

# Investigating public interest disclosures

## 1. Objectives

- To assist organisations to investigate public interest disclosures (PIDs) once an assessment has been made that an investigation is warranted.
- To help organisations and their investigators understand the requirements to be satisfied when investigating PIDs and the elements of best practice for investigating them – and avoid a range of pitfalls that may arise.
- To ensure that PIDs are effectively investigated by organisations.

This guideline does not cover every aspect of an investigation – it just aims to highlight some important facets of investigating PIDs. For more information about investigations, see the NSW Ombudsman's *Investigating complaints – A manual for investigators*. Further advice can also be obtained from the NSW Ombudsman and the Independent Commission against Corruption (ICAC).

See *Guideline C3: Assessing and streaming internal reports* for help deciding whether an investigation is warranted.

## 2. Why is this important?

Internal reports of wrongdoing are one way in which deficiencies in the management or operations of an organisation are uncovered. An investigation explores whether there are any deficiencies – and if so, their nature and scale – so that action can be taken to remedy any problems identified. The process of investigation is an important opportunity for an organisation to review its processes and identify areas in which improvements can be made.

Public sector staff need to have confidence in the internal reporting processes of their organisations so they know that appropriate action will be taken in response to their report. Appropriate and robust techniques for investigating reports of wrongdoing within organisations will encourage staff to make reports and reassure them that their reports will be adequately investigated. Internal reporters are also more likely to be satisfied with an outcome that is not in line with their expectations if they feel that the investigation process has been fair and impartial.

The *Whistling While They Work* research found that the most common reason given for not reporting wrongdoing was a belief that once the matter was reported no action would be taken in response. This view was expressed by 38% of respondents.<sup>1</sup>

## 3. Legal and management obligations

### 3.1 PID Act

Under s.27 of the *Public Interest Disclosures Act 1994* (PID Act), the organisation that receives a PID, or to which a PID is referred, must notify the person who made the PID within six months of the action taken or proposed to be taken. This means that if an organisation makes an assessment that they are going to investigate a PID, they should advise the internal reporter of this fact. For more information, see *Guideline D2: Information, advice and feedback to internal reporters*.

Under s.22 of the PID Act, an organisation to which a PID is made or referred must not disclose information that might identify or tend to identify the person who made the PID – other than in certain defined circumstances. For more advice about maintaining confidentiality and the exceptions to the obligation to maintain confidentiality, see *Guideline C7: Confidentiality*.

### 3.2 Other legislation

The PID Act does not give organisations investigative powers that they do not otherwise have. Powers to conduct an investigation are usually found in legislation and regulations, employment agreements or awards, contracts, codes of conduct, employment law and the common law.

Organisations should therefore look to these, and in particular the legislation under which they operate, for their investigative powers. For example:

- The *Public Sector Employment and Management Act 2002* sets out procedures for dealing with breaches of discipline by public officials employed under that Act.
- Codes of conduct adopted under the provisions of the *Local Government Act 1993* give councils the power to investigate complaints made about breaches of the code.

## 4. What does this mean for your organisation?

### 4.1 Determining the nature of the investigation

The purpose of an investigation is to:

- establish and document the relevant facts
- reach appropriate conclusions based on the available evidence
- develop options for response.

Determining the nature of the subject matter of the investigation helps you to decide on the process of investigation and the powers and resources necessary for an effective investigation. For example:

- If the investigation is about misconduct or the negligence of an individual, the investigation should focus on determining whether there is evidence to support disciplinary action or – if the misconduct is criminal in nature – to refer the matter and evidence obtained to the NSW Police Force. This means that all avenues of inquiry should be pursued in ways that will meet legal and procedural requirements. Particular attention should be paid to meeting any procedural fairness requirements.
- If the investigation is about policies, procedures and practices, it should focus on identifying problems of the type alleged by the internal reporter and remedying them. It may therefore be possible to frame the scope of the investigation more broadly and investigate the matter more expediently.

### 4.2 Power to conduct the investigation

The scope and purpose of the investigation will be limited by your organisation's powers and responsibilities.

The head of your organisation and investigators should be familiar with the range of investigative powers conferred on either them or your organisation under legislation or other instruments. This includes any ability to:

- require witnesses to provide evidence
- obtain relevant documentation
- obtain information from people about relevant policies, procedures and practices.

Investigators should also ensure that any decision to investigate is approved by the head of your organisation (or their delegate) in writing. The head of your organisation (or delegate) should also delegate to the investigator any available powers that are needed to conduct the investigation.

### 4.3 Deciding who is going to investigate

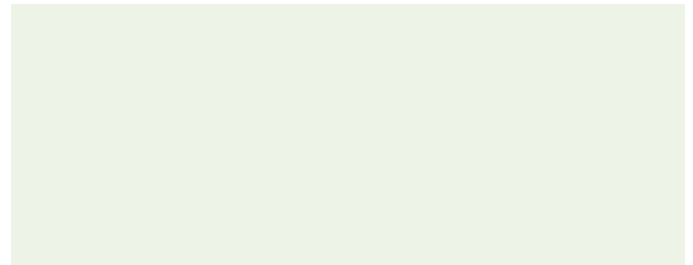
If your organisation does not have the necessary experience, resources or expertise to conduct an 'in-house' investigation, you may have to contract an appropriately qualified and experienced investigator.

If your organisation does not have the necessary powers to conduct the investigation, you may have to refer the investigation to an external body that has the powers to conduct an effective investigation.

It also may not be appropriate for your organisation to investigate a matter internally if the report relates to:

- the head of your organisation, general manager or mayor
- the conduct of more than one organisation
- a matter that is highly politically sensitive
- a matter where there is an actual or reasonably perceived conflict of interest.

Under these circumstances, your organisation should consider referring the matter to a relevant investigating authority for assessment. See [Guideline C6: Managing referred and external investigations](#) for more information about your responsibilities when referring matters to investigating authorities.



Where reports are to be investigated internally, it is preferable to select an internal investigator with experience in conducting PID investigations or, at a minimum, someone with relevant investigative experience. If possible, the internal investigator should not be the disclosures coordinator or one of the nominated disclosures officers. Try to keep the role of the investigator and disclosures coordinator/officer separate – so that the outcome of the investigation does not affect the reporter's perception of your organisation's internal reporting processes.

The disclosures coordinator or officer can be responsible for providing any necessary support to the internal reporter, as well as giving them information and updates on the investigation. This will avoid any perception of bias that may arise from the investigator communicating directly with the internal reporter, other than to obtain relevant evidence (see [Guideline E1: Model for internal reporter support](#)).

Once the investigator is chosen, the disclosures coordinator should provide them with a brief setting out:

- a copy of the report of wrongdoing
- the risk assessment conducted after the report was received – including the likelihood of reprisals, any related workplace conflict and confidentiality being maintained
- the assessment of the report and the reasons the matter has proceeded to investigation
- the terms of reference for the investigation
- the written authorisation from the head of your organisation (or delegate) for the investigation
- the powers that the investigator is delegated to conduct the investigation
- the responsibilities of the investigator under the PID Act.

## 4.4 Planning the investigation

### a) Terms of reference

It is important to establish a focus for and set limits on the investigation. This can be achieved by clearly spelling out the terms of reference at the start of the investigation.

These terms of reference set the boundaries – they should take into account the practicalities of an investigation, particularly the resources available to the investigator, and be approved by the person who authorised the investigation. The internal reporter should be consulted when drafting the terms of reference. Any decision to not examine some of the issues raised by the internal reporter in the investigation should be communicated to them by the disclosures coordinator along with the reasons for the decision.

Setting the terms of reference requires the key issues in the report of wrongdoing to be clarified. The person who sets the terms of reference should consider possible recommendations that might arise from the investigation if the allegations are substantiated and make sure that the terms of reference allow for these possible outcomes. The terms of reference should be framed as broadly as possible, while still keeping a focus on the conduct or issues to be investigated. This will also help avoid the need to amend the terms of reference if more information comes to light.

The terms of reference should be reviewed throughout the course of the investigation by the investigator and disclosures coordinator to make sure they are still relevant. Reviewing the investigation and the avenues of inquiry that are being undertaken also helps to ensure focus is maintained on the issues to be investigated. It can sometimes be tempting to inquire into issues that appear interesting but are peripheral to the key issues raised in the report of wrongdoing. If a matter does not fit within the terms of reference, approval should be sought to change the terms – or the matter should not be investigated at all. Alternatively, the issue can be looked at in another way outside of the investigation.

### b) Investigation plan

The first step in preparing an investigation plan is to clarify what is being alleged in the report of wrongdoing, and what the subject of the investigation will be – this may be narrower or broader than the allegations. Once the terms of reference are set, the investigator can develop an investigation plan that addresses the following issues.

#### Sources of information

Sources that may help you prove the allegations include:

- records that should exist or might be obtained
- things that might have been used, created or affected
- people who might have witnessed events, created documents or handled things.

#### Prioritising tasks

Decide how you will gather any evidence. Based on the avenues of inquiry, you should prepare a list of specific tasks to be performed and try to arrange them in order of completion.

#### Resources

Try to give an estimate of the resources needed to conduct a successful investigation, such as:

- the people required, including expert knowledge requirements
- computer facilities
- storage facilities, including secure areas for evidence and records
- tape/video recording equipment
- transport
- stationery
- communications.

#### Timeframe

Try to give a rough estimate of the timeframe for the investigation. Although it is rarely possible to be exact about timeframes at the beginning of an investigation, it is important that there is a defined end-point and sufficient time is allocated to each step.

## 4.5 Procedural requirements

### a) Procedural fairness

You should consider the requirements of procedural fairness at each stage of the investigation. Procedural fairness is required if proposed adverse comment or recommendations to be made in an investigation report have 'a real potential to prejudice the [subject of the report's] reputation and business interests and to do so in a way that was plainly bound to become a matter of public interest and concern'.<sup>2</sup>

The principles of procedural fairness include giving a fair hearing, not being biased, and acting on the basis of logically probative evidence – evidence that is relevant and tends logically to prove the existence or non-existence of a fact.

Depending on the circumstances, procedural fairness may require an investigator to:

- inform people against whose interests a decision may be made of the substance of any allegations against them or grounds for proposed adverse comment about them
- provide people with a reasonable opportunity to put their case – in writing, at a hearing or otherwise
- make reasonable inquiries or investigations before making a decision
- ensure that no person decides a case in which they have a direct interest
- act fairly and without bias
- conduct the investigation without undue delay.

One of the exceptions to the confidentiality requirements of the PID Act (s.22(1)(b)) is where it is essential, having regard to the principles of natural justice or procedural fairness, to disclose information that might identify or tend to identify a person who made a PID. For more information, see [Guideline C7: Confidentiality](#).

# Investigating public interest disclosures

In some cases, there may be an overriding public interest in not adhering to certain procedural fairness requirements. This will only be in limited situations that involve serious risks to personal safety or where substantial amounts of public funds may be at risk. In these cases, expert external advice should always be sought and documented. Reasons for any decisions involving procedural fairness considerations should always be recorded.

## b) Communication

The investigator should not communicate directly with the internal reporter or any subjects of the report, except to obtain information from them as part of the investigation or to clarify matters arising from the investigation. This will help to avoid any perception of bias or partiality.

The investigator should, however, communicate at regular intervals with the disclosures coordinator to advise them of the progress made in the investigation and the reasons for any delays. At each stage of the investigation, the investigator and disclosures coordinator should identify what information is appropriate to provide to the internal reporter. This should be information about the overall progress rather than detailed information that could prejudice the investigation.

See [Guideline D2: Information, advice and feedback to the internal reporter](#) for further advice about communication.

## c) Confidentiality

The PID Act requires organisations to keep information that might identify or tend to identify an internal reporter confidential, where this is practical and appropriate. The obligation to keep matters confidential should be reinforced with the internal reporter when the report is made and again if a decision is made to investigate. Any subjects of the report and witnesses should be directed to keep matters confidential – when they are made aware of the report and again after any interviews are conducted. For more information, see [Guideline C7: Confidentiality](#).

### Some traps to avoid

- Putting information on an unsecured computer or in an unsecured electronic file.
- Leaving documents on a photocopier.
- Leaving incoming or outgoing faxes on a fax machine.
- Interviewing people where they can be seen or heard.
- Causing suspicion by not interviewing the internal reporter if it is expected that everyone in the workplace be interviewed.
- Giving confidential information to others to copy, type, address or send.
- Not blacking out names, addresses or phone numbers on documents that you refer to when interviewing parties to the report.
- Leaving messages on desks or phone services that could be read or listened to by third parties.
- Sending sensitive material by mail that reveals the identity of the internal reporter.
- Saving electronic records into an electronic records management system in a non-secure way.
- Emailing or sending confidential information by mail to the wrong recipient.

## d) Record keeping

Keeping full and accurate records helps you comply with your organisation's obligations under the [State Records Act 1998](#). You must keep detailed records of any investigation of a report and the reasons for decisions about how your organisation will respond. These records should be retained in a secure location.

In addition, each key interaction with the internal reporter, subjects of the report and witnesses should be carefully documented on the file – including telephone conversations, interviews and emails received during the investigation. Any documents obtained should also be placed on the investigation file or attached to it.

Your organisation's procedures should ensure that:

- There is no indication on the cover of a file that it involves a PID or the name of the internal reporter.
- A notice is included inside each PID file to remind responsible staff of the need for confidentiality under the PID Act.
- The timeframes under the PID Act – 45 days for acknowledgment and six months for notifications as to action taken or proposed – are prominently recorded, as well as any shorter period for acknowledgment recommended in your organisation's internal reporting policy.
- Electronic records can only be accessed by appropriate people.
- A 'clear desk' policy is maintained for PID files and they are locked up securely when the office is unattended.

An appropriate record keeping system for PID matters will also enable your organisation to meet its statutory obligations to provide statistical information in your annual report and to the NSW Ombudsman every six months. For more information, see [Guideline C2: Reporting to the NSW Ombudsman](#).

Example notice to be placed on the inside cover of PID files:

### **CONFIDENTIAL**

**The material in this file relates to a public interest disclosure made under the *Public Interest Disclosures Act 1994*.**

**You must not disclose information that might identify the person who has made the public interest disclosure, unless in accordance with the PID Act.**

**The reporter must be provided with a written acknowledgement and a copy of the internal reporting policy as soon as possible but by no later than [include date 45 days after the PID was made].**

**The reporter must be notified of the action taken or proposed to be taken in relation to their public interest disclosure as soon as a decision has been made but by no later than [include date six months after the PID was made].**

## e) Outcome and final investigation report

You should prepare a report at the end of the investigation. This is a record for your organisation and may also be subject to outside scrutiny by an investigating authority.

At a minimum, an investigation report should include:

- a covering memo or executive summary explaining how the investigation was instigated, how it was conducted, who by, the timeframes involved, the process of investigation, the findings of the investigation and any recommendations made
- the terms of reference for the investigation
- any decisions made to maintain confidentiality, as well as any strategies adopted and whether they appear to have been effective
- a statement of all relevant facts and the evidence relied on in reaching any conclusions
- the conclusions reached and the basis for these conclusions
- any recommendations to overcome or address any wrongdoing or actual or potential problems identified.

Procedural fairness should be considered before drafting an investigation report, particularly if any adverse comment is to be included about the conduct of an individual or organisation. If a person is not afforded procedural fairness before an investigation report is finalised and it contains adverse comment or recommendations for disciplinary or other action against them, this may be grounds for a legal challenge.

In compiling the investigation report, you should also keep in mind that it will be subject to the [Government Information \(Public Access\) Act 2009](#) (GIPA Act). Under the GIPA Act, there is an overriding public interest against disclosure of information that would identify or tend to identify a person who made a PID – see the overriding secrecy law provisions of Schedule 1 to the GIPA Act. Various other public interest considerations against disclosure may also apply. However, it may be that some information in the report and associated documentation must be released to a person making an access application under the GIPA Act.

## 5. Your questions answered

### Our organisation has received an anonymous report. Does it still have to be investigated?

If a report of wrongdoing satisfies all the relevant criteria in the PID Act and contains sufficient information to warrant conducting an investigation, it should be investigated. The fact that the report has been made anonymously may, of course, affect your organisation's ability to effectively investigate the matter – especially if insufficient detail has been given in the report.

If a person makes an anonymous report, your organisation does not have the same obligations to communicate with the internal reporter that you ordinarily do under the PID Act. For example, you will not be able to:

- provide the internal reporter with a written acknowledgement and a copy of your internal reporting policy within 45 days of the report being made

- notify the internal reporter of the action taken or proposed to be taken on the report within six months of the report being made.

For more information, see [Guideline B6: Anonymous reporting](#).

### A person has made a public interest disclosure about a matter that has already been investigated as part of another process. Does the PID Act require me to do another investigation or can I just rely on the outcome of the original investigation?

If a report of wrongdoing raises exactly the same issues that have already been appropriately investigated, the fact that it is reported through a different channel – for example, to the disclosures coordinator or nominated disclosures officer – does not of itself mean that another investigation is warranted.

You should carefully consider the content of the report. If no substantial new information is raised, a separate investigation may not be necessary. If you decide that no further investigation of the issues is appropriate, then you should document the reasons for that decision and your assessment of how the initial investigation addresses the matters raised in both the earlier and later reports. This decision should be communicated to the internal reporter along with reasons for the decision.

If additional information is provided in the later report – or through the process of assessing the later report you become aware of additional information or issues – further investigation may be warranted. For example, evidence may show that what was thought to be an isolated event is part of a course of conduct raising systemic issues.

### What action should be taken following an investigation?

This depends on the conduct that was discovered by the investigation (see Table 1).

Table 1. The focus of an investigation and possible appropriate action

Focus of investigation	Possible appropriate action if substantiated
An action or inaction in relation to policies, procedures and practices	Addressing any problems identified
Alleged wrong conduct by an individual	Depending on the nature and seriousness of the conduct – a caution, training, disciplinary action of some kind, suspension, termination of employment or criminal action
Alleged detrimental action substantially in reprisal for making a PID	Disciplinary action (s.20(1B) of the PID Act) or referral of the evidence to the ICAC or police for consideration of criminal action (s.20(4) of the PID Act)

In taking action, organisations are limited by the powers and functions under the PID Act (s.20 in particular) and the legislation under which they operate. They should be guided by what is necessary and reasonable in the circumstances.

# Investigating public interest disclosures

Your organisation should also:

- document any decision made about action to be taken and the reason for that decision
- notify the ICAC if there is evidence of corrupt conduct
- notify the NSW Police Force if there is evidence of a criminal offence.

If there is evidence of other conduct that your organisation does not have the capacity to investigate, you should consider referring the matter to another person, body or organisation with the power to investigate the matter.

Your organisation should also provide information to the internal reporter about the outcome of the investigation, including any decision that no action is warranted.

## What action should be taken if the investigation reveals that a person has taken detrimental action substantially in reprisal for the making of a report of wrongdoing?

If an investigation establishes on the balance of probabilities that a person has taken detrimental action substantially in reprisal for the making of a PID, you should take action against that person.

Under the PID Act, taking detrimental action substantially in reprisal for the making of a PID constitutes:

- misconduct and justifies disciplinary action
- a criminal offence – you must refer any evidence of such an offence to the Commissioner of Police, the ICAC or the Police Integrity Commission (depending on the subject matter of the allegation) to see if there are sufficient lines of inquiry to establish that a criminal offence has taken place.

For more details, see [Guideline D5: Reprisals – investigating, acknowledging, remedying](#).

## 6. Additional resources

- [Guideline B6: Anonymous reporting](#)
- [Guideline C2: Reporting to the NSW Ombudsman](#)
- [Guideline C3: Assessing and streaming internal reports](#)
- [Guideline C6: Managing referred and external investigations](#)
- [Guideline C7: Confidentiality](#)
- [Guideline D2: Information, advice and feedback to internal reporters](#)

## Contact us for more information

Our business hours are: Monday to Friday, 9am–5pm (*Inquiries section closes at 4pm*)

If you wish to visit us, we prefer you make an appointment. Please call us first to ensure your complaint is within our jurisdiction and our staff are available to see you.

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**Web** [www.ombo.nsw.gov.au](http://www.ombo.nsw.gov.au)

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**Tel. typewriter** (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450  
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

- [Guideline D5: Reprisals – investigating, acknowledging, remedying](#)
- [Guideline E1: Model for internal reporter support](#)
- [Fact sheet 7: Confidentiality and its practical alternatives](#)
- NSW Ombudsman's [Investigating complaints – A manual for investigators](#)
- [Government Information \(Public Access\) Act 2009](#)
- [Local Government Act 1993](#)
- [Public Interest Disclosures Act 1994](#)
- [Public Sector Employment and Management Act 2002](#)
- [State Records Act 1998](#)

## 7. Last updated

December 2011

## 8. Endnotes

- 1 Brown, AJ (ed.) 2008, [Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations](#), ANU E Press, Canberra, p. 72.
- 2 [Queensland Police Credit Union Limited v Criminal Justice Commission](#) [2000] 1 Qd R 626.