or concern an intelligence agency.
- » You may not make a disclosure to a foreign public official.

External disclosure

If you made an internal disclosure under the PID Act, you may later make an 'external disclosure' to any person if:

- » the internal investigation under the PID Act was not completed within 90 days or within a timeframe approved by the Ombudsman or IGIS (an investigation is completed when the report of investigation is finalised), or
- » you believe on reasonable grounds that the investigation under the PID Act was inadequate, or
- » you believe on reasonable grounds that the agency took inadequate action after the investigation, whether under the PID Act or other legislation such as the Ombudsman Act, was completed,

and

- » it is not on balance contrary to the public interest for an external disclosure to be made (s 26).

You should note that the first two grounds (the time limit was exceeded or the investigation was inadequate) only apply to investigations under the PID Act. If the investigation was carried out by the Ombudsman, IGIS or an investigative agency under another law, those grounds are not available reasons for making an external disclosure.

If you make an external disclosure, you must ensure that you do not disclose more information than is reasonably necessary to identify the wrongdoing. You must not disclose intelligence information, including sensitive law enforcement information. Sensitive law enforcement information is information whose disclosure is reasonably likely to prejudice Australia's law enforcement interests, including interests in avoiding disruption to law enforcement and criminal investigation, protecting informants and witnesses, and protecting the technologies and methods used in dealing with criminal intelligence and investigation (see the full definition of this and 'intelligence information' in s 41).

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

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

Emergency disclosure

If you believe on reasonable grounds that the information you have concerns a substantial and imminent danger to the health or safety of one or more people or to the environment, you may make an emergency disclosure to anyone, provided you meet certain requirements:

- » The extent of the information you disclose must be only what is necessary to alert the recipient of the substantial and imminent danger. The danger would need to be substantial and imminent in the sense that the physical impact on safety or to the environment was imminent, and would not include matters that are not disclosable conduct under the PID Act (such as disagreement with government policy).
- » If you have not previously made an internal disclosure about the matter, or if you have done so and the investigation is not yet completed, there must be exceptional circumstances justifying your action. This might include, for example, if investigation was taking too long to complete having regard to the risk to a person's health and safety.
- » As noted above, you must not disclose intelligence information, including sensitive law enforcement information.

Lawyers

You may make a disclosure to a lawyer for the purposes of seeking legal advice or professional assistance about a public interest disclosure you have made or propose to make, but you must not disclose intelligence information, including sensitive law enforcement information (s 26).

If the information you wish to disclose is not intelligence information (including sensitive law enforcement information) but you know, or should reasonably have known, that it is nonetheless covered by a national security or other protective security classification, the lawyer must hold an appropriate security clearance. You should ask the lawyer about this before you disclose such information.

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

WHAT HAPPENS IF I DISCLOSE THE INFORMATION OUTSIDE THESE CIRCUMSTANCES?

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

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

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

Making a public interest disclosure

WHAT SHOULD I DO BEFORE MAKING A DISCLOSURE?

The PID Act requires each public sector agency to develop procedures for facilitating and dealing with public interest disclosures relating to the agency (s 59). You should make your disclosure in accordance with your agency's procedures, which should be published on the intranet and agency website.

Before you decide to go ahead, you may want to find out more about what you can expect from the process, what protection and support are available to you and whether there may be more appropriate ways to address the matters that concern you. You can seek advice from your agency.

If you believe it is appropriate to make a public interest disclosure to another agency such as the Ombudsman or IGIS, you can contact them for similar information.

CAN I DISCUSS THE MATTER WITH A LAWYER?

You can disclose information to a lawyer for the purpose of obtaining legal advice or professional assistance about a public interest disclosure you have made or propose to make, provided the information does not include intelligence information, including sensitive law enforcement information (s 26). The lawyer may also need to have an appropriate security clearance (see p. 6 for further details).

CAN I DISCLOSE ANONYMOUSLY?

Yes. You do not have to identify yourself when making a public interest disclosure (s 28(2)). You may want to initially approach the agency anonymously to discuss your concerns about confidentiality.

You should be aware, however, that anonymous disclosures, like anonymous complaints, are often more difficult to investigate.

Agencies will not be able to seek further information from you or advise you of any action they take if you remain anonymous and uncontactable. They also have the discretion not to investigate if you do not provide your name and contact details or are unable to give them further information or assistance if they need it (s 48(1)(i)).

If you do identify yourself to an authorised officer when making your public interest disclosure, the agency must make every effort to keep your identity confidential (ss 20, 21).

If you plan to make a disclosure anonymously, ask yourself:

- » Have I included all the information I believe is relevant so that the authorised officer would have reasonable grounds to suspect the disclosable conduct has occurred?
- » Can the information I have provided be understood without clarification or further explanation from me?
- » Is my identity likely to be apparent when this information is received or an investigation is begun?
- » Should I provide an anonymous contact method, such as an email account that does not identify me?

DO I HAVE TO DISCLOSE IN WRITING?

No. You may make a disclosure orally or in writing (s 28(1)). You may do this in person, by telephone, by letter or email, or via the internet if the agency has an online form for receiving disclosures. You should check the agency's procedures, as they may prefer a written disclosure.

It is the agency's responsibility to keep a record of your disclosure. It is also a good idea to keep your own records of what you disclosed and when, and any responses you received from the agency. This may assist you later in establishing that you are entitled to protection under the PID Act, if that becomes necessary.

WHAT INFORMATION SHOULD I PROVIDE?

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

Depending on your circumstances, you should think about covering as many of these matters as possible in your disclosure so as to help the agency to determine how to proceed:

- » your name and contact details
- » the nature of the wrongdoing
- » who you think committed the wrongdoing
- » when and where the wrongdoing occurred
- » relevant events surrounding the issue
- » if you did anything in response to the wrongdoing
- » others who know about the wrongdoing and have allowed it to continue
- » whether you believe your information is a public interest disclosure under the PID Act (you do not have to describe it that way for it to be treated as a public interest disclosure, but it will assist the agency if you do)
- » if you are concerned about possible reprisal as a result of making your disclosure.

Be clear and factual. Avoid speculation, personal attacks and emotive language as they divert attention from the real issues. If you have information in supporting correspondence or other documents, such as file notes or a diary of events, you should provide that to the authorised officer. You can also include the names of any people who witnessed the conduct or who may be able to verify what you are saying.

You should not investigate a matter yourself before making the disclosure – you may hinder a future investigation if you do. You should also be aware that the sooner you raise your concerns, the easier it may be for the agency to take action.



Even if the information you provide turns out to be incorrect or unable to be substantiated, your disclosure is protected by the PID Act, provided that you:

- » made the disclosure to your supervisor, an authorised officer, the Ombudsman, the IGIS or other prescribed investigative agency
- » honestly believe on reasonable grounds that the information tends to show disclosable conduct.

WILL MY NAME BE KEPT CONFIDENTIAL?

Agencies will make every reasonable effort to protect your identity.

It is a criminal offence for a public official who is involved in handling your disclosure to reveal your identifying information to anyone else without your consent or use it for another purpose unless it is for:

- » the purposes of the PID Act
- » an investigation by the Ombudsman or the IGIS
- » another Commonwealth law or prescribed law

or

- » the information has already lawfully been published (s 20).

Your identifying information must also not be disclosed to a court or tribunal except when necessary to give effect to the PID Act (s 21).

In addition, agencies are bound by obligations under the *Privacy Act 1988* in relation to storing personal information securely and limiting its use and disclosure.

You should be aware, though, that the protection the PID Act provides is not absolute. For example, your identity, or information that would effectively identify you, may need to be disclosed to certain other people if that is necessary:

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

In such circumstances, the agency may seek your consent to provide your identifying information to relevant people. You should also recognise that even if the staff involved in handling your disclosure take the utmost care to protect your identity, they may not be able to prevent your identity from becoming known.

If it is necessary or highly likely that your identity will be revealed, the agency should discuss this with you before proceeding. They may seek your consent to disclose your identity, and they should take steps to protect you against reprisal (for example, by making staff aware that criminal or disciplinary action may be initiated if detrimental action is threatened or taken against you).

WHAT ARE MY OBLIGATIONS?

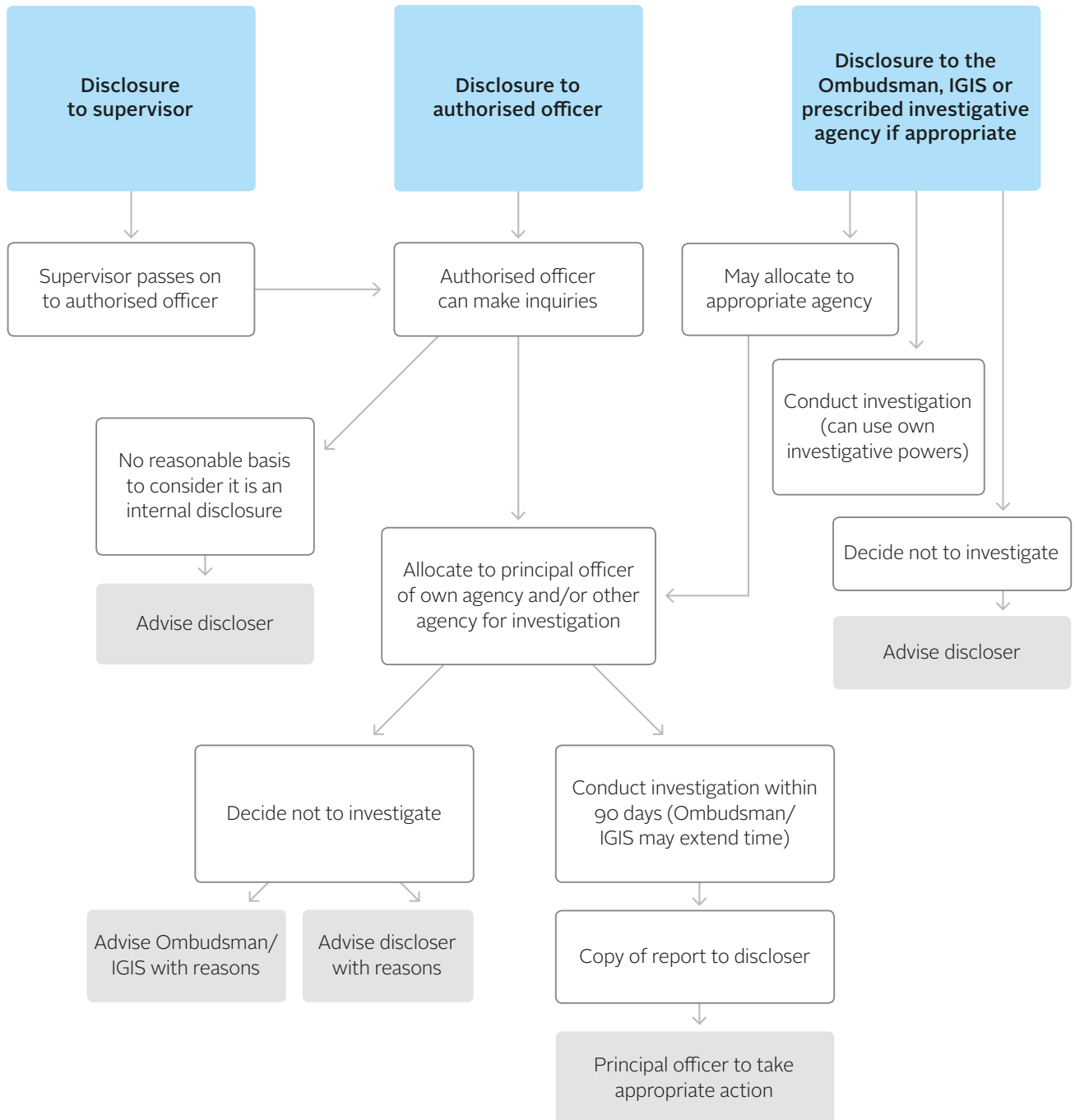
After making a disclosure, you should not discuss the details with anyone who does not need to know. Discussions with them will not be covered by the protections in the PID Act.

You should be discreet about the fact that you have made a public interest disclosure, the information in your disclosure and any information that would identify someone you allege has acted wrongly. The investigator must make sure that everyone involved is treated fairly and impartially.

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

You must not knowingly provide false or misleading information, as your liability for doing so will not be covered by the protections under the PID Act (s 11).

DEALING WITH AN INTERNAL DISCLOSURE



After a disclosure is made

ALLOCATION AND INVESTIGATION

The first step is that an authorised officer will examine the information you have supplied and decide whether it is a disclosure covered by the PID Act. An authorised officer is the agency head and people they appoint to that role. They may make preliminary inquiries and may ask you for further information.

Unless there is no reasonable basis for considering the matter to be a public interest disclosure, the matter will then be allocated for investigation. This will normally occur within 14 days. The matter may be allocated within the same agency, or to one or more other relevant agencies, including the Ombudsman or IGIS. If you consent, your name and contact details will be provided to the person receiving the allocation.

The principal officer (agency head) or their delegate must investigate the disclosure, unless one of the exemptions in s 48 apply. For example, if the matter does not relate to serious disclosable conduct, or it is already under investigation, or your disclosure is frivolous or vexatious. It may also be impracticable to investigate because of the age of the disclosure, or because you have not disclosed your name or contact details or have failed to give the investigator the information or assistance they requested.

If the matter is investigated by the Ombudsman, IGIS or a prescribed investigative agency, they may use their separate investigative powers rather than conducting the investigation under the PID Act (s 49). For example, the Ombudsman has powers to investigate complaints under the *Ombudsman Act 1976*, and may exercise the discretion not to investigate, or investigate further, under that Act.

More details on the investigation process are in the Agency Guide to the *Public Interest Disclosure Act 2013*.

AFTER THE INVESTIGATION

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

Detriment means any disadvantage to you, including dismissal, injury, discrimination between you and other employees or alteration of your position to your disadvantage (s 13(3)). It does not include administrative action that is reasonable to protect you from detriment (s 13(3)).

You will be given a copy of the investigative report within a reasonable time (provided that contacting you is reasonably practicable) (s 51(4)). Some material may be deleted from the copy you receive, if it is likely to identify any person, is intelligence information, would be exempt under the Freedom of Information Act 1982 or would contravene a publication restriction or protective security classification.

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

HOW LONG WILL THE PROCESS TAKE?

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

However, the Ombudsman, or the IGIS in the case of intelligence agencies, may grant one or more extensions of time. If an extension is granted, the Ombudsman or the IGIS will inform you and give you reasons for the extension (s 52(5)). The principal officer will also let you know about the progress of the investigation (s 52(5)). Failing to complete an investigation within time does not invalidate the investigation (s 52(6)).

WILL I BE KEPT INFORMED?

The agency will notify you at various stages in the process, provided they have your contact details. You will be advised:

- » when your disclosure is allocated for investigation
- » if the agency decides to investigate
- » if the investigation is under the PID Act, the estimated length of the investigation
- » if the agency decides not to investigate, the reasons for the decision and any action that might be available to you under other Commonwealth laws
- » if an investigation is conducted under the PID Act and an extension of time is granted by the Ombudsman or IGIS, the progress of the investigation
- » after the investigation report is completed.

You may be advised of the allocation decision and the decision not to investigate in the same document (for example, if the two decisions are made very close together).

The agency should keep you up to date with reasonable information on what is being done in response to your disclosure. If you have not heard anything within a reasonable period, ask the agency for an update. You may not be given certain information if, for example, it would jeopardise an ongoing investigation.

After an investigation under the PID Act is completed, you will be given a copy of the investigation report (s 51). The version you receive may have some information deleted if including it would cause the document:

- » to be exempt under the *Freedom of Information Act 1982* (exempt material includes commercially valuable information, material obtained in confidence, Cabinet information, personal information whose disclosure would be unreasonable and contrary to the public interest, and information that could prejudice an investigation or affect the effectiveness of agency audit procedures)
- » to have a national security or protective security classification, or
- » to contain intelligence information, including sensitive law enforcement information.

Such information may also be deleted from the reasons you are given if an agency decides not to investigate your disclosure.

If the investigation is conducted under other legislation, the information you will receive at the end of the investigation will depend on that legislation.

It is important to remember that you do not 'own' the public interest disclosure. It is up to agencies to determine how best to resolve matters by identifying problems and taking corrective action.

WHAT HAPPENS IF THE DISCLOSURE IS SUBSTANTIATED?

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

- » commencing Code of Conduct proceedings under the *Public Service Act 1999* or other disciplinary process
- » 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
- » referral of the matter to the police or another body that can take further action.

WHAT HAPPENS IF THE DISCLOSURE IS NOT SUBSTANTIATED?

There may be a number of reasons why your public interest disclosure is not substantiated, including insufficient evidence to find on the balance of probabilities that any disclosable conduct has occurred. It does not mean that making a disclosure was not worthwhile. The information you provide may be useful in making your agency aware of possible gaps in its policies or procedures, or lead to consideration of how to prevent similar issues in the future. Keeping silent about problems can lead to bigger issues in the longer term.

If you do not know what happened after you made your disclosure or the reasons you were given are not clear to you, you are entitled to ask. Talk to the authorised officer who handled your disclosure.

Regardless of the outcome, you will still be protected under the Act for making a public interest disclosure. Your agency should continue to support you for having done the right thing by bringing the matter to their attention.

WHAT IF I AM NOT SATISFIED WITH THE AGENCY'S ACTION?

If you are unhappy with an agency's decision not to investigate a matter, you can approach the agency. The agency procedures may give you a right to an internal review of the decision. Similarly, if you believe on reasonable grounds that an investigation was inadequate or the agency's response to the investigation was inadequate, you may wish to raise the matter with the agency. Consult the agency's public interest disclosure procedures, or talk to an authorised officer about your options.

If you are not satisfied with the explanation and believe that the agency has not acted appropriately, you may be able to have the Ombudsman (or the IGIS in the case of intelligence agencies) consider the matter by making a complaint about the agency. The Ombudsman or the IGIS may investigate your complaint or may refer it back to the agency for further action. The Ombudsman's office or the IGIS will let you know what it decides to do.

You may also have the right to release the information publicly if doing so is not contrary to the public interest and it does not include intelligence or sensitive law enforcement information (see p. 5–6 for the conditions for making external disclosures).

HOW AM I PROTECTED?

If you make a public interest disclosure under the Act (even if an investigation subsequently determines that there was no wrongdoing), you are protected in two ways.

Liability

You cannot be subject to any civil, criminal or administrative liability, including disciplinary action, for making a disclosure in accordance with the PID Act, and no contractual or other remedy can be enforced against you on the basis of your disclosure. This means, for example, that you would not be committing an offence against the official secrets provisions of the *Crimes Act 1914*, or be liable for defamation. Nor can a contract to which you are a party be terminated on the basis that your disclosure is a breach of contract.

This protection does not apply if you knowingly make a statement that is false or misleading. It also does not apply if you knowingly contravene, without a reasonable excuse, certain publication restrictions listed in the PID Act (these generally concern protecting the identity of people by such means as court or tribunal orders that information not be published, witness protection and law enforcement mechanisms).

Making a disclosure about matters that include your own wrongdoing also does not protect you from liability for your wrongdoing.

Reprisal

You are also protected against reprisal. It is an offence for any person to cause you any detriment because they suspect or believe that you made or will make a public interest disclosure (s 19).

Detriment includes any disadvantage to you, including dismissal, injury, discrimination between you and other employees or alteration of your position to your disadvantage (s 13(3)). It does not include administrative action that is reasonable to protect you from detriment (s 13(3)), for example, moving you temporarily to another work area.

If you believe you are being or may be subject to a reprisal, you should let your agency know. Each agency head has a responsibility to put procedures in place for assessing risks that reprisals might be taken, and to ensure that public officials who belong to the agency are protected from detriment or threats of detriment related to public interest disclosures (s 59). The agency head's responsibility to protect public officials belonging to their agency applies even if the public official has made a disclosure relating to another agency, or a different agency (such as the Ombudsman or IGIS) is investigating the disclosure.

You also have the right to apply to the Federal Court for compensation for loss, damage or injury you suffer from a reprisal or threat of reprisal (s 14). Your claim can be not only against the person causing the reprisal but also their employer. The employer has a defence if they took reasonable precautions and exercised due diligence to avoid the reprisal (s 14(2)).

You also have the right to seek an injunction from the Federal Court to prevent a reprisal or order an apology, or to make other appropriate orders (s 15). If your employment was terminated as a result of a reprisal you may apply to the Federal Court for reinstatement (s 16).

Making a public interest disclosure is recognised for the purposes of the *Fair Work Act 2009* (s 22), which protects employees from any unlawful adverse action based on their workplace rights. However, to avoid duplication, you cannot seek remedies under the PID Act if you have sought remedies under the *Fair Work Act 2009* arising from the same circumstances (s 22A).

If you are considering legal action in relation to reprisal, you should first make sure that the agency knows your concerns so that they can take any appropriate action to protect you. It is a good idea to talk the matter over with an authorised officer or your supervisor. Taking legal action is expensive and can be a stressful process, and you should consider whether you will be able to prove your case and the possible adverse effects on you (financial and emotional) if your action fails.

You should also be aware that making a disclosure does not exclude you from reasonable management action for any unsatisfactory performance or wrongdoing on your part – such action is not a reprisal.

WHERE CAN I GET SUPPORT?

Even when an agency handles the public interest disclosure process well, making a disclosure can be a stressful experience. You should be prepared for this, and make sure you seek support from appropriate people.

You are entitled to support from your agency when making and after you have made a public interest disclosure. The head of your agency must take reasonable steps to protect public officials who belong to the agency (including staff of contracted service providers) from detriment and threats of detriment.

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

Your agency should be able to link you to appropriate people you can trust. They may have established an internal network of support people you can talk to. Larger agencies may have professional staff such as welfare officers. Many agencies provide access for their staff to counselling services. Remember that while your discussions with people authorised under the PID Act (including a lawyer) are protected, discussions with other people are not. You should not disclose any confidential information to them, including identifying people you allege have committed wrongdoing, but you may find it helpful to talk about what you are going through.

Some key points to remember

Disclosures under the PID Act are about matters that it is in the public interest to investigate and correct where problems are found. You must have a reasonable belief in what you are reporting – this is an objective test based on what a reasonable person would believe. You should be able to provide information to support an allegation, but you do not need to prove it. Nor should you investigate the matter yourself, as this may prejudice a future investigation.

Remember that disagreement with government policy or expenditure is not a public interest disclosure.

Remember also that there are further restrictions on who you can make a public interest disclosure to where intelligence information or sensitive law enforcement information is concerned.

Your identity will be kept confidential, subject to the requirements of the PID Act. You are protected from reprisals and from civil and criminal liability if you follow the procedures in the Act and disclose information only to the people who need to be involved.

Your agency should have authorised officers who can receive your disclosure, but you may report to your supervisor if you prefer. Your agency will have procedures to deal with public interest disclosures, and you should make yourself familiar with those. The agency must respond to your disclosure, and if the matter is investigated under the PID Act you have a right to a copy of the investigation report and to know what action is being taken, with the exception of any material that must remain in confidence.

Further information

Have a look at your agency procedures on handling public interest disclosures – these should be available on the agency's website and intranet. More information on the PID scheme, including fact sheets and guides, is on the Ombudsman's website at www.pid.ombudsman.gov.au.

You may also like to look at the PID Act, PID rules and standards made by the Ombudsman under the PID Act – go to www.comlaw.gov.au for the most up-to-date version, or follow the links from the Ombudsman's website.

For information about the IGIS, see www.igis.gov.au. For information about breaches of the APS Code of Conduct, see www.apsc.gov.au. Information about Australian workplace rights and rules and the role of the Fairwork Ombudsman is at www.fairwork.gov.au.