

Public Interest Disclosure Act 2013

Principal Officer's Procedures

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These procedures are made by the Principal Officer of the National Disability Insurance Agency under section 59 of the *Public Interest Disclosure Act 2013* (**the PID Act**).

Simplified Outline of the PID Act

- The PID Act encourages you, as a Commonwealth public official who belongs to the NDIA, to disclose wrongdoing affecting the Commonwealth public sector, to the NDIA or to the agency to which the wrongdoing relates.
- It does not matter when the wrongdoing occurred.
- It allows you to disclose information to your supervisor, or a more senior person in the line of reporting, or to an 'Authorised Officer', or, in certain cases, directly to the Commonwealth Ombudsman. You can find the contact details for Authorised Officers for the NDIA here on the NDIS website.
 - You can disclose orally or in writing.
 - You can disclose anonymously or openly, or you can use an assumed name.
- You will have a number of legal protections if you make a disclosure that is covered by the PID Act.
 - As long as the information that you disclose to one of the people identified above is not knowingly false or misleading, you cannot have civil or criminal action or disciplinary action taken against you because you made the disclosure.
 - The Act makes it a crime for a person to take or threaten reprisal action against you because you made a public interest disclosure (**PID**), or because they believe that you made a PID.
 - There are restrictions on identifying you as a person who has made a disclosure, although these restrictions do not guarantee that you will not be identified.
 - The information in your disclosure can only be used or disclosed by the people who have a role under the PID Act, in a narrow range of circumstances.
- The Act requires that PIDs be investigated, subject to some exceptions. The investigation is generally done by the agency to which the wrongdoing relates.
- A report of the investigation must be provided to the discloser.
- In certain circumstances, the Act permits you to make your internal disclosure public, that is, to make an 'external disclosure', without losing the protections that you have as the discloser of that information.

1. Agency commitment and protections for disclosers

1.1 The NDIA encourages the making of reports of disclosable conduct

- a) As an Australian Public Service employee working in the NDIA, you are a 'public official' within the meaning of the *Public Interest Disclosure Act 2013 (PID Act)*. If you are a contractor, or an employee of a contractor that provides goods or services to the NDIA, you are also a 'public official'.
- b) The NDIA encourages and supports the reporting of wrongdoing by public officials in accordance with the PID Act.
- c) The NDIA will take active steps to support and to protect public officials in the NDIA who make disclosures under the PID Act. The NDIA will carry out risk assessments, will monitor the effectiveness of measures designed to control risks, and will actively follow up on any reports of reprisal action taken against disclosers or persons who are thought to be disclosers.
- d) The NDIA recognises that it is important to have an effective system for reporting and investigating disclosable conduct. Some of the potential benefits of such a system are reducing the work health and safety risks to workers, saving money, and making programs and processes more efficient. Another potential benefit is increasing the confidence of workers in the way the NDIA is managed.
- e) The NDIA also recognises that a decision by the NDIA not to deal with a disclosure as a disclosure under the PID Act, when, as a matter of law that is how the disclosure should have been dealt with, could be seriously detrimental to the discloser and to the effective operation and the good reputation of the NDIA.

1.2 Legal protections for disclosers under the PID Act

The PID Act provides a range of protections for persons who make a PID.

1.2.1 Immunity from legal action

- a) Subject to three important exceptions, a person who makes a PID within the meaning of the PID Act is not liable to have any civil, criminal or administrative action (including disciplinary action) taken against them for making the PID. Neither can any contractual or other right or remedy be enforced against them on the basis of the person having made a PID.

- b) This means that if a person makes a PID which is, for example, defamatory, or which breaches secrecy legislation, then subject to the exceptions, they will be protected.
- c) The first exception is that the immunity will not apply to civil, criminal or administrative liability for knowingly making a statement that is false or misleading.
- d) The second exception is that the immunity will not apply to protect a person from liability for four specific offences under the *Criminal Code Act 1995* (Cth). These are offences involving:
 - giving false or misleading information,¹
 - giving false or misleading documents,²
 - making a false document,³ or
 - using a forged document.⁴
- e) The third exception is that the immunity will not apply for making a disclosure that contravenes a designated publication restriction, except in certain circumstances.
- f) The PID Act also makes it clear that if an individual makes a PID about their own conduct, the making of the disclosure will not protect them from liability for that conduct.

1.2.2 Protecting disclosers and others from reprisal action

- a) The PID Act makes it a criminal offence for a person to cause any disadvantage to a second person, because the first person believes or suspects that the second person (or any other person) has made, or may have made, or proposes to make a PID.
- b) It is also a criminal offence to threaten to take reprisal action.⁵
- c) However, the PID Act provides that reasonable administrative action that is taken to protect a discloser or another person from detriment will not be reprisal action.⁶

1.2.3 Protecting the identity of a discloser

¹ Criminal Code Act, s.137.1.

² Criminal Code Act, s.137.2.

³ Criminal Code Act, s.143.

⁴ Criminal Code Act, division 144.

⁵ PID Act, s.19.

⁶ PID Act, s.13(3).

- a) Section 20 of the PID Act makes it a criminal offence for a person to disclose or use information that is likely to enable the identification of another person as one who has made a PID.
- b) This protection is subject to a number of exceptions.
- c) The exceptions include if the disclosure or use of the identifying information:
 - is for the purposes of the PID Act,
 - is for the purposes of a law of the Commonwealth, or
 - has been consented to by the discloser.
- d) There is also an exception if the identifying information has already been lawfully published.
- e) Public interest disclosers should be aware that there is a range of circumstances in which their identity as a discloser might be revealed. For example, the identity of a discloser may be revealed:
 - to carry out the processes required by the PID Act, or
 - to carry out a risk assessment in relation to possible reprisals, or
 - if it is necessary when interviewing witnesses in a PID Act investigation, or
 - to the subject of the disclosure, in a PID Act investigation, because it is required as a matter of procedural fairness, or
 - for the purposes of the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), to ensure a safe workplace while a disclosure is being investigated.

1.2.4 Keeping the content of the disclosure confidential

- a) Section 65 of the PID Act makes it a criminal offence for a person who has information that they obtained in the course of carrying out a function under the PID Act – this could be a supervisor, an Authorised Officer, an investigator or the Principal Officer – from disclosing or using that information except in very limited circumstances.
- b) Usually, the only situations in which one of those persons can use or disclose that information will be where they are doing so:
 - for the purposes of the PID Act, or
 - for the purposes of taking agency response action in relation to a PID Act investigation, or
 - where the information has already been lawfully published and the information is not intelligence information.

- c) Section 65 means that supervisors, Authorised Officers, PID Act investigators and the Principal Officer must be very careful with information that they have obtained through a PID or in the course of a PID Act investigation.

2. How does the PID Act work?

Simplified outline of the ‘internal disclosure’ process under the PID Act

- A disclosure is made by a current (or former) public official to their supervisor, to an Authorised Officer or, in certain circumstances, to the Ombudsman.
- The disclosure is about wrongdoing (known as ‘disclosable conduct’), generally by a public official in their capacity as a public official.
- If the disclosure is made by a current public official to their supervisor, and the supervisor thinks it concerns, or could concern, disclosable conduct, the supervisor must pass the disclosure to an Authorised Officer in the NDIA.
- If the disclosure is made by a current or former public official to an Authorised Officer (or if it is passed to an Authorised Officer by a supervisor) the Authorised Officer must decide whether to ‘allocate’ the disclosure for possible investigation.
- The Authorised Officer must allocate the disclosure if it tends to show (or if the discloser believes on reasonable grounds that it tends to show) one or more instances of disclosable conduct.
- If the Authorised Officer decides to allocate the disclosure, they will give it to the relevant agency for handling, and the Authorised Officer will inform the Principal Officer of that agency (which could be the NDIA), the discloser and the Ombudsman.
- The Authorised Officer cannot include the discloser’s name and contact details in the allocated material unless the discloser consents to this.
- A disclosure will usually be allocated to the agency in which the alleged conduct occurred.
- The Authorised Officer must use their best efforts to allocate a disclosure within 14 days of receiving it.
- If the Authorised Officer decides that a disclosure is not a PID, they will not allocate it. But they must inform the discloser of this, and inform the discloser of other actions available to them under Commonwealth law.
- The Principal Officer will decide whether or not to investigate.
- If they decide not to investigate, they will inform the discloser and the Ombudsman, give reasons to the discloser and advise them of other actions that may be available to them under other laws of the Commonwealth.
- If they decide to investigate, the investigation must be completed within 90 days, unless the Ombudsman authorises an extension of time.

- After the investigation has been completed, a copy of the Principal Officer's Report of Investigation must be given to the discloser, although it may be redacted.
- The NDIA's Principal Officer is required to take 'appropriate action' in response to the recommendations in a PID investigation report that relate to the NDIA.

2.1 Who can make disclosures under the PID Act?

2.1.1 Disclosures under the PID Act can be made by 'public officials',⁷ by people who have been public officials, and by people who have been deemed to be a public official for a particular disclosure.

2.1.2 The term 'public official' is defined very broadly in the PID Act, but in summary, it includes:

- a person who is employed under the Public Service Act or the Parliamentary Service Act;
- a person who is employed by a Commonwealth authority or a Commonwealth company;
- a person who is a member of the Australian Defence Force;
- a Commonwealth statutory office holder;
- a contractor to the Commonwealth or a Commonwealth authority; and
- an employee of a contractor who works directly or indirectly on that contract.

2.1.3 A full definition of the term 'public official' is set out in section 69 of the PID Act.

2.2 What wrongdoing does the PID Act cover?

2.2.1 The PID Act revolves around reports of 'disclosable conduct'. The full definition of disclosable conduct is in section 29 of the PID Act. That definition applies for the purposes of these procedures.

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

- a) contravenes a law of the Commonwealth, a State or a Territory, or
- b) occurs in a foreign country and contravenes a law in force in that country that applies to the agency, public official or contracted service provider and that corresponds to a law in force in the Australian Capital Territory, or

⁷ PID Act, s.26.

- c) perverts, or attempts to pervert, the course of justice or involves corruption of any other kind, or
- d) constitutes maladministration, including conduct that:
 - i. is based, in whole or in part, on improper motives,
 - ii. is unreasonable, unjust or oppressive, or
 - iii. is negligent, or
- e) is an abuse of public trust, or
- f) is fabrication, falsification, plagiarism or deception in relation to scientific research, or misconduct in relation to scientific work, or
- g) results in the wastage of public money or public property or of the money or property of an authority covered by the PID Act, or
- h) unreasonably results in a danger to the health and safety of a person or unreasonably results in or increases the risk of a danger to the health and safety of a person, or
- i) results in a danger to the environment or results in or increases the risk of a danger to the environment, or
- j) is prescribed by the PID Rules.

2.2.3 Disclosable conduct also includes conduct engaged in by a public official that:

- involves abuse of the public official's position, or
- could, if proved, give reasonable grounds for disciplinary action against the public official.

2.2.4 It does not matter whether the disclosable conduct occurred before or after the PID Act commenced.

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

2.2.6 The PID Act makes it clear that conduct is not disclosable conduct⁸ if it relates only to a policy or proposed policy of the Commonwealth Government or to an action or proposed action taken by a Minister, the Speaker of the House of Representative or the President of the Senate, with which a person disagrees. Conduct is unlikely to be disclosable conduct if, for example, it is:

⁸ PID Act, s.31.

- a lawful and reasonable direction issued to an employee in the NDIA by a person who has authority to do this, or
- reasonable management of an employee's work performance.

2.3 How do you make an 'internal disclosure' under the PID Act?

- All employees in the NDIA and former employees in the NDIA are entitled to make a disclosure under the PID Act.
- All contracted service providers⁹ and their employees who provide, or who provided, goods or services to the NDIA under a contract made with the NDIA are entitled to make a disclosure under the PID Act.
- Beyond the NDIA, all public officials and former public officials who belong or belonged to another Commonwealth agency are entitled to make a disclosure under the PID Act. And in some cases, a person who has never been a public official may be entitled to make a disclosure.

2.3.1 What is the process to follow?

- A PID may be made anonymously or openly, or under an assumed name.¹⁰
- A PID may be made orally or in writing.¹¹
- Where a public official makes a PID, they do not have to refer to the PID Act or say that they are making a PID. A public official can make a PID without even knowing about the PID Act.
- Where a public official is considering making a disclosure, they should, in the first instance, contact one of the NDIA's Authorised Officers to get information about how to make a PID under the PID Act.
- Employees in the NDIA may make a disclosure of disclosable conduct to their supervisor, an Authorised Officer, or, in certain circumstances, to the Ombudsman.
- Employees or former employees of contracted service providers, or officers of contracted service providers, may make a disclosure of disclosable conduct to an Authorised Officer or, in certain circumstances, to the Ombudsman.

2.3.2 Who are the NDIA's Authorised Officers?

⁹ Defined in PID Act, s.30(2).

¹⁰ PID Act, s.28.

¹¹ Ibid.

- a) The names and contact details of the NDIA's Authorised Officers are set out on the NDIA's intranet and on the [NDIS website](#).
- b) Where possible, an employee in the NDIA should make their PID to an Authorised Officer rather than to their supervisor.

Note: Authorised Officers in the NDIA have been trained in receiving PIDs and they can provide information about how to make a PID and about the protections given to disclosers under the PID Act.

Note: This paragraph does not prevent an employee in the NDIA from making a disclosure to their supervisor.

2.3.3 Can you get your own legal advice before you make a disclosure?

In certain circumstances a public official who discloses information to a legal practitioner for the purpose of obtaining advice about making a PID will be protected by the PID Act.¹² These circumstances are discussed at the end of this chapter.

2.3.4 Can someone else make a PID on your behalf?

A public official will only have the protections of the PID Act¹³ if they make the disclosure themselves. A public official who makes a disclosure through an agent will generally not have the protections of the PID Act.

2.3.5 What information should be included in a PID?

- a) The information contained in a disclosure should be clear and factual, and should, as far as possible, avoid speculation, personal attacks and emotive language. It should contain supporting evidence where that is available to the discloser and should, where possible, identify any witnesses to the disclosable conduct.
- b) A potential discloser should not investigate a matter themselves before making a disclosure. Raising concerns without undue delay will help the NDIA to address those concerns.
- c) A public official in making a disclosure may want to set out:
 - their name and contact details (but they do not have to do this, and they can use a pseudonym instead of their real name);
 - the details of the suspected wrongdoing;
 - the name of the person who they believe carried out the wrongdoing;
 - the place and time and date of the suspected wrongdoing;

¹² PID Act, s.26.

¹³ PID Act, Part 2.

- whether the suspected wrongdoing has been reported to anyone else;
 - whether there were any witnesses to the wrongdoing, and if so, who the witnesses are; and
 - whether the discloser has any concerns that anyone might take reprisal action against them for having made this disclosure.
- d) A person who knowingly makes a false or misleading disclosure will not have any protections under the PID Act.¹⁴
- e) A person who is considering making a disclosure should be aware that making a disclosure does not entitle them to protection from the consequences of their own wrongdoing.¹⁵

2.3.6 What if you change your mind about a disclosure once you have made it?

You cannot withdraw a PID once you have made it. But you may tell the Authorised Officer or the investigator that you do not want the disclosure to be investigated. If you do this, this will be a relevant consideration in the investigator deciding whether or not to investigate the disclosure.¹⁶ Further, you may decline to consent to your name and contact details being provided to the Principal Officer, and doing this could mean that it is not practical to investigate the disclosure.¹⁷

2.3.7 Are you allowed to tell other people that you have made a disclosure under the PID Act?

Generally, if you have made a disclosure under the PID Act, you should not discuss the details of your disclosure with anyone who does not need to know about it. Discussions with these people about the content of your disclosure will not be protected by the PID Act, and you may expose yourself to the possibility of legal action or misconduct action by doing this.

2.3.8 If you do not disclose anonymously, can you be identified as the discloser?

A supervisor or Authorised Officer who receives a disclosure of disclosable conduct from a public official must deal with the disclosure in accordance with the PID Act. This means that the identity of the discloser as a person who has made a PID can only be revealed if the PID Act allows this – see section 20. But it is possible that the identity of the discloser could be revealed to the person who the discloser has made allegations against. The information in the disclosure can generally only be used for the purposes of the PID Act or for the purposes of the NDIA taking action in response to a PID Act investigation, though there are some exceptions to this.

2.3.9 What protections apply to public interest disclosers?

¹⁴ PID Act, s.11(1).

¹⁵ PID Act, s.11(2).

¹⁶ PID Act, s.48(1).

¹⁷ PID Act, s.48(1)(i)(i).

The protections that the PID Act gives to public interest disclosers are set out in detail at Chapter 1 of these Procedures.

2.4 What other types of public interest disclosures can be made?

Apart from an internal disclosure, there are three other types of PID that the PID Act protects.¹⁸ These are:

- an external disclosure;
- a legal practitioner disclosure; and
- an emergency disclosure.

The requirements for each of these disclosures are set out below.

2.4.1 Making an external disclosure

- a) An external disclosure can only be made where an internal disclosure of the same information has already been made. But there is a number of additional requirements which must be met before such a disclosure will have the protections of the PID Act.
- b) In general terms, a current or former public official may disclose information to any person other than a foreign public official, where:
 - the information disclosed tends to show, or the discloser believes on reasonable grounds that it tends to show, one or more instances of disclosable conduct, and
 - the discloser has previously made an internal disclosure of this information, and
 - a disclosure investigation has been commenced, but one of the following applies:
 - the discloser believes on reasonable grounds that the investigation was inadequate, or
 - the discloser believes on reasonable grounds that the response to the investigation was inadequate, or
 - the investigation has not been completed within the required time limit, and
 - the disclosure is not contrary to the public interest, and

¹⁸ PID Act, s.26(1).

- no more information than is reasonably necessary is disclosed, and
 - no intelligence information is disclosed, and
 - none of the conduct referred to in the disclosure relates to an intelligence agency.
- c) Because this is a complex test, the NDIA recommends that a person who is considering making an external disclosure obtain their own legal advice before going public. An alternative is for the person to make a complaint to the Ombudsman in relation to their earlier internal disclosure.

2.4.2 Making a legal practitioner disclosure

- a) The PID Act allows current and former public officials to get legal advice about making a PID,¹⁹ and to have the protections of the PID Act if they comply with the requirements for making a legal practitioner disclosure.
- b) In general terms, a current or former public official may disclose information to an Australian legal practitioner where:
- the disclosure is made in order to obtain legal advice from the legal practitioner in relation to a PID that the person has made, or is proposing to make, and
 - the disclosure to the legal practitioner does not include intelligence information.
- c) In certain circumstances, there is an additional requirement if the discloser knew or should have known that any of the information disclosed to the legal practitioner was classified information, the legal practitioner must hold the appropriate level of security clearance for that information.

2.4.3 Making an emergency disclosure

- a) The final type of disclosure that is protected by the PID Act is called an emergency disclosure.²⁰ Like an external disclosure, an emergency disclosure can be made to any person other than a foreign public official.
- b) In general terms, a current or former public official may disclose information where:
- they believe, on reasonable grounds, that it concerns a ‘substantial and imminent danger to one or more persons or to the environment’, and
 - no intelligence information is disclosed.

¹⁹ PID Act, s.26.

²⁰ PID Act, s.26.

- c) But the PID Act provides that there will usually need to be exceptional circumstances which justify this kind of disclosure:
- if the discloser has not previously made an internal disclosure of this information, there must be exceptional circumstances which justify the failure to make an internal disclosure, or
 - if the discloser has previously made a disclosure of this information, and the disclosure investigation has not been completed, there must be exceptional circumstances which justify the making of the emergency disclosure before the investigation is completed.

3. Procedures for supervisors

Simplified outline of the function of supervisors under the PID Act

- A supervisor is a person who supervises or manages a public official.
- Supervisors have a duty under the PID Act to recognise, and to pass on to an Authorised Officer in their agency, certain disclosures made to them by their subordinates, as soon as practicable.
- A supervisor should not investigate a disclosure made to them by their subordinate if the disclosure is a PID.
- If the disclosure is to be dealt with as a PID, there is no option to deal with it informally ahead of the PID Act processes being carried out.
- But a supervisor may need to consider the WHS Act implications of a disclosure that is made to them.
- A supervisor who receives a disclosure which is a PID must assist the Authorised Officer in assessing the risk of reprisal against the discloser.
- A supervisor who receives a disclosure which is a PID must not breach the secrecy provisions in the PID Act.
- The secrecy provisions do not prevent a supervisor from seeking advice from Legal Services in the NDIA about how to deal with the disclosure under the PID Act.

3.1 Who is a 'supervisor' under the PID Act?

The PID Act defines the supervisor of a public official to mean a (second) public official who supervises or manages the first public official.²¹ This means that the direct supervisor of a public official who is an employee in the NDIA, and every person up the line of reporting in the NDIA in relation to that public official, is that public official's supervisor. So if you are an APS6 supervising an APS4 in the NDIA, you are the APS4's supervisor, and so is the EL2 who supervises you, and so on.

3.2 What should you do when you receive a disclosure from a subordinate?

- a) If a subordinate makes a disclosure to you, you must make a written record to say that a disclosure has been made to you, and record the time and date of the disclosure.

²¹ PID Act, s.8.

- b) If the disclosure is made orally and not in writing, you must make a written record of the substance of the disclosure.
- c) You should then ask the discloser to sign the record of the disclosure, where this is practicable.
- d) Where a subordinate discloses information to you, and you have reasonable grounds to believe that the information disclosed to you concerns, or could concern, 'disclosable conduct', you must, as soon as practicable, give the information to an Authorised Officer in the NDIA.²²
- e) The term 'disclosable conduct' is discussed in detail at paragraph 2.2.2 of these Procedures.
- f) If you are in doubt about referring a disclosure on to an Authorised Officer, you should err on the side of referral. The motive of the subordinate in making their disclosure is not relevant to your decision to refer, or not refer, a disclosure to an Authorised Officer. It is the substance of the disclosure that is relevant.

3.3 Assessing the risk of reprisal action

When you give the information to an Authorised Officer in the NDIA under paragraph 3.2(d), you must also give the Authorised Officer your written assessment of any risks that reprisal action might be taken against the person who disclosed the information to you. The Authorised Officer may ask you for further assistance in carrying out a risk assessment.

3.4 As a supervisor, you may need to consider other risks

Apart from the issue of possible reprisal action, you may also need to consider whether the disclosure that has been made to you raises any risks to the work health and safety of the discloser, or anyone else in the workplace. For example, if the subordinate is bringing a disclosure of bullying to you, you may need to consider whether they should be moved to a different work area, or whether the person who is the subject of the disclosure should be moved. For that purpose, you should speak to the Authorised Officer in the first instance.

3.5 Supervisors should not investigate disclosures

If you have decided that the disclosure that has been made to you concerns, or could concern, disclosable conduct, you should not take any steps to investigate the disclosure yourself. This is not your role in this situation. Neither should you take any steps to try to resolve the disclosure yourself, other than referring the disclosure to an Authorised Officer. Attempting to resolve the disclosure yourself can create serious

²² PID Act, s.60A.

legal risks for you, for the NDIA and for the subject of the disclosure, and may create serious risks for the discloser.

3.6 Informing the discloser that their information has been passed on

Where you have passed information to an Authorised Officer in the NDIA, and assuming that you are able to contact the discloser, you must inform the discloser that you have given the information to an Authorised Officer in the NDIA, and inform the discloser of the name and contact details of that Authorised Officer.

3.7 You must protect the information you have received

- a) If you have received a PID in your capacity as a supervisor, you need to be very careful about what you do with information about the identity of the discloser, and you need to be even more careful with what you do with the information contained in the disclosure. Section 20 of the PID Act makes it a criminal offence to reveal information that would identify a person as a public interest discloser, unless one of the exceptions in that section applies. The exceptions in section 20 include where this is done for the purposes of the PID Act, or for the purposes of another law of the Commonwealth, or where the discloser has consented.
- b) A more detailed discussion of section 20 is set out at paragraph 1.2.3 of these Procedures.
- c) In broad terms, section 65 of the PID Act makes it a criminal offence for a supervisor, among others, to use within the NDIA, or disclose outside the NDIA, information in the disclosure that was made to them, unless this is done for the purposes of the PID Act, or unless it is done for the purposes of the NDIA taking response action to a PID Act investigation, or unless the information has already been lawfully published and is not intelligence information.
- d) You should seek advice from Legal Services of the NDIA before you take any action which could breach section 20 or section 65.

4. Procedures for Authorised Officers

Simplified outline of the role of Authorised Officers

- Authorised Officers have a role in advising disclosers and potential disclosers about the PID Act.
- They are responsible for making the key decision as to whether a disclosure will be dealt with under the PID Act – whether it will be allocated.
- If the Authorised Officer decides that a disclosure is to be dealt with under the PID Act, they will decide which agency is to handle the disclosure, and allocate it to that agency.
- An Authorised Officer must not provide the name and contact details of the discloser to the Principal Officer of the NDIA unless the discloser consents to this.
- An Authorised Officer has the role of deciding whether to deem a person to be a ‘public official’ for the purposes of a disclosure.
- Authorised Officers are appointed by the Principal Officer of the NDIA under section 36 of the PID Act.

4.1 The role of an Authorised Officer under the PID Act

4.1.1 Providing information about the PID Act

Authorised Officers have the role of providing advice to disclosers, and potential disclosers, who contact them, about what the PID Act requires for a disclosure to be an internal disclosure, and about the protections that the PID Act provides for people who make disclosures under the Act. This role is set out in section 60 of the PID Act.

4.1.2 Receiving disclosures

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

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

4.1.3 Making a decision to allocate or not to allocate

a) Where a disclosure has been given to an Authorised Officer by a supervisor in the NDIA, or where a disclosure has been made directly to an Authorised Officer, the Authorised Officer must use their best endeavours to decide on the allocation

of the disclosure within 14 days after the disclosure is given to or made to the Authorised Officer.²³

- b) The PID Act provides that an Authorised Officer who receives a disclosure must allocate the disclosure to an agency unless they are satisfied, on reasonable grounds, that there is no reasonable basis on which the disclosure could be considered to be an 'internal disclosure'.²⁴
- c) For this purpose, the Authorised Officer must ask themselves either one or two questions.

- Does the information disclosed tend to show one or more instances of disclosable conduct?

And if not, the second question is:

- Does the discloser believe on reasonable grounds that the information disclosed tends to show one or more instances of disclosable conduct? (See section 26 of the PID Act.)

- d) If the answer to either of these two questions is yes, then unless there is some other basis on which the disclosure is not an internal disclosure, the Authorised Officer is required to allocate the disclosure.

Note: Other grounds on which an Authorised Officer might decide that a disclosure is not an internal disclosure include:

- that the disclosure has not been made by a person who is, or was, a public official;
 - that the disclosure was not made to an 'authorised internal recipient' or supervisor;
 - that the person who is alleged to have carried out the disclosable conduct was not a public official at the time they are alleged to have carried out that conduct; and
 - that the disclosure is not otherwise a PID within the meaning of the PID Act.
- e) Where an Authorised Officer receives a disclosure, the Authorised Officer may obtain information and make such inquiries as they think fit, for the purposes of deciding the allocation of the disclosure.²⁵

4.1.4 Seeking the discloser's consent before allocating certain disclosures

²³ PID Act, s.43(5).

²⁴ PID Act, s.43(2).

²⁵ PID Act, s.43(4).

- a) Where the Authorised Officer is proposing to allocate a disclosure and is aware of the contact details of the discloser, they must, as soon as practicable after receiving the disclosure and before allocating the disclosure, ask the discloser whether the discloser:
 - i. consents to the Authorised Officer giving the discloser's name and contact details to the Principal Officer and to the Principal Officer's delegates; and
 - ii. wishes the disclosure to be investigated.
- b) The Authorised Officer must make a written record of the discloser's responses (if any) to the questions referred to in the paragraph above.
- c) Where a discloser does not respond within 7 days to the question referred to:
 - i. in paragraph 4.1.4(a)(i) – the discloser is taken not to have consented to the disclosure of their name and contact details to the Principal Officer and their delegates; and
 - ii. in paragraph 4.1.4(a)(ii) – the discloser is taken to wish the disclosure to be investigated.

4.1.5 Processing the decision: where the Authorised Officer decides not to allocate

- a) Where an Authorised Officer decides that a disclosure that has been made to them is not to be allocated, they must, where the discloser's contact details are known to the Authorised Officer, advise the discloser in writing that the disclosure is not to be allocated²⁶. In this situation, the Authorised Officer is effectively reaching a view that the disclosure is not a PID under the PID Act.

4.1.6 Processing the decision: where the Authorised Officer decides to allocate

- a) The Authorised Officer will allocate a disclosure to an agency in accordance with the principles in the PID Act. This will usually mean that allocation is to the agency in which the conduct is alleged to have occurred.
- b) If an Authorised Officer proposes to allocate a disclosure to an agency other than their own agency, they must first obtain the consent of an Authorised Officer in that other agency.²⁷
- c) Where an Authorised Officer in the NDIA decides to allocate a disclosure to an agency (including to the NDIA) they must provide written notification to the Principal Officer of the relevant agency and set out the allocation decision, including:
 - the name of each agency to which the disclosure has been allocated;

²⁶ PID Act, s.50(1)(b).

²⁷ PID Act, s.43(6).

- the reasons for the allocation decision; and
 - the consent of an Authorised Officer in each agency (other than the NDIA) to which the disclosure has been allocated.
- d) The Authorised Officer must also provide written notification to the relevant contact point in the Ombudsman's Office.
- e) Where the Authorised Officer is aware of the contact details of the discloser, the Authorised Officer must inform the discloser of the allocation.²⁸ This notification must be in writing.
- f) The Authorised Officer must make a file note about informing the discloser. The completed file note will record:
- the date and time the discloser was notified;
 - the means by which they were notified; and
 - the content of the notification.
- g) Where an Authorised Officer in the NDIA allocates a disclosure, they must conduct a risk assessment based on a checklist of risk factors,²⁹ and having regard to any assessment of risk provided under these procedures by the discloser's supervisor.
- h) The Ombudsman's 'Agency Guide to the Public Interest Disclosure Act 2013', latest version, which can be found on the Commonwealth Ombudsman's website, provides information on how to carry out a risk assessment.

4.1.7 Deeming a discloser to be a public official

- a) All persons, including public officials, persons who have been public officials and others, are encouraged to make PIDs in an anonymous way if they wish to do so.
- b) Where an Authorised Officer receives a disclosure and it is not clear that the discloser is or has been a 'public official', the Authorised Officer may consider whether to exercise the power in section 70 of the PID Act to determine on their own initiative that a person who has disclosed information to them is a public official in relation to the making of that disclosure. Where a discloser requests the Authorised Officer to make such a determination, the Authorised Officer must make a decision, one way or the other. However, if the Authorised Officer cannot contact the discloser in writing, no determination can be made. This is because the Authorised Officer must be able to give written notice of the determination to the individual. Where the Authorised Officer is able to contact the discloser, they must inform the discloser of their decision, and if the Authorised Officer's decision

²⁸ PID Act, s.44(2).

²⁹ PID Act, s.59(1)(a).

is to decline the request, they must also give the discloser reasons for their decision.

- c) The Authorised Officer should make this decision having regard to whether it is in the public interest, in the NDIA's interest and in the discloser's interest to have the disclosure dealt with as a disclosure under the PID Act.
- d) Where an Authorised Officer decides to make a determination under section 70 that the PID Act has effect as if the individual had been a public official, the Authorised Officer should seek assistance from Legal Services on the drafting of the written notice.
- e) The written notice must be given to the individual.³⁰ A copy of the determination notice must also be given to the Principal Officer of the agency to which the disclosure has been allocated (which could be the NDIA), at the same time as the written notification specified in paragraph 4.1.6(d).

³⁰ PID Act, s.70(3).

5. Procedures for investigators

Simplified outline of the functions of PID Act investigators

- The power to act as a PID Act investigator will usually be delegated by the Principal Officer of the NDIA to a public official in the NDIA.
- The investigator must decide whether to investigate the internal disclosure or not, and inform the discloser of this decision.
- The investigator must comply with the NDIA's procedures under section 15(3) of the Public Service Act, if the disclosable conduct concerns breaches of the APS Code of Conduct.
- The investigator must comply with the Australian Government Investigations Standards if the disclosable conduct concerns fraud.
- The Public Interest Disclosure Standard (**PID Standard**) imposes a number of process requirements on the investigator's investigation.
- The investigator may report, and in certain circumstances, must report, to the police, if they suspect on reasonable grounds that a criminal offence has been committed.
- The investigator may decide that a different investigation, under another law of the Commonwealth, should be carried out.
- Where the investigator is proposing to make adverse findings against a person (including that the person has carried out disclosable conduct) they must provide procedural fairness to the person.
- The investigator has 90 days, in the first instance, to complete their PID Act investigation, but may seek extensions from the Ombudsman.
- The investigator must write a report of their investigation, the Investigator's Report.
- The PID Act and the PID Standard impose requirements on the investigator about the content of the report.

5.1 The role of the investigator

5.1.1 Delegation of powers to investigator

The Principal Officer of the NDIA has the power, under the PID Act, to investigate a PID that has been allocated to the NDIA. The power of investigation is usually delegated. This power can only be delegated to a public official who 'belongs' to the NDIA.

5.1.2 Investigator to inform discloser

Where an Authorised Officer allocates an internal disclosure to the Principal Officer of the NDIA and the Principal Officer of the NDIA has been given the name and contact details of the discloser, the PID Act investigator, within 14 days after the disclosure was allocated to the NDIA, must inform the discloser in writing³¹ that the investigator may decide:

- a. not to investigate the disclosure, or
- b. not to investigate the disclosure further

and the investigator must inform the discloser of the grounds on which that decision may be taken.

5.1.3 The investigator's discretion not to investigate

- a) The investigator must consider whether to exercise the discretion under s 48 of the PID Act not to investigate the disclosure under the PID Act.
- b) In broad terms, the investigator may decide not to investigate (or may decide to discontinue an investigation that they have already begun) if:
 - a. the discloser is not a current or former public official (and a determination has not been made under section 70 of the PID Act), or
 - b. the information does not to any extent concern serious disclosable conduct, or
 - c. the disclosure is frivolous or vexatious, or
 - d. the disclosure is substantially the same as a disclosure that has been investigated under the PID Act, or
 - e. the disclosure is substantially the same as a disclosure that has already been investigated, or is currently being investigated, under another law of the Commonwealth, and
 - i. it would be inappropriate to conduct another investigation at the same time, or
 - ii. the investigator is reasonably satisfied that there are no matters that warrant further investigation, or
 - f. the discloser has informed the investigator that they do not wish the disclosure to be pursued and the investigator is reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation, or
 - g. it is impracticable to investigate the disclosure because:

³¹ PID Act, s.50.

- i. the discloser has not revealed their name and contact details, or
 - ii. the discloser has refused or has failed or is unable to give the investigator the information they requested, or
 - iii. of the age of the information.
- c) Guidance on factors that might go towards the exercise of the power in section 48 is provided in the Ombudsman's 'Agency Guide to the Public Interest Disclosure Act 2013', latest version, which can be found at on the Commonwealth Ombudsman's website.

5.1.4 Where the investigator decides not to investigate

- a) Where the investigator decides under section 48 of the PID Act not to investigate a disclosure, the investigator must, as soon as reasonably practicable, inform the Ombudsman in writing of that decision, and of the reasons for that decision,³² and sending it to the relevant contact in the Ombudsman's Office.
- b) Where the investigator decides under section 48 of the PID Act not to investigate a disclosure, and where they have been given the name and contact details of the discloser, the investigator must, as soon as reasonably practicable, inform the discloser of that decision in writing, of the reasons for that decision and of other courses of action that may be available to the discloser under other laws of the Commonwealth,³³ if the discloser is contactable.

5.1.5 Where the investigator decides that they will investigate

Where the investigator has considered exercising the discretion under section 48 of the PID Act and has decided that they are required to investigate the disclosure, and where the investigator has been given the name and contact details of the discloser, the investigator must inform the discloser that they are required to investigate the disclosure,³⁴ and inform the discloser in writing of the estimated length of the investigation.

5.1.6 Where the investigator later decides to discontinue

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

- a. the discloser of that decision in writing, or the reasons for the decision and of other courses of action that might be available to the discloser under other laws of the Commonwealth,³⁵ and

³² PID Act, s.50A(1).

³³ PID Act, s.50(1)(b).

³⁴ PID Act, s.50(1)(a).

³⁵ PID Act, s.50(1)(b).

- b. the Ombudsman's Office in writing of that decision and the reasons.

5.1.7 Generally, the investigator may investigate as they think fit

- a) Where the investigator has decided to commence an investigation into an internal disclosure, they may conduct the investigation as they think fit.³⁶
- b) The investigator must be independent and unbiased in the matter. They must ensure that they do not have an actual or perceived conflict of interest.³⁷
- c) The investigator may, for the purposes of the investigation, obtain information from such persons, and make such inquiries, as they think fit.³⁸
- d) When conducting an investigation the investigator must ensure that a decision regarding whether evidence is sufficient to prove a fact is made on the balance of probabilities.³⁹

5.1.8 But there are some constraints on the investigation

The investigator, in conducting an investigation, must comply with:

- a. the *Public Interest Disclosure Standard 2013*, and
- b. to the extent that they are relevant to the investigation:
 - i. the Commonwealth Fraud Control Guidelines, and
 - ii. these procedures, and
 - iii. the NDIA's procedures established under section 15(3) of the *Public Service Act 1999*.

5.1.9 Investigator's authority and requirement to report suspicions to the police

- a) Section 56 of the PID Act provides that a PID Act investigator, in the course of their investigation, may suspect on reasonable grounds that the information disclosed, or other information obtained in the investigation, is evidence of an offence against a Commonwealth, State or Territory law. The PID Act provides that the investigator may disclose this information to the Australian police force that is responsible for investigating such an offence. This provision provides a clear permission to disclose this information.
- b) But the section goes further than this. Where the offence in question is serious, that is, where it is punishable by life in prison, or by 2 years in prison or more, the PID Act investigator who has the reasonable suspicion must disclose the information to the relevant police force.

³⁶ PID Act, s.53(1).

³⁷ PID Act, s.53(1).

³⁸ PID Act, s.53(2).

³⁹ PID Standard, s.11.

- c) Where a referral to the police is made, the PID Act investigator will need to consider, in consultation with the police, whether the PID investigation should be suspended.

5.1.10 Interviewing witnesses

- a) Subject to any restrictions imposed by a law of the Commonwealth other than the PID Act, the investigator must ensure that, if a person is interviewed as part of the investigation of an internal disclosure, that person is informed of:
 - a. the identity and function of each person conducting the interview, and
 - b. the process of conducting an investigation, and
 - c. the authority of the investigator under the PID Act to conduct an investigation, and
 - d. the protections provided to the person by section 57 of the PID Act, and
 - e. the person's duty:
 - i. if they are a public official – to use their best endeavours to assist the investigator in the conduct of an investigation under the PID Act (subject to the public official's privilege against incriminating themselves or exposing themselves to a penalty), and
 - ii. that their evidence might be provided to the person who is the subject of the disclosure, because of the requirements of procedural fairness, and
 - iii. not to take or threaten to take reprisal action against the discloser, and
 - iv. subject to the PID Act, not to disclose the identity of the person who made the disclosure.
- b) Where the investigator conducts an interview as part of an investigation, they must not make an audio or visual recording of the interview unless they inform the interviewee that this is being done.⁴⁰
- c) Where the investigator conducts an interview as part of their investigation, at the end of the interview, the investigator must give the interviewee an opportunity to make a final statement or comment or express a position. And the investigator must include any final statement, comment or position in the record of the interview.⁴¹

⁴⁰ PID Standard, s.10(2)(a).

⁴¹ PID Standard, ss.10(2)(b) and (c).

- d) Where the investigator is aware of the discloser's identity and considers that it is necessary to reveal the discloser's identity to a witness, the investigator must consult with the discloser, where practicable, before proceeding.⁴²

5.1.11 The requirement of procedural fairness in the investigation

- a) Procedural fairness does not require that a person against whom allegations are made must be advised as soon as a disclosure is received or as soon as an investigation is commenced.
- b) Procedural fairness may require that the discloser's identity be revealed to the person who is the subject of the disclosure. But the issue of procedural fairness will generally not arise until a PID Act investigation is being carried out. Procedural fairness will usually not be an issue that an Authorised Officer needs to consider.
- c) Where the investigator in preparing the Investigator's Report of their investigation proposes to:

- a. make a finding of fact, or
- b. express an opinion,

that is adverse to the discloser, to a public official who is the subject of the disclosure or to another person:

the Principal Officer may, at his or her discretion, give the person who is the subject of that proposed finding or opinion a copy of the evidence that is relevant to that proposed finding or opinion and must give the person a reasonable opportunity to comment on it.

Note: The paragraph above will not apply where the investigation does not make substantive findings or express adverse opinions but instead simply recommends or decides that a further investigation action should or should not be taken or will or will not be taken.

- d) The investigator must ensure that a finding of fact in an Investigator's Report of an investigation under the PID Act is based on logically-probative evidence.⁴³
- e) The investigator must ensure that the evidence that is relied on in an investigation is relevant.

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

5.1.12 Time limits for the PID Act investigation

⁴² PID Act, s.20 – it is an offence to disclose information which may identify the discloser.

⁴³ PID Standard, s.11.

- a) The investigator has 90 days from the date the disclosure was allocated in which to complete the investigation.⁴⁴
- b) The investigator may seek one or more extensions of time from the Ombudsman.⁴⁵
- c) A request to the Ombudsman for an extension of time must be made at least 10 business days before the end of the 90 day time limit.
- d) The Ombudsman has indicated that an application for extension should include reasons why the investigation cannot be completed within the time limit, the views of the discloser and an outline of action taken to progress the investigation.
- e) An investigation that is not completed within time does not become invalid.

5.1.13 In preparing a report of an investigation under the PID Act, the investigator must comply with the PID Act and the PID Standard. The investigator must set out in the Investigator's Report:

- a. the matters considered in the course of the investigation, and
- b. the duration of the investigation, and
- c. the investigator's findings (if any), and
- d. the action (if any) that has been, is being or is recommended to be taken, and
- e. any claims made about, and any evidence of, detrimental action taken against the discloser, and the NDIA's response to those claims and that evidence,

and, where relevant, an Investigator's Report must:

- a. identify whether there have been one or more instances of disclosable conduct, and
- b. identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct (if any) relates, and
- c. explain the steps taken to gather evidence, and
- d. set out a summary of the evidence, and
- e. set out any recommendations made based on that evidence.⁴⁶

5.1.14 Advising the discloser that the investigation has been completed

Where a Principal Officer has completed a Principal Officer's Report of Investigation, incorporating the investigator's report, under the PID Act, and where they have been

⁴⁴ PID Act, s.52(1).

⁴⁵ PID Act, s.52(3).

⁴⁶ PID Act, s.51(2).

given the discloser's contact details, the Principal Officer must, as soon as practicable, advise the discloser in writing:

- a. that the Principal Officer's Report of Investigation has been completed, and
- b. whether the Principal Officer's Report of Investigation was completed within the time limit provided for by the PID Act.

5.1.15 Confidentiality in the investigation

- a) The investigation of the disclosure is to be conducted in as confidential a manner as is possible.⁴⁷ In particular, the identity of both the discloser and the person alleged to have engaged in the disclosable conduct is not to be revealed except where this is reasonably necessary for the effective investigation of the disclosure (including because of the need to afford procedural fairness).⁴⁸
- b) Any interviews conducted by an Authorised Officer or a PID Act investigator are to be conducted in private.⁴⁹
- c) Any interviews with the discloser are to be arranged so as to avoid the identification of the discloser by other staff of the NDIA.⁵⁰

⁴⁷ PID Act, ss. 20, 21 and 65.

⁴⁸ PID Act, ss. 20, 21 and 65.

⁴⁹ PID Act, ss. 20, 21 and 65.

⁵⁰ PID Act, ss. 20, 21 and 65.

6. Action following a PID investigation

Simplified outline

- A copy of the Principal Officer's Report of Investigation (which may be redacted) must be provided to the discloser.
- The Principal Officer of the NDIA must ensure that 'appropriate action' is taken in response to recommendations in a PID investigation report that relate to the NDIA.
- The Principal Officer of the NDIA must provide a report to the discloser about the response action that the NDIA has taken.

6.1 Giving a copy of the PID investigation report to the discloser

- a) The Principal Officer of the NDIA must, within a reasonable time after a Principal Officer's Report of Investigation under the PID Act has been prepared, give a copy of the report to the discloser.⁵¹
- b) The Principal Officer of the NDIA may redact from the copy of the Principal Officer's Report of Investigation given to the discloser any material:
 - a. that is likely to enable the identification of the discloser or another person, or
 - b. the inclusion of which would result in the copy being a document:
 - i. that is exempt for the purposes of Part IV of the *Freedom of Information Act 1982*, or
 - ii. having, or being required to have, a national security or other protective security classification, or
 - iii. containing intelligence information.
- c) The Principal Officer of the NDIA must redact from the copy of a report given to the discloser any material which would result in the Principal Officer's Report of Investigation contravening a designated publication restriction.

6.1.1 Giving information to other persons

Where the person who is the subject of a PID is aware of the allegations that have been made against them, or is aware that there has been a PID Act investigation into their conduct, they should be advised in writing of the outcome of the PID Act investigation. But the person does not have a right to be given a copy of the Principal

⁵¹ PID Act s.51(4).

Officer's Report of Investigation. And they do not have a right to know the identity of the discloser, if this right did not arise during the investigation.

6.2 Taking 'appropriate action in response' to a PID investigation report

- a) The PID Act requires the Principal Officer of the NDIA to ensure that 'appropriate action' is taken in response to recommendations in a PID investigation report, and or any other matters raised in such a report, that relate to the NDIA. (See section 59(3) of the PID Act.)
- b) The term 'appropriate action' could in some cases mean the commencement of a formal Code of Conduct investigation. It could mean the formally counselling an employee; it could mean taking steps to improve business processes in the NDIA.

6.2.1 Reporting to the discloser on the outcome of 'response action'

Because an internal discloser may be able to make an external disclosure if the discloser believes on reasonable grounds that an agency's response action to a PID Act investigation has been inadequate, it is important that the discloser is informed about the response action.