

PARLIAMENTARY COUNSEL

Office Procedural Circular No. 2.10 Procedures for facilitating and dealing with public interest disclosures

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Part 1—Introduction

Background

1 The *Public Interest Disclosure Act 2013 (PID Act)* which commenced on 15 January 2014 promotes integrity and accountability in the Australian public sector by encouraging the disclosure of information about suspected wrongdoing, protecting people who make disclosures and requiring agencies to take action in relation to public interest disclosures.

2 Section 59 of the PID Act requires First Parliamentary Counsel (as a principal officer under the PID Act) to establish procedures for facilitating and dealing with public interest disclosures relating to the Office of Parliamentary Counsel (*OPC*).

What is a public interest disclosure

3 A public interest disclosure is a disclosure by a current or former public official of suspected wrongdoing in the Commonwealth public sector. There are four different types of

public interest disclosure sanctioned by the PID Act: internal disclosure, external disclosure, emergency disclosure and legal practitioner disclosure.

Application of these procedures

4 These procedures apply to internal disclosures that relate to OPC and are made by a current or former public official. An internal disclosure may be made to the supervisor of the discloser, an authorised officer of OPC (First Parliamentary Counsel and the 2 Second Parliamentary Counsel), an authorised officer within another agency, or the Ombudsman (or the Inspector-General of Intelligence and Security (*IGIS*) for intelligence related disclosures). A disclosure must be made to an authorised officer or supervisor to gain the protections available under the PID Act.

5 Where a disclosure has been allocated to OPC from another agency (including the Ombudsman or IGIS) and the authorised officer reasonably believes the disclosure to relate to OPC, the authorised officer will accept the allocation and deal with the disclosure in accordance with these procedures (see Part 3).

6 These procedures must be complied with when a supervisor or an authorised officer receives a disclosure. Other legislative obligations may apply in addition to these procedures; for example, in relation to work health and safety.

Part 2—Making a public interest disclosure

Who can make a public interest disclosure

7 All public officials and former public officials are entitled to make a disclosure under the PID Act. This includes the following:

- (a) all employees and former employees of OPC;
- (b) all statutory office holders and former statutory office holders of OPC; and
- (c) all contracted service providers and their employees who provide, or who provided, services to OPC under a contract with OPC.

8 An authorised officer can also deem an individual to be a public official if they reasonably believe the individual has information about wrongdoing and proposes to make a disclosure.

What is disclosable conduct?

9 The full definition of disclosable conduct is set out in section 29 of the PID Act. In summary, disclosable conduct is conduct by an agency or by a public official that:

- (a) contravenes a law;
- (b) involves corruption;
- (c) perverts, or attempts to pervert, the course of justice;

- (d) results in wastage of public funds or property;
- (e) is an abuse of public trust;
- (f) unreasonably endangers health and safety or endangers the environment;
- (g) is misconduct relating to scientific research, analysis or advice;
- (h) is maladministration, including conduct that is unjust, oppressive or negligent;
- (i) involves the public official abusing his or her position as a public official; or
- (j) would give reasonable grounds for disciplinary action against a public official if the conduct was proved.

What is not disclosable conduct?

10 Disagreeing with government policy, action or expenditure does not make it disclosable conduct.

11 Judicial, ministerial and parliamentary conduct and the proper activities of intelligence agencies are also excluded.

How can I make a public interest disclosure?

12 An internal disclosure under the PID Act should be made to one of OPC's authorised officers who are First Parliamentary Counsel (*FPC*) or a Second Parliamentary Counsel (*2PC*). If the disclosure is made to a supervisor, who is not one of the authorised officers, the disclosure will be referred on to an authorised officer.

13 An internal disclosure may be made anonymously, verbally and/or in writing and may be made without a clear intention of making a public interest disclosure. If a disclosure is made verbally, it is recommended that the person receiving the report makes a record of the disclosure.

14 Where a report is made anonymously there may be limitations to the ability of officers to fully investigate the disclosure or for the discloser to be informed of the progress or outcome of the disclosure.

15 Supervisors and authorised officers will need to consider whether or not reports made to them are of a nature that requires action under the PID Act, or whether the issues can be resolved quickly through prompt management action or other appropriate avenues (for example, where the matter is substantially a personal grievance or workplace conflict and not a matter of public interest¹). Issues to consider include the seriousness of the wrongdoing reported and whether the person making the report is at potential risk of reprisal.

16 Where a supervisor or authorised officer is unsure whether information could be considered a disclosure under the PID Act, the supervisor or authorised officer should err on the side of caution and treat the information as a disclosure under these procedures.

¹ See page 10 of *Agency Guide to the Public Interest Disclosure Act 2013*, December 2013, Commonwealth Ombudsman

17 If a person discloses, or proposes to disclose information to an authorised officer or supervisor and the authorised officer or supervisor has reasonable grounds to believe that the information could be a disclosure under the PID Act, the supervisor or authorised officer must:

- (a) inform the individual of this belief;
- (b) explain these procedures in relation to making a disclosure report;
- (c) advise of any restrictions of disclosure of which the authorised officer is aware;
- (d) reassure the individual that even if the disclosure is found to be incorrect or is unable to be substantiated the disclosure is protected under the PID Act (except if the disclosure is intentionally false or misleading);
- (e) encourage disclosures to be factual and issues focused and to avoid being emotive about individuals²; and
- (f) explain the protections available to the individual under the PID Act.

18 If the discloser does not wish the disclosure to be investigated, FPC will take this into consideration. However, FPC may decide to pursue an investigation should the matters outlined in the disclosure warrant such action.

19 In making a disclosure, the discloser should consider providing the following information to assist the authorised officer and/or principal officer to decide how the disclosure should be handled:

- (a) their name and contact details;
- (b) the nature of the suspected wrongdoing;
- (c) who they think committed the suspected wrongdoing;
- (d) when and where the suspected wrongdoing occurred;
- (e) relevant events surrounding the issue;
- (f) if they did anything in response to the suspected wrongdoing;
- (g) whether others know about the suspected wrongdoing and have allowed it to continue;
- (h) whether they believe their information is a public interest disclosure under the PID Act; and
- (i) if they are concerned about possible reprisal as a result of making a disclosure.

² See page 23 of *Agency Guide to the Public Interest Disclosure Act 2013*, December 2013, Commonwealth Ombudsman

20 The authorised officer may ask the discloser for any supporting correspondence or other documents, such as file notes, and the names of any people who witnessed the conduct or who may be able to verify what the discloser is saying, to assist the authorised officer to determine whether the information would constitute an internal disclosure under the PID Act.

Protections for the discloser under the PID Act

21 To gain the protections of the PID Act, a disclosure must be made to a person authorised to receive it under the PID Act.

22 If the disclosure meets the PID criteria, the discloser is afforded immunity from civil, criminal and administrative liability that might otherwise apply for disclosing that information. They are also protected from reprisals or threats of reprisals, such as discriminatory treatment, termination of employment or injury, as a result of making a disclosure.

23 The identity of a person who makes a disclosure will be kept confidential as far as practicable. It is an offence to provide identifying information about a person who makes a disclosure without their consent unless authorised by the PID Act.

24 The protections and immunities continue to apply after a PID investigation is finalised. However, the PID Act will not protect the person if they knowingly disclose false or misleading information or it is the consequence of their own wrongdoing.

Part 3—Dealing with an internal disclosure

Allocation and investigation

25 Where FPC or a 2PC receives an internal disclosure that is covered by the PID Act, the matter will be allocated by FPC to one of the 2PCs for investigation within 14 days.

26 The disclosure must be investigated unless one of the exemptions in section 48 of the PID Act applies, for example, the matter does not relate to serious disclosable conduct, or it is already under investigation, or it is frivolous or vexatious.

27 Investigations must be completed, including the report of the investigation, within 90 days of the date the matter was allocated for investigation (unless an extension of time has been sought and granted).

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

Advice to discloser

29 The discloser will be notified at various stages in the process, provided the contact details of the discloser is known to the authorised officer. The discloser will be advised:

- (a) when the disclosure is allocated for investigation;

- (b) if OPC decides to investigate;
- (c) if the investigation is under the PID Act, the estimated length of the investigation;
- (d) if OPC decides not to investigate, the reasons for the decision and any action that might be available to the discloser; and
- (e) after the investigation report is completed.

30 After the investigation under the PID Act is completed, the discloser will be given a copy of the investigation report. Some material may be deleted from the copy the discloser receives if it is likely to identify any person, is intelligence information, would be exempt under the *Freedom of Information Act 1982* or would contravene a publication restriction or protective security classification.

How the PID Act interacts with other legislation

31 The PID Act complements other investigative and complaint schemes that apply to the Australian public sector. For example, an allegation that a public servant has breached the APS Code of Conduct can be investigated under the *Public Service Act 1999* and complaints about agency action can still be made to the Commonwealth Ombudsman.

Part 4—Further information

32 The Commonwealth Ombudsman has responsibility for administering the PID scheme across all Commonwealth agencies. More detailed information on the PID scheme, including fact sheets and guides, is available on the Ombudsman's website at www.pid.ombudsman.gov.au.

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