



Australian Government  
National Mental Health Commission

# **Public Interest Disclosure Guidelines**

November 2016

# Public Interest Disclosure Guidelines

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## Purpose

1. The *Public Interest Disclosure Act 2013* (the PID Act) promotes the integrity and accountability of the Commonwealth public sector by:
  - encouraging and facilitating the making of disclosures of wrongdoing by public officials
  - ensuring that public officials who make protected disclosures are protected from adverse consequences relating to the making of a disclosure
  - ensuring that disclosures are properly investigated and dealt with by the National Mental Health Commission.
2. The purpose of these guidelines is to support those objectives.

## Scope and Application

3. This policy applies to all current and former Commonwealth public sector employees, officers and employees of contracted service provider and other public officials including Commission and Committee members, who make a protected disclosure under the Act. For the purposes of these guidelines a person who makes a disclosure is called a 'discloser'.

## What is a public interest disclosure?

4. A disclosure is made when:
  - a person who is or has been a public official
  - discloses to their supervisor or manager, or an authorised officer of an agency
  - information which tends to show, or the discloser believes on reasonable grounds tends to show, one or more instances of disclosable conduct.
4. Disclosable conduct is conduct by:
  - an agency
  - a public official in connection with their position
  - a contracted Commonwealth service provider in connection with entering into or giving effect to the contract
5. 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 in s29(1) of the PID Act.

6. Without limiting any of those grounds, disclosable conduct also includes conduct by a public official that involves or is engaged in for the purposes of abusing their position as a public official, and conduct that could give reasonable grounds for disciplinary action against the public official.

## **What is not disclosable conduct?**

7. It is not disclosable conduct just because a person disagrees 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.
8. 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.
9. The conduct of members of Parliament is not covered by the PID Act. However, the departments of the Parliament and their employees are covered.
10. 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.
11. Conduct that is wholly private and has no bearing on the public official's position is not disclosable conduct. Disclosable conduct by a public official must be conduct in connection with their position as a public official.

## **To whom can a public interest disclosure be made?**

12. A disclosure must be made to an appropriate person in order to gain the protections available under the PID Act.
13. Public officials can report suspected wrongdoing either to their current supervisor (someone who supervises or manages them) or to an authorised officer of the Commission. A public official who wants to make a disclosure about an agency other than the National Mental Health Commission should approach that agency directly.
14. The authorised officers in the Commission are the CEO (known in the Act as the 'principal officer') and authorised officers appointed by the principal officer. The Chief Operating Officer and the Deputy CEO have been appointed authorised officers by the CEO.
15. A public official can also make a disclosure to the Commonwealth Ombudsman or to another agency as outlined in the Act. Where the disclosure relates to suspect wrongdoing by the CEO, it should be reported directly to the Commonwealth Ombudsman. It is recommended that advice be sought from the Commonwealth Ombudsman if the circumstances of the disclosure are not connected with the Commission.
16. A public official who has made an internal disclosure under the PID Act may make a disclosure to any person if:
  - the internal investigation under the PID Act was not completed (meaning that the report of investigation was not finalised) within 90 days or

- they believe on reasonable grounds that the investigation under the PID Act was inadequate or
- they believe on reasonable grounds that the agency took inadequate action after the investigation was completed (whether the investigation was conducted under the PID Act or under other legislation) and
- it is not on balance contrary to the public interest for an external disclosure to be made.

## **Protection for Disclosers**

17. If a person takes or threatens action intended to penalise a discloser this would be considered reprisal. Types of reprisal could include;
- dismissal of an employee
  - injury of an employee in his or her employment
  - alteration of an employee's position to his or her detriment
  - discrimination between an employee and other employees of the same employer.
18. Section 19 of the Act states that if a person commits an offence by taking or threatening to take an act of reprisal against a discloser (including proposed or suspected disclosures), that the person may face penalties of 2 years imprisonment and fines exceeding \$20,000.00.
19. The protections under the Act for Disclosers against acts or threats of reprisal are ongoing and do not expire or cease over time, even if the Discloser chooses to make their identity known.

## **Responsibilities**

### **Chief Executive Officer**

20. The CEO is required to establish procedures for facilitating and dealing with public interest disclosures. The procedures must include:
- assessing the risk that reprisals may be taken against a person who makes a disclosure, and
  - providing for confidentiality of investigative processes.
21. In addition the CEO is required to:
- take reasonable steps to protect public officials who belong to the agency from detriment or threats of detriment
  - appoint authorised officers
  - ensure there are sufficient authorised officers to be readily accessible to public officials who belong to the agency
  - ensure that public officials are aware of their identity
  - prepare an investigation report
  - take appropriate action in response to a report
22. The principal officer can delegate any or all of those functions or powers to a public official who belongs to the agency.

## Key roles and responsibilities

### Authorised officers

23. Authorised officers are officers of an agency authorised in writing by the principal officer for the purposes of the PID Act. 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 that information that the authorised officer reasonably believes could concern disclosable conduct could be treated as an internal 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
- allocating all or part of the disclosure to the principal officer of their agency and/or another agency, with that agency's consent
- 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

24. A public official may make a disclosure to their supervisor. A supervisor includes any public official who supervises or manages the discloser. If the supervisor or manager believes that the information given to them concerns, or could concern, disclosable conduct, they must give that information to an authorised officer of the agency as soon as reasonably practicable.

### All staff

- Use their best endeavours to assist the principal officer in the conduct of an investigation.
- Reporting matters where there is evidence that shows or tends to show disclosable conduct
- Keeping confidential the identity of a discloser and anyone against whom an allegation has been made, if they become aware of those matters.

## How can a public interest disclosure be made?

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

26. If a disclosure is made orally, a record should be made by the person to whom the disclosure was made of what was said. The discloser will be asked to sign the record as being correct.

27. A current or former public official can report suspected wrongdoing via the following means:

- a) to their immediate supervisor or manager. If the supervisor or manager believes that the information concerns, or could concern, one or more instances of disclosable conduct, the supervisor or manager must give the information to an authorised officer of the agency as soon as reasonably practicable
- b) to a National Mental Health Commission authorised officer
- c) to the Ombudsman, IGIS or an investigative agency prescribed by the Act in the context of an external or emergency disclosure
- d) if the person has moved to a new agency and reports suspected wrongdoing in their previous workplace. The authorised officer who receives the disclosure will then consider to which agency the matter should be allocated

28. Written disclosures should be sent to the National Mental Health Commission at PO Box R1463 Royal Exchange NSW 2000. Envelopes or external covers should be marked 'Confidential - National Mental Health Commission PID'.

## **Anonymous Disclosers**

29. Disclosers do not have to identify themselves and may remain anonymous. Remaining anonymous means disclosers do not identify themselves at any stage to anyone, including the authorised officer who receives the disclosure.
30. Anonymous disclosures will be acted on whenever possible. The authorised officer who receives an anonymous report must have reasonable grounds to suspect the disclosable conduct has occurred in order to allocate the matter for investigation. If they cannot contact the person to seek necessary further information, the matter may not proceed. In addition, the Commission cannot ensure protection from reprisal if the identity of the disclosure is unknown.
31. The PID Act requires agencies to keep a discloser's identity confidential, subject to limited exceptions including the discloser's consent. If an investigation is commenced it is possible that the person's identity may become apparent.
32. It may also be difficult to conduct an investigation if the discloser cannot be contacted for further information. An investigator has the discretion not to investigate, or investigate further, if the discloser does not provide their name and contact details or is unable to give the investigator further information or assistance if needed.
33. A discloser who does not provide a means of contact cannot be updated on the progress of the matter, including the outcome of the investigation.
34. A person who has made an anonymous disclosure may come forward at a later stage to disclose their identity and seek the protections of the PID Act.

## **Does the person need to identify their report as a public interest disclosure?**

35. A person need not expressly identify their report of wrongdoing as a public interest disclosure, as they are not required to do so under the PID Act (s 28(3)). They may not even know that their information or allegations could constitute a public interest disclosure.
36. This does not mean that every complaint about workplace conduct should be treated as a public interest disclosure, particularly as one of the grounds for not investigating a matter under the PID Act is that it is not 'serious disclosable conduct'.
37. Complaints can cover a wide range of matters, including workplace disputes, harassment or bullying complaints, health and safety concerns, and allegations of improper conduct. Some matters (such as those alleging inappropriate behaviour) can be managed by less formal approaches, such as resolving the matter managerially, and/or reviewing policies or procedures. In other cases a matter may initially appear to be a personal grievance but on investigation may reveal more complex issues (for example, investigation of a complaint about an incident of harassment may reveal a serious workplace culture issue).
38. The Commission has guidelines on Determining Breaches of the APS Code of Conduct, Bullying and Harassment Prevention and Work Health and Safety Arrangements. A workplace matter may be better managed under these guidelines. Employees should familiarise themselves with all avenues before making a complaint.

## What are the discloser's obligations?

39. No particular information is specified in the PID Act about what information needs to be disclosed. A discloser, however, should consider providing the following information to help the Commission to proceed to investigate the matter:

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

40. A discloser should try to:

- be clear and factual
- avoid speculation
- avoid personal attacks and
- avoid emotive language

41. The discloser should not investigate a matter themselves before making the disclosure as doing so may hinder a future investigation.

42. The sooner a discloser raises their concerns, the easier it may be for the Commission to take action.

43. The Commission has guidelines on Determining Breaches of the APS Code of Conduct, Bullying and Harassment Prevention and Work Health and Safety Arrangements. A workplace matter may be better managed under these guidelines. Employees should familiarise themselves with all avenues before making a complaint.

44. The authorised officer will ask the discloser for additional information including any supporting correspondence or other documents, such as file notes or a diary of events, and the names of any people who witnessed the conduct or who may be able to verify what the discloser is saying.

45. Making a disclosure does not necessarily protect the discloser from the consequences of their own wrongdoing, including where they have been involved in the misconduct they are reporting.

46. A person who makes a disclosure that is intentionally false or misleading will not gain the protections under the PID Act.

47. The authorised officer should emphasise to the discloser that they should not discuss the details of their disclosure with anyone who does not need to know. Discussions with those people will not be covered by the protections in the PID Act.

48. The discloser should be discreet about the fact that they have made a public interest disclosure, the information in their disclosure and any information that would identify someone they allege has acted wrongly.



49. The discloser should also be prepared to provide further information to help the investigator, as this will often be required. All public officials must use their best endeavours to assist in any investigation.
50. Even if the information provided turns out to be incorrect or unable to be substantiated, their disclosure is protected by the PID Act, provided that the discloser:
- made the disclosure to an appropriate person under the PID Act, and
  - honestly believe on reasonable grounds that the information tends to show disclosable conduct.

## Confidentiality

51. Agencies need to make every reasonable effort to protect the discloser's identity. It is a criminal offence for a public official who is involved in handling a disclosure to reveal the discloser's identifying information to anyone else without their 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, or another Commonwealth law or prescribed law, or if the information has already lawfully been published.
52. The discloser's identifying information must also not be disclosed to a court or tribunal except when necessary to give effect to the PID Act. In addition, Commonwealth government agencies are bound by obligations under the *Privacy Act 1988* in relation to storing personal information securely and limiting its use and disclosure. However, the discloser's identity, or information that would effectively identify them, may need to be disclosed to certain other people if that is necessary:
- to investigate the disclosure effectively (for example, if the wrongdoing that was reported was directed solely against the discloser), or
  - to protect them against reprisals (for example, if there are concerns that it is impossible for them to remain in their current workplace).
53. In such circumstances, the authorised officer should emphasise that the PID Act cannot provide absolute protection of the discloser's identity in all situations. Even if the staff involved in handling the disclosure take the utmost care to protect the discloser's identity, they may not be able to prevent the identity from becoming known. Other staff may guess who made the disclosure once an investigation is under way, particularly if the discloser has previously complained about the issue to colleagues or flagged their intention to disclose.
54. If it is necessary or highly likely that the discloser's identity will be revealed, the Commission will discuss this with them before proceeding and seek the discloser's consent to reveal their identity to appropriate people.
55. Even if the discloser does not consent to their identity being revealed, they could be asked if they would like to provide an anonymous means of contact (such as an email address that does not include their name), so that they can at least be notified of the progress of the matter as required by the PID Act.

## Risk assessment

56. The Commission is obliged to assess the risk that reprisals may be taken against a person who makes a public interest disclosure.
57. If the disclosure is made to the authorised officer, a risk assessment is undertaken by the authorised officer. If 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 a risk assessment.

58. There are four steps the Commission will consider in the risk framework:

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

## **Conducting the investigation**

59. An investigation of a Public Interest Disclosure by the CEO or authorised officer must comply with the Standard issued by the Commonwealth Ombudsman.

60. Section 11 of the Standard provides that the CEO must ensure that a disclosure is investigated on the basis that a decision whether evidence is sufficient to prove that a fact must be determined on the balance of probabilities. The CEO must ensure that facts of the investigation are based on both relevant and logically-probative evidence.

61. If, in the course of a disclosure investigation, the CEO or authorised officer suspects on reasonable grounds that some or all of the information disclosed, or obtained in the course of the investigation is evidence of an offence against a law of the Commonwealth, a State or a Territory, the person may choose to disclose the information and any evidence to the Australian Federal Police for investigation. If the offence is punishable by imprisonment for a period greater than two years the CEO or authorised officer must, by law so notify the Australian police force.

## **Conducting an interview**

62. When either the CEO or authorised officer is conducting an interview as part of the investigation of a disclosure the CEO must inform the interviewed party or witness of:

- the identity and function of each person conducting the interview;
- the process of conducting the investigation;
- the authority of the CEO or authorised officer to conduct the investigation under the Act; and
- the protections for witnesses under Section 57 of the Act.

63. It is the responsibility of the CEO to ensure that:

- no audio or visual recordings are made of the interview without the interviewed party's knowledge
- on completion of the interview that the interviewed party or witness is provided the opportunity to make a final statement, comment or express a position and
- that any final statement, comment or expression of position is included in the interview records.

64. Interviewed parties and witnesses must be informed that if during the course of the questioning they obtain the identity of a discloser they must not disclose the person's identity to others or

threaten to or take any act of reprisal against the discloser. Interviewed parties or witness who do so may face criminal charges.

## **Report of investigation**

65. On completing an investigation the CEO or authorised officer must prepare a report of the investigation. The report must set out:

- whether there actually has been one or more acts of disclosable conduct
- any regulations, rules or administrative requirements to which the disclosable conduct relates
- the process used to collect the evidence
- the matters considered in the course of the investigation
- the duration of the investigation
- the principal officer's findings (if any)
- the action (if any) that has been, is being, or is recommended to be, taken; and
- any claims made about, and any evidence of, detrimental action taken against the discloser, and the agency's response to those claims and that evidence.

66. Additionally the CEO or authorised officer must within a reasonable timeframe after preparing the report provide a copy of the report to the discloser. This is not required where the discloser is unable to be contacted.

67. The CEO may delete from the copy given to the discloser any material:

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

67. The investigation and report must be completed within 90 days of the disclosure. However the CEO, authorised officer or the discloser may make a request to the Commonwealth Ombudsman for additional time. In the event that additional time is approved the discloser must be advised of the progress of the investigation by the CEO or authorised officer. This is not required where the discloser is unable to be contacted.

68. The Commonwealth Ombudsman will collate the Public Interest Disclosure reports and submit an annual report to parliament at the end of each financial year. For the purposes of preparing the annual report the CEO must provide the following information to the Commonwealth Ombudsman:

- the number of public interest disclosures received by the Commission
- the nature of the disclosable contact to which the public interest disclosures relate
- the number of public interest disclosure investigations conducted
- the actions that the CEO to respond to the recommendations of in the public interest disclosure reports during the relevant financial year and
- any other information requested by the ombudsman.

## Definitions

**The Act** is the Public Interest Disclosure Act 2013 (Cth).

**Agency** is one of the following:

- a department
- an executive or 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
- the intelligence 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 High Court, Federal Court and any other court created by parliament
- the Office of Official Secretary to the Governor-General
- the Commonwealth Ombudsman
- the IGIS
- a prescribed entity established by a Commonwealth law
- a prescribed person holding an office established by a Commonwealth law.

**Authorised Officer** is a public official belonging to an agency appointed in writing by the CEO (see s.36 of the Act).

**Chief Executive Officer (CEO)** is the head of a prescribed authority under the Act.

**Contracted Service Provider** is an officer or employee of a contracted service provider for a Commonwealth contract; and provides services for the purposes (whether direct or indirect) of the Commonwealth contract.

**Disclosable conduct** is suspected or probable illegal conduct or other wrongdoing as defined in Section 26 of the Act.

**Disclose** means to make new or secret information known.

**Identifying information** is information or details which could be used to discover the identity of the discloser.

**Line Manager** in relation to a person, who makes a disclosure, is a public official who supervises or manages the person making the disclosure.

**Ombudsman** means the Commonwealth Ombudsman.

**Public Interest Disclosure** is the disclosure of information that tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct.

**Public Official** includes current or former Commonwealth public sector employees, contracted service provider and officers and employees of contracted service provider and other public officials including Commission and Committee members. This definition is provided in Section 69 of the Act.

**Reprisal** is an act of retaliation against a person for making or being suspected of making a public interest disclosure. Under section 13 of the Act, reprisal may include dismissal, injury, and detriment to the person's position or discrimination.

The Standard is the *Public Interest Disclosure Standard 2013*

## Revision History

Version	Authorisation Date	Approved by	Approval/Revision Type
1.0	17/11/16	CEO	New Policy Approval
			

