FEDERAL COURT OF AUSTRALIA

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA

TITLE	**Public Interest Disclosure Policy**
SUMMARY OF POLICY	This policy sets out how public interest disclosures under the *Public Interest Disclosure Act 2013* (Cth) are to be made and handled within the Federal Court of Australia Entity
EMPLOYEES AFFECTED	All staff
CONTACT OFFICER	Executive Director, Strategy and Corporate Services
DATE OF EFFECT	19 February 2024

Contents

1. Purpose

This policy establishes procedures for facilitating and dealing with public interest disclosures under the *Public Interest Disclosure Act 2013* (Cth) (PID Act) relating to the Federal Court of Australia entity (the Entity) and to avoid any doubt, this policy applies to disclosures relating to the Federal Court of Australia (FCA), the Federal Circuit and Family Court of Australia (FCFCOA) and the National Native Title Tribunal (NNTT). The PID Act and this policy complement other measures the FCA, the FCFCOA and the NNTT have in place to maintain the highest standards of ethical and accountable conduct.

The policy applies to all officers and staff of the FCA, the FCFCOA and the NNTT. You should use this policy to report any disclosable conduct that you believe has occurred or is occurring within the Entity.

The PID Act establishes a framework to:

- promote the integrity and accountability of the Commonwealth public sector;
- encourage and facilitate the making of public interest disclosures by public officials in the Commonwealth public sector;
- ensure that public officials who make, in accordance with the PID Act, allegations of disclosable conduct in the Commonwealth public sector, are supported and are protected from adverse consequences (including civil and criminal immunity) relating to the disclosures;
- ensure that disclosures by public officials are properly investigated and dealt with.

The PID Act is supplemented by the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act), which established the National Anti-Corruption Commission (NACC).

The NACC Act deals with some of the most serious disclosable conduct captured by the PID scheme: corrupt conduct. The PID Act and NACC Act have been designed to operate together, with consistent and complementary responsibilities and powers for those within the Entity who have functions to perform as part of the Commonwealth integrity framework.

2. Application of the PID Act

The PID Act applies to "public interest disclosures" made by a person who is, or has been, a public official. Public officials for the purposes of the PID Act are persons working in, or with a relevant connection to, the Commonwealth public sector. This includes all APS entity heads and APS employees. Individual contracted service providers (contractors) to the Commonwealth and Commonwealth authorities are also considered public officials, and the employees of any contractors to the Commonwealth or a Commonwealth authority are public officials if they provide services for the purposes of the contract.

Those with responsibilities under the PID Act also have obligations under the NACC Act. A public official must refer certain corruption issues to the NACC so the NACC Commissioner can decide whether to investigate. These obligations are called mandatory referral obligations (see below at Part 6). They are separate from the ability to make voluntary referrals under the NACC Act.

3. What is a Public Interest Disclosure?

A disclosure of information is considered a public interest disclosure (PID) 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 (including an act or omission of an act) engaged in by an agency, public official in connection with his or her position as a public official, or contractor in connection with entering into or giving effect to their contract with the Commonwealth or a Commonwealth authority. "Disclosable conduct" includes (but is not limited to) conduct that:

- involves, or is engaged in for the purpose of, corruption;
- contravenes a law of the Commonwealth, a State or a Territory;
- perverts, or attempts to pervert, the course of justice;
- results in wastage of public funds or property;
- is an abuse of public trust;
- unreasonably endangers the health and safety of others;
- constitutes maladministration including conduct that is unreasonable, unjust, oppressive or negligent;
- involves, or is engaged in for the purpose of, the public official abusing his or her position as a public official; or
- could give reasonable grounds for disciplinary action resulting in termination of employment or a contract.

Conduct is not disclosable if it relates only to disagreement with government policy, action by Ministers or the Speaker/President of the chambers of Parliament or expenditure relating to such policy or action.

From 1 July 2023 "personal work-related conduct" will not be considered to be disclosable conduct unless it constitutes reprisal action or the conduct is of such a significant nature it would undermine public confidence in, or has other significant implications for, the agency.

Personal work-related conduct is conduct (including omissions) engaged in by a public official in relation to a second public official's engagement, appointment, employment or exercise of functions and powers as a public official that has (or would tend to have) personal implications for that other public official. Examples include interpersonal conflicts (including bullying and harassment) and conduct relating to the transfer or promotion of the second public official. If, however, a disclosure relates to both personal work-related conduct and other types of disclosable conduct, it will still be covered by the PID Act if the other type of disclosable conduct meets the definition of disclosable conduct.

There are also some exclusions that are particularly relevant for the Entity. Conduct is <u>not</u> disclosable if it is:

- conduct of a judicial officer,
- conduct of the Chief Executive Officers (CEOs) of the courts or court officers and staff when exercising a power of the court or exercising/performing a power or function of a judicial nature;
- conduct of a member, a CEO or officers and staff of a Commonwealth tribunal when exercising a power

of the tribunal;

- any other conduct of, or relating to, a court or Commonwealth tribunal, unless the conduct is both of an administrative nature and does not relate to the management or hearing of matters before the court or tribunal.

4. To whom can a PID be made?

A disclosure of information is a public interest disclosure if the disclosure is made by a person (the discloser) who is, or has been, a public official. There are five categories of PID recognised by the PID Act that a discloser can make: internal disclosures, external disclosures, emergency disclosures, legal practitioner disclosures and NACC disclosures. Each of these categories has its own approved class of recipients.

Internal disclosures

Generally, public officials should make an internal disclosure in the first instance - that is ordinarily a disclosure to either their immediate supervisor or manager or an "authorised officer" (see below). This is because, in order to gain the protections available under the PID Act (discussed below in part 7), a public official must make the disclosure to an appropriate recipient. While, in certain circumstances set out below, a disclosure may be made to an external person or body, a failure to meet the necessary conditions may leave the public official open to civil, criminal or administrative liability (including disciplinary action) for making the disclosure.

All officers and staff can make a disclosure to their immediate supervisor or manager. Disclosures can also be made to persons designated as "authorised officers" under the PID Act. The authorised officers for the FCA, FCFCOA and NNTT are listed in Appendix A.

Disclosures to the relevant authorised officers can be made either by direct contact or by emailing:

- FCA – PID@fedcourt.gov.au
- FCFCOA – PID@fcfcoa.gov.au
- NNTT – PID@nntt.gov.au

In addition to these internal recipients, an "internal" disclosure can also be made to the Commonwealth Ombudsman if the discloser believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman.

While disclosures can be made in any form, including orally, ideally they should be in writing and accompanied by any supporting evidence. Whilst helpful, disclosures do not have to make specific reference to the PID Act.

A disclosure may be made anonymously. If you wish to make an anonymous disclosure, you may like to consider providing a pseudonym. In many cases, it will assist if you still provide your contact details, to enable communication with you throughout the process including to gather further information or clarification.

Your identity, contact details, and the content of your public interest disclosure will remain confidential in accordance with the PID Act. If your personal information needs to be disclosed to assist the PID process, you will be consulted with first.

Any personal information will be handled in accordance with our Privacy Policy. You may request access to or correction of your personal information, or you can make a complaint about how your personal information has been handled, in accordance with the Privacy Policy.

External disclosures

A person who has already made an internal disclosure can make an external disclosure to any person (other than a foreign public official) if all the following conditions are met:

(a) the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct;

(b) on a previous occasion, the discloser made an internal disclosure of information that consisted of, or included the information now disclosed;

(c) the disclosure is not, on balance, contrary to the public interest;

(d) no more information is disclosed than is reasonably necessary to identify one or more instances of disclosable conduct;

(e) the information does not include intelligence information, including sensitive law enforcement information;

(f) none of the conduct with which the disclosure is concerned relates to an intelligence agency; and

(g) one of the following apply:

(i) an internal investigation was not completed within the required timeframe (see below at Part 5 for more information on internal investigations);

(ii) the discloser believes on reasonable grounds that the investigation was inadequate; or

(iii) the discloser believes on reasonable grounds that the relevant agency took inadequate action after the investigation was completed.

Emergency disclosures

An emergency disclosure to any person (other than a foreign public official) may be made if all the following conditions are met:

(a) the discloser believes on reasonable grounds that the information concerns a substantial and imminent danger to the health or safety of one or more persons or to the environment;

(b) the extent of the information disclosed is no greater than is necessary to alert the recipient to the substantial and imminent danger;

(c) if the discloser has not previously made an internal disclosure of the same information, there are exceptional circumstances justifying the discloser's failure to make such an internal disclosure;

(d) if the discloser has previously made an internal disclosure of the same information, there are exceptional circumstances justifying this disclosure being made before a disclosure investigation of the internal disclosure is completed; and

(e) the information does not consist of intelligence information, including sensitive law enforcement information.

Legal practitioner disclosures

A discloser may give information to an Australian legal practitioner (as defined by the *Evidence Act 1995* (Cth)) for the purpose of obtaining legal advice or professional assistance in relation to a PID they have made or will be making, provided that intelligence information, including sensitive law enforcement information, is not disclosed. If the discloser knows, or ought reasonably to have known, that any of the information has a national security or other protective security classification, the legal practitioner must hold the appropriate level of security clearance.

NACC disclosures

A public official may provide information directly to the NACC (i.e. without the need for prior internal disclosure) if the information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct that involve "corrupt conduct". The definition of "corrupt conduct" is the same under both the NACC Act and the PID Act and is set out below in Part 6 in relation to mandatory disclosures to the NACC.

5. Procedure for handling and investigating disclosures

A diagrammatic overview of the procedures outlined below is provided in the Commonwealth Ombudsman's Public Interest Disclosure Flowchart attached at Appendix B.

Supervisors/Managers

A supervisor who receives information from a public official they supervise or manage, that the supervisor has reasonable grounds to believe contains disclosable conduct, has a legal obligation to refer the information to one of the relevant authorised officers listed in Appendix A, as soon as reasonably practicable. This referral should be by email or some other verifiable means. It is important that supervisors request and receive an acknowledgment regarding the disclosure from the authorised officer to ensure that any disclosure has been received by the authorised officer.

In addition, the supervisor must:

- inform the discloser that their disclosure could be treated as an internal disclosure; and
- explain to the discloser the next steps in the PID process as outlined in this Part – referring their disclosure to the authorised officer, the potential allocation and investigation of the PID; and
- advise the individual about the circumstances (if any) in which a PID must be referred to an agency, or other person or body, under another law of the Commonwealth. This may involve mandatory referral to the NACC (see Part 6); and
- explain the civil and criminal protections from reprisal the PID Act provides to disclosers, and those assisting with the handling of a PID (see Part 7).

Authorised Officers

Authorised officers may receive public interest disclosures through a discloser's manager or supervisor, or directly from a discloser.

If the authorised officer receives information directly from a public official, it becomes the responsibility of the authorised officer to provide the discloser with similar information to that which would otherwise be provided by the discloser's supervisor, namely:

- inform the discloser that their disclosure could be treated as an internal disclosure; and
- explain the PID Act requirements for the disclosure to be an internal disclosure; and

- advise the discloser about the circumstances (if any) in which a PID must be referred to an agency, or other person or body, under another law of the Commonwealth (see below in relation to mandatory referrals to the NACC); and

- advise the discloser of any orders or directions of which the authorised officer is aware that may affect disclosure of the information – these include designated publication restrictions such as judicial non-publication and suppression orders.

Authorised officers must review the information they have received and decide whether it is a public interest disclosure under the PID Act and, if so, how it should be allocated. The authorised officer must use their best endeavours to make this decision within 14 days of becoming aware of the disclosure. The authorised officer may make any inquiries and obtain further information as the authorised officer thinks fit.

An authorised officer must allocate the handling of a disclosure, unless they are satisfied that there is no reasonable basis on which the disclosure could be considered an internal public interest disclosure. If an authorised officer decides the information does *not* constitute a PID, the authorised officer should make a written record of the decision and reasons and, if reasonably practicable, should inform the discloser of the reasons why the disclosure has not been allocated and any other courses of action that might be more appropriate or available to the discloser under another law or power. The authorised officer must also give written notice to the Commonwealth Ombudsman of the decision and the reasons for the decision.

If satisfied the requirements for a public interest disclosure have been met, the authorised officer must then decide which agency or agencies should be allocated the disclosure. In deciding which agency should be allocated a disclosure, the authorised officer must have regard to the principle that an agency should only handle a disclosure if some or all of the conduct disclosed relates to that agency. In the case of the Entity, the authorised officer must therefore be satisfied that the information they have received discloses conduct that relates to the Entity before it can be allocated internally for handling.

If the authorised officer considers that the PID should be handled by another agency, options include:

- another agency in the same portfolio, if the authorised officer considers that the other agency would be better able to handle the disclosure. For the Entity, the relevant portfolio is that of the Attorney-General, including the Attorney-General's Department; and

- the Commonwealth Ombudsman (but only if some or all of the conduct disclosed relates to an agency *other than* an intelligence agency, the Inspector-General of Intelligence and Security or the intelligence functions of the Australian Criminal Intelligence Commission or Australian Federal Police).

In any case, however, a PID received by an authorised officer of the Entity can only be allocated out to another agency with the consent of an authorised officer of that other agency. That consent must be recorded in writing.

Having decided which agency (or agencies) the PID should be allocated to, the authorised officer must record the decision in writing (including reasons) and, as soon as reasonably practicable, notify the "principal officer" of the recipient agency and the Commonwealth Ombudsman in writing of the following:

- the allocation to the agency;

- the information that was disclosed;

- the disclosable conduct; and
- the discloser's name and contact details (if these are known to the authorised officer and the discloser consents).

The principal officer of an agency is ordinarily the Chief Executive Officer or the head – however described – of the agency. In the case of our courts, see immediately below: "Principal Officers".

If reasonably practicable, the written notice provided to the principal officer and the Ombudsman must also be given to the discloser as soon as reasonably practicable.

Principal Officers

Once a disclosure has been allocated under the PID Act, it is the responsibility of the principal officer of the recipient agency to decide whether to investigate the disclosure. Within the Entity this function rests with the CEOs of the FCA and FCFCOA. The function has also been delegated to the authorised officers for the FCA and FCFCOA listed in Appendix A.

The various circumstances in which the principal officer may decide not to investigate (or further investigate) a disclosure are as follows:

(a) the discloser is not a current or former public official;

(b) the information does not, to any extent, concern "serious disclosable conduct" (see below);

(c) the disclosure is frivolous or vexatious;

(d) the information is the same or substantially the same as another disclosure that has been or is being investigated under the PID Act or in relation to which a previous decision not to investigate has been made;

(e) the conduct disclosed, or substantially the same conduct

  (i) is being investigated under another law or power and the principal officer is satisfied on reasonable grounds that it would be inappropriate to conduct another investigation at the same time; or

  (ii) has been investigated under another law or power and the principal officer is satisfied on reasonable grounds that there are no further matters that warrant investigation;

(f) the principal officer is satisfied on reasonable grounds that the conduct disclosed would be more appropriately investigated under another law or power (noting however that this circumstance cannot be relied upon only because the conduct disclosed raises a corruption issue);

(g) the principal officer has been informed by the discloser or an authorised officer (or an authorised/principal officer of another agency) that the discloser does not wish the investigation to be pursued and the principal officer is satisfied on reasonable grounds that there are no matters concerning the disclosure that warrant investigation; or

(h) it is impracticable to investigate the disclosure because:

  (i) of the age of the information;

(ii) the discloser's name and contact details have not been disclosed; or

(iii) the discloser refuses, fails or is unable to give, for the purposes of the investigation, such information or assistance as is requested.

"Serious disclosable conduct" is not defined within the PID Act. Factors that may be relevant to whether disclosable conduct might be considered to be serious include:

- whether the alleged wrongdoing, if proved, involves an offence with a significant penalty or would lead to severe disciplinary or other consequences;
- whether the conduct involves a series of incidents that indicates a course of conduct;
- the level of trust, confidence or responsibility placed in the public official;
- the level of risk to others or to the Commonwealth;
- the harm or potential harm arising from the conduct;
- the benefit or potential benefit derived by the public official or others;
- whether the public official acted with others, and the nature of their involvement;
- any premeditation or consciousness of wrongdoing;
- what the public official ought to have done;
- any applicable codes of conduct or policies; and
- maladministration that relates to significant failure in the administration of government policy, programs or procedures.

Unless it is not reasonably practicable, a decision by the principal officer not to investigate must be notified in writing to the discloser as soon as reasonably practicable – along with reasons for the decision. The principal officer must also provide written notice of the decision not to investigate and reasons to the Commonwealth Ombudsman, as soon as reasonably practicable.

In cases where the principal officer does conduct an investigation, it is to be conducted as the principal officer thinks fit. This may include nominating or otherwise obtaining the assistance of other persons to undertake investigative tasks. The principal officer must ensure that, where it is reasonably practicable to do so, the discloser is – within 14 days of allocation of the PID – given information about the principal officer's powers to decide not to investigate, or further investigate, a disclosure and to decide to investigate the disclosure under another law or power.

The discloser must also be given written notice by the principal officer of the estimated length of the investigation. An investigation, including the preparation of the report of the investigation, must be completed within 90 days of the matter being allocated, unless the Ombudsman has extended that period.

The PID Act and *Public Interest Disclosure Standard 2013* set out the information that must be contained in the report of the investigation. Within a reasonable time after preparing the report, the principal officer must give written notice of the completion of the investigation, together with a copy of the report, to the Ombudsman and (if reasonably practicable) to the discloser. The principal officer must, as soon as reasonably practicable, ensure that

appropriate action is taken in response to any recommendations in the report.

6. Mandatory Referrals to the National Anti-Corruption Commission

Authorised officers and principal officers (collectively referred to as "PID officers" under the NACC Act) have mandatory referral obligations imposed by the NACC Act if:

- in the course of exercising their functions or powers they handle an internal disclosure that raises a "corruption issue" that concerns the conduct of a person who is, or was, staff member of the agency while that person is, or was, a staff member of the agency; and
- the PID officer suspects that the issue could involve *serious* or *systemic* "corrupt conduct".

When these criteria are met, the PID officer must refer the corruption issue to the NACC as soon as reasonably practicable after becoming aware of the issue, unless the PID officer believes on reasonable grounds that the NACC is already aware of the issue, or the NACC has made a determination providing that referral is not required.

A "corruption issue" is an issue of whether a person has engaged, is engaging or will engage in "corrupt conduct".

"Corrupt conduct" is defined by the NACC Act to mean each of the following:

> (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:
>
> > (i) the honest or impartial exercise of any public official's powers as a public official; or
> >
> > (ii) the honest or impartial performance of any public official's functions or duties as a public official;
>
> (b) any conduct of a public official that constitutes or involves a breach of public trust;
>
> (c) any conduct of a public official that constitutes, involves or is engaged in for the purpose of abuse of the person's office as a public official;
>
> (d) any conduct of a public official, or former public official, that constitutes or involves the misuse of information or documents acquired in the person's capacity as a public official.

Although "corrupt conduct" is defined by the NACC Act, "serious" and "systemic" are not and will therefore take their ordinary meanings. A variety of factors might be considered when assessing whether corrupt conduct could be "serious", including whether the conduct could involve:

- a criminal offence and, if so, the seriousness of the offence and maximum penalty if a person is found guilty;
- a financial gain or loss or other benefit or detriment and, if so, its amount or significance;
- misuse of information and, if so, the sensitivity of the information and any potential harm from an improper disclosure or misuse of that information;

- a person who holds a senior or trusted role and, if so, the seniority of the person; the level of trust or influence they exercise in their role; and whether the person should have understood their responsibilities and duties in that role;
- a person trying to cause a public official to act dishonestly or in a biased way and, if so, the significance if the public official did behave dishonestly or did not act impartially;
- secrecy, deception, planning or deliberation; or
- misconduct sustained over a prolonged period.

The ordinary meaning of "systemic" is something that relates to a system or affects a system (including an organisation) as a whole. Corrupt conduct could also be systemic if it formed part of a pattern. For example, a pattern of similar kinds of conduct in the agency.

Although the NACC commenced operation on 1 July 2023, the mandatory reporting obligations apply to corruption issues that occurred prior to that date if the PID officer becomes aware of it after 1 July 2023. If the authorised officer was already aware of a corruption issue before the NACC commenced, they are not obligated to refer it to the NACC. However, they can still do so voluntarily.

It is important to note that the referral of a corruption issue to the NACC does not prevent an agency from taking other steps to deal with the issue. In particular, authorised officers and principal officers are still required to meet their obligations under the PID Act in relation to an internal disclosure, including allocating and investigating the PID, unless the NACC issues a "stop action direction".

7. Protections provided under the PID Act

The PID Act provides a variety of protections for persons who make a PID. Comparable protections are also provided to witnesses who assist with PID investigations.

Immunity

- The person will not be subject to any civil, criminal or administrative liability (including disciplinary action) for *making* the disclosure (as distinct from any liability that may arise from the discloser's own conduct). This includes absolute privilege in proceedings for defamation in respect of a PID. However, immunity does not apply if the disclosure is knowingly false or misleading or the discloser knowingly and without reasonable excuse contravenes a designated publication restriction. Immunity also does not apply to liability for an offence against sections 137.1, 137.2, 144.1 or 145.1 of the *Criminal Code Act 1995* (Cth) – which are concerned with false statements and information and forgery.
- No contractual or other remedy may be enforced, and no contractual or other right may be exercised, against the person based on the PID. A contract to which the person is a party must not be terminated on the basis that the disclosure constitutes a breach of the contract.

Reprisal

- It is a criminal offence under the PID Act, punishable by imprisonment, for a person to take, or threaten to take, a reprisal against another person. A reprisal is defined as conduct that causes or threatens "detriment" to another person, which occurs by reason of a belief or suspicion that a PID

was made, may have been made, proposes to be made, or could be made.

- "Detriment" includes (but is not limited to) employment-related harm such as dismissal and alteration of an employee's position to the employee's disadvantage and also extends to harassment or intimidation, harm or injury to a person, and any damage to a person (including their property, reputation or business or financial position). However, administrative action that is reasonable to protect the discloser from detriment is not a reprisal.
- Remedies, including compensation, injunctions and reinstatement, may be available in respect of reprisal actions under the PID Act or the *Fair Work Act 2009* (Cth) (although an application may only be made under one Act). The general workplace protections offered by Part 3-1 of the *Fair Work Act 2009* (Cth) will apply in relation to the making of a PID by a public official who is an employee within the meaning of that Act.

Identification

- It is a criminal offence under the PID Act, punishable by imprisonment, to disclose or use information that is likely to enable the identification of the public official making the disclosure unless:
  (a) it is for the purposes of the PID Act;
  (b) it is for the purposes of an investigation by the Commonwealth Ombudsman;
  (c) it is for the purposes of a Commonwealth law or prescribed state or territory law;
  (d) the public official consents to the use or disclosure of the information; or
  (e) the information has previously been lawfully published.

The NACC Act also contains provisions that provide immunity from liability and criminalise reprisal action. If a discloser refers conduct directly to the NACC (a NACC disclosure), the discloser can access both NACC Act and PID Act protections. However, if the NACC declines to investigate and refers the matter to another agency, it will no longer be recognised as a public interest disclosure under the PID Act.

If an internal disclosure to an agency results in mandatory referral to the NACC, the PID Act protections apply to the public official who made the disclosure, and the NACC Act protections apply to the PID officer who makes the referral. The PID officer must tell the discloser if they refer the disclosure to the NACC.

8. Assessing the risk of reprisals, providing confidentiality and making arrangements to protect and support employees

Reprisals

The PID Act imposes a duty on authorised officers and principal officers to take reasonable steps to protect public officials who belong to the agency (including the discloser and any witnesses) against reprisals. To satisfy that duty, the following procedures have been established to deal with the risk that reprisals may occur. These procedures involve assessing the specific circumstances that may indicate a risk of reprisal and then putting in place appropriate strategies to prevent them.

An assessment of the risk of reprisal is to be undertaken, as soon as is practicable, following the receipt of the disclosure (or notification, e.g., from the Ombudsman, that a disclosure has been received). The risk assessment will ordinarily be conducted by the authorised officer who receives the disclosure. If, however, the

disclosure is first made to a manager or supervisor and the person wishes their identity to remain anonymous, the manager or supervisor should conduct the risk assessment.

The discloser and the discloser's manager (provided the manager is not involved in the alleged wrongdoing) are likely to be the best sources of information for conducting the risk assessment. In particular, 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;
- understanding the discloser's expectations about how other staff might perceive their disclosure; and
- identifying the motives of staff allegedly involved in reprisals if a later investigation becomes necessary.

Of particular importance is the relationship between the discloser and the subject of the disclosure. Accordingly, the risk assessment must examine:

- whether the discloser and the subject work together;
- whether they are in each other's reporting lines or have managers or staff in common;
- whether they are physically located in the same office; and
- whether they socialise outside of work.

In addition, the person conducting the assessment of the risk of reprisal should consider whether any of the following indicators of a potentially higher risk of reprisal or workplace conflict are present:

Indicator	Considerations for risk assessment
Threats or past experience	• Has a specific threat against the discloser been received? • Is there a history of conflict between the discloser and the subjects of the disclosure, management, supervisors or colleagues? • Is there a history of reprisals or other conflict in the workplace? • Is it likely that the disclosure will exacerbate this?
Confidentiality unlikely to be maintained	• 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 in the workplace their disclosure or intention to make a disclosure? • Who in the workplace is aware of the actual or intended disclosure and/or 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	• Is there more than one wrongdoer involved in the matter? • Is the reported wrongdoing serious? • Is the disclosure particularly sensitive or embarrassing for any subjects of the disclosure, senior management, the agency or the Government? • Do these people have the intent to take reprisals—for example, because they have a lot to lose? • Do these people have the opportunity to take reprisals—for example, because they have power over the discloser?

Vulnerable discloser	• 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?

Having assessed the likelihood of reprisal, consideration should be given to the strategies that can reasonably be adopted to provide protection against reprisals occurring and a plan prepared to implement those measures.

Reasonable steps may include:

- reducing or eliminating the need for the discloser to interact with the subject of the disclosure through physical separation or alternate work;
- overseeing or supervising any required interaction between the discloser and the subject of the disclosure;
- taking positive action to ensure that the discloser can access their entitlements, rights or development opportunities without impediment;
- ensuring that the discloser is fully apprised of how to seek help in the event of concerns that they are being subject to reprisal;
- ensuring appropriate steps are taken to minimise any physical threat to the employee, their family or property; and/or
- providing and maintaining the confidentiality of the discloser and any investigation to the fullest extent practicable.

Following the implementation of reasonable steps to provide protection against reprisals, their effectiveness should be regularly monitored and, if necessary, the plan revised. Ongoing engagement with the discloser is a critical aspect of ensuring the sustained effectiveness of the measures adopted.

Confidentiality

As noted above in Part 7, the protections provided in the PID Act extend to making it a criminal offence – unless specified circumstances apply – to disclose or use information that is likely to enable the identification of the public official making the disclosure.

Disclosures should be received, assessed and investigated in a confidential manner. 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 – see below).

Measures that should be taken to maintain confidentiality include conducting interviews and other discussions in a private environment that avoids, as far as possible, the possibility that the discloser can be identified as

participating in a PID process. It is also important for all records relating to the PID – hard copy and electronic – to be stored in a safe and secure manner with access only available to persons performing functions under the PID Act or another law of the Commonwealth (e.g., the *Work Health and Safety Act 2011* (Cth) or the *Public Service Act 1999* (Cth)).

Although a discloser should be assured that their identity will always be protected as much as possible and of the procedures that are in place to ensure confidentiality, the discloser must also be made aware that, to investigate a matter, their identity will quite possibly be revealed.

The person(s) alleged to have engaged in the conduct giving rise to the PID must be accorded procedural fairness. Unless the allegations are considered to be without substance, this generally requires that the person be told about the nature of the allegations and the evidence against them, and that they are given an opportunity to respond. Depending on the nature of the allegations, this may require the investigator to reveal the identity of the discloser, or to reveal information that may effectively allow the person to deduce the identity of the discloser. If an investigator is required to take this course of action to properly investigate the disclosure, they should discuss this with the discloser first.

Support

The Entity recognises the importance of providing practical and effective support for public officials who are involved in a PID process. The PID Act requires that principal officers must take reasonable steps to support and encourage public officials who make, or are considering making, PIDs and any other persons who provide, or are considering providing, assistance in relation to such PIDs.

In relation to the discloser, options for support that should be considered include:

- appointing a support person to assist the discloser and who is principally responsible for regularly checking on the wellbeing of the discloser;
- ensuring that the discloser is kept apprised of the progress of the investigation;
- if concerns exist or arise in relation to the health and wellbeing of the discloser, making or facilitating arrangements for assistance;
- where necessary, activating alternative working arrangements.

Consideration must also be given to the support that may be required by an employee who is the subject of a PID. Many of the same or similar support options set out above in relation to disclosers may also warrant consideration in respect of these persons. Furthermore, in addition to providing an employee who is the subject of a PID with information concerning their rights and obligations under the PID Act and the investigative process, it may be appropriate to remind the employee that they are entitled to seek their own independent legal advice on these matters.

9. Complaints

Complaints regarding the way a disclosure is handled can be made to the relevant CEO and/or directly to the Commonwealth Ombudsman.

It is also noted that a belief on the part of the discloser, on reasonable grounds, that an investigation was

inadequate, not conducted within mandated timeframes or that the response to the investigation was inadequate is one of the preconditions to be met before an external disclosure will be considered a PID. A discloser who is dissatisfied with an investigation and is considering disclosing information to an external person other than the Ombudsman should carefully consider the PID Act requirements and the other obligations of confidentiality attaching to their position.

Appendix A – List of Authorised Officers

Federal Court of Australia

Sia Lagos – CEO and Principal Registrar

Paul Kennedy – Acting Executive Director, Strategy and Corporate Services

Jimmy Mastorakos – Executive Director People, Culture and Communications

Federal Circuit and Family Court of Australia

David Pringle – CEO and Principal Registrar

Virginia Wilson – Deputy Principal Registrar and Executive Director - Court Finances and Operations

Amanda Morris – National Judicial Registrar – Legal, Policy, Projects and Judicial Case Management

Lynda Maitland – Senior Judicial Registrar, Joint Coordinating Registrar, Central Region and Director – Property Operations

National Native Title Tribunal

Paulette Dupuy – Director Legal & Compliance

Appendix B – Commonwealth Ombudsman's "Handling a PID Flowchart"

Please click here for a PDF version of the flowchart (PDF 188 KB)