

Internal reporters involved in wrongdoing

1. Objectives

- To provide clear advice that staff will not be shielded from the consequences of their own wrongdoing.
- To provide guidance about the circumstances where it may be appropriate that action is not taken against an internal reporter involved in wrongdoing.

2. Why is this important?

An issue that consistently arises concerns the obligations and responsibilities of organisations in relation to internal reporters who may be involved in wrongdoing or misconduct (whether the subject of their report or separate from it) or who are the subject of performance management or disciplinary action. The wrongdoing does not have to be intentional – it can include under-performance, incompetence or negligence.

There are a wide range of reasons why staff will report wrongdoing that is occurring within their organisation. Private interest motivations – such as vindication, remorse and malice – can produce disclosures that are very much in the public interest.

The fact that an internal reporter's motive may be improper or inappropriate often has little bearing in practice on whether the information provided is of value. In the area of criminality and corrupt conduct – where both parties to a criminal or corrupt transaction are equally to blame – reports motivated by malice or disaffection can sometimes be the only way that such wrongdoing is brought to light.

That said, the credibility of an organisation's internal reporting system depends on staff understanding that it cannot be used as a self-protective strategy in relation to their own wrongdoing.

The complexities involved in managing internal reporters involved in wrongdoing can arise in various scenarios. This could include, for example, when a staff member:

- confesses their part in wrongdoing and implicates others who are involved
- is being performance managed and, in the midst of that, reports wrongdoing
- has problems emerge with their work performance or they behave in a problematic way after making a report – and this is unrelated to the stress of reporting wrongdoing
- reports wrongdoing while in the middle of an industrial dispute with the organisation.

3. Legal and management obligations

3.1 PID Act

The [Public Interest Disclosures Act 1994](#) (PID Act) does not apply to reports made solely or substantially to avoid dismissal or other disciplinary action – as opposed to a report about disciplinary action that has occurred in reprisal for making a public interest disclosure (PID) (s.18).

4. What does this mean for your organisation?

Making a PID does not shield staff from the reasonable consequences of unsatisfactory performance or wrongdoing on their part. Reasonable disciplinary or other employment-related action may still be taken against a person even if they have made a PID. The issue for management is whether they can prove that this action is reasonable in the circumstances.

Your internal reporting policy should advise staff that the PID Act does not apply to reports of wrongdoing made with the sole or substantial motive of avoiding dismissal or other disciplinary action. However your procedures should note that this information may still be reliable and require investigation or other action – even if the motives of the internal reporter mean the report is not a PID. See [Guideline B3: What's not a public interest disclosure?](#) for advice about reports made to avoid dismissal or disciplinary action.

Make sure you thoroughly document all contacts with internal reporters, witnesses, investigators and managers and the reasons for any decisions. Keeping good records also ensures compliance with your obligations under the [State Records Act 1998](#).

4.1 Taking action against an internal reporter

Taking disciplinary action against an internal reporter may create the perception that this action is being taken in reprisal for making the PID. Just as formal disciplinary action can be perceived as a reprisal, so can other employment-related actions including:

- harshly imposing human resource procedures
- rewriting job descriptions
- deciding not to award or provide a promotion, reclassification, transfer, leave of absence or other benefit

- allocating tasks, workloads or access to training
- transfers or redeployments
- redundancies or dismissals.

When an organisation is contemplating taking action against an internal reporter, they should be able to clearly demonstrate that:

- There are sufficient grounds or enough evidence – depending on the seriousness of the conduct – that the internal reporter has been involved in improper conduct or has acted dishonestly, incompetently or negligently.
- There is sufficient evidence in existence before the report was made that the internal reporter has been involved in improper conduct or has acted dishonestly, incompetently or negligently.
- The action is reasonable, proportionate and consistent with action taken in similar circumstances in relation to staff who were not internal reporters.
- The particular circumstances of the internal reporter have been taken into account.
- The action is not causally connected to making the PID, as opposed to the content of the PID or other available information.
- The action complies with your organisation's policies and procedures, such as the performance management or discipline policy.

It is critical your organisation can prove the actions were taken for a legitimate reason. You will then be in the strongest position to defend claims that the criminal offence of reprisal – as defined in the PID Act – has been committed.

In such circumstances, the onus of proof is reversed. If an internal reporter can demonstrate that they made a PID and were subjected to detrimental action, it is the defendant that has to prove that the detrimental action was not taken substantially in reprisal for them making their PID.

If the disciplinary action relates to the conduct that is the subject of the internal reporter's PID, your organisation should be able to show that disciplinary action only started after the PID had been appropriately dealt with and the matters listed above had been considered.

Before taking disciplinary or other action against an internal reporter for poor performance, managers should ask themselves:

- Are the problems affecting the internal reporter's work performance related to the stress of reporting wrongdoing or to other extenuating circumstances?
- Was the internal reporter aware of your expectations and standards? What proof is there?
- Are issues based on fact/evidence/objective assessment or on speculation/personal opinion/hearsay?
- Have you given the internal reporter:
 - › an opportunity to respond
 - › time and assistance to improve
 - › access to training, resources or support?
- Do you have adequate and accurate records of all relevant matters?¹

4.2 Exercising discretion not to take action

Even if it appears that disciplinary action or criminal proceedings against an internal reporter is possible, an admission of wrongdoing may sometimes be a mitigating factor when considering action. It may be in the public interest for the principal officer of your organisation to exercise discretion not to institute disciplinary action or for the Office of the Director of Public Prosecutions (DPP) to request indemnity against prosecution for the internal reporter from the Attorney General.

Whether this action is appropriate depends on:

- the seriousness of the wrongdoing disclosed
- the relevance and importance of the information disclosed
- the likelihood of uncovering the alleged wrongdoing without the internal reporter
- the extent (substantiated or admitted) of the internal reporter's involvement in that or any other wrongdoing, its level of seriousness, whether it has continued or been repeated, and the length of time since their involvement
- the degree of cooperation by the internal reporter with those investigating or dealing with the alleged wrongdoing
- the internal reporter's previous good behaviour and willingness to acknowledge wrongdoing.

However, any discretion must not be beneficial treatment or be used to influence the internal reporter to make, refrain from making or providing further information about their PID. Your organisation should only discuss or make a decision about the discretion to not take criminal or disciplinary action – or to seek an indemnity – after a PID has been made and assessed.

If wrongdoing is committed by an internal reporter that has no connection with their PID, there may still be circumstances where it is in the public interest for a principal officer to use their discretion to not take disciplinary action or for the Office of the DPP to seek an indemnity from the Attorney General.

These circumstances are very limited and only arise if:

- the wrongdoing occurred before the PID was made
- the PID was not made solely or substantially to avoid dismissal or other disciplinary action or as a result of a promise that the internal reporter would be granted beneficial treatment
- the wrongdoing is of a relatively minor nature.

If you are considering seeking an indemnity for an internal reporter who is to be a witness in criminal proceedings, consult the DPP's [Prosecution policy](#) and [Prosecution guidelines](#).

5. Additional resources

- [Guideline B3: What's not a public interest disclosure?](#)
- Office of the DPP's [Prosecution policy](#) and [Prosecution guidelines](#)
- [Public Interest Disclosures Act 1994](#)
- [State Records Act 1998](#)

For further guidance on internal reporters involved in wrongdoing, seek legal advice or contact the [Public Interest Disclosures Unit](#).

6. Last updated

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7. Endnotes

- 1 Crime and Misconduct Commission, Queensland Ombudsman and Public Service Commission 2011, [Handling a public interest disclosure: A guide for public sector managers and supervisors](#), Brisbane, p. 29.

Contact us for more information

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