

What's not a public interest disclosure?

1. Objectives

- To provide clear advice that the *Public Interest Disclosures Act 1994* (PID Act) does not apply to staff reports that deliberately provide false or misleading information, primarily question the merits of government policy or are made to avoid dismissal or disciplinary action.
- To provide advice on how public authorities should deal with reports where the PID Act does not apply.

2. Why is this important?

While the statutory protections of the PID Act only apply to reports about certain categories of serious wrongdoing made to specific people or authorities, staff should be encouraged to report all wrongdoing. See *Guideline B2: What should be reported?* and *Guideline B4: Reporting pathways*.

However, the credibility of an authority's internal reporting system depends on staff understanding that it is not to be used to make false or misleading reports. This is important for organisational justice – the reporter, the person who is the subject of the report, and their colleagues in the workplace need to see that procedures are followed and are fair, reasonable and appropriate regardless of the outcome.

Reporters with improper motives can also undermine an internal reporting system. For example, if staff perceive a reporter is vengeful or seeking to protect themselves by damaging others.

3. Legal and management obligations

3.1 PID Act

a) False or misleading reports

It is an offence for a public official – when seeking to make a report under the PID Act – to wilfully make any false statement or to mislead or attempt to mislead (s.28). The maximum penalty is \$5,500 or imprisonment for 12 months or both.

b) Reports questioning the merits of government policy

A public official reporting wrongdoing does not receive the statutory protections of the PID Act if the report questions the merits of government policy (s.17).

c) Reports made to avoid disciplinary action

The PID Act does not apply to reports of wrongdoing made solely or substantially with the motive of avoiding dismissal or other disciplinary action (s.18).

4. What does this mean for public authorities?

4.1 False or misleading reports

To discourage misuse of the internal reporting system, an authority's policy should draw attention to the sanctions for making false or misleading reports – that it is a criminal offence under the PID Act to wilfully make a false or misleading statement when reporting wrongdoing.

The assessment of whether a reporter provided false or misleading information must be based on evidence. It is very unlikely that such an assessment could be satisfactorily made when a report is first received. However, information collected during the course of an investigation may later indicate that the reporter willingly provided false and misleading information – and so the protections of the PID Act will not apply.

If there is evidence to a sufficient standard that a person willingly provided false or misleading information, the authority should:

- notify the ICAC of possible corrupt conduct under s.11 of the ICAC Act
- notify the NSW Ombudsman's Public Interest Disclosures Unit
- take, at a minimum, disciplinary action
- consider referring the matter to the police for criminal action.

4.2 Reports questioning the merits of government policy

The PID Act does not provide a definition of government policy other than to say it includes the policy of the governing body of a local government authority.

For state government public authorities and officers, it is likely that this excludes from the PID Act any reports which, at their core, criticise the formal policies of the executive arm of government – for example, the Cabinet, the Premier or another Minister.¹

For a council or county council, the PID Act specifically excludes reports that essentially criticise any formal policy of the council's governing body – that is, the elected councillors.

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Government policy should not be confused with organisational or administrative policy, which concerns the procedural issues or routine practices of an authority. These policies do not set the agenda for an authority but provide the mechanisms for achieving the agenda set by the government of the day or elected council.

The PID Act may apply to reports relating to government policy if they focus on the adequacy of the advice given by a public official or authority. However, they cannot principally involve questioning the merits of the adopted policy.

For example, a report alleging that the government's decision to close a particular school was wrong would most likely fall outside the coverage of the PID Act.

However if the report was that a relevant public authority wilfully refused to consider the likely impact of that decision on the vulnerable group of children, the PID Act could apply and the public official who made the report might be able to seek the protections of the PID Act.

4.3 Reports made to avoid dismissal or disciplinary action

Some staff members may make a report because they have been involved in wrongdoing or their performance has been unsatisfactory and they want to set up a defence that any subsequent dismissal or disciplinary action is a reprisal. See *Guideline D3: Reporters involved in wrongdoing*.

Deciding whether a report was made solely or substantially to avoid dismissal or disciplinary action is a difficult issue because it requires the motive of the reporter to be assessed. The fact that the making of a report had the effect of avoiding such consequences is not sufficient – the authority must be able to prove that this was the intention of the reporter.

If the authority believes that a PID has been made with the intention of avoiding dismissal or disciplinary action, the rules of procedural fairness require that the reporter is given an opportunity to be heard (whether by a hearing or in writing) before the final decision is made as to whether or not this was the case.

An 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 procedures should note that this information may still be reliable and require investigation or other action – even if the motives of the reporter mean the report is not a PID.

4.4 Reports where the PID Act does not apply

If staff suspect something wrong is happening they should report it. Potentially, reports can include workplace disputes, harassment or bullying complaints and health and safety concerns. Staff need to understand that there are multiple

avenues for reporting different types of concerns and that each may need to be dealt with differently.

Staff should be given training, information and guidance – including through the authority's internal reporting policy – about:

- the types of reports and concerns that the PID Act is unlikely to apply to
- more appropriate avenues – such as internal grievance, performance management, bullying and harassment, or work health and safety processes – for resolving various reports and concerns that do not meet the criteria of a PID.

If the disclosures coordinator or principal officer makes an assessment that a report is not a PID, the authority still has an obligation to ensure that the substance of the report is properly addressed and the person who made it is appropriately supported. See *Guideline C3: Assessing and streaming internal reports*. Also see *Template - Letter for public authorities - Concerns raised* which can be used by authorities when responding to an individual who has reported a matter assessed as not meeting the requirements of the PID Act.

Similarly, disclosures officers and other staff who receive reports of wrongdoing under an internal reporting policy should be trained and know to refer reporters to other appropriate policies if they raise concerns that are not PIDs.

For example:

- If staff believe there is a risk in the workplace, they should be referred to work health and safety policy.
- If they believe they are being discriminated against, they should be referred to the equal opportunity policy.
- If they wish to lodge a grievance, they should be referred to the grievance policy.

5. Your questions answered

Does the PID Act apply if the content of the report is frivolous?

If the actual content of the report is frivolous in that it carries no weight or is not about a serious matter, the PID Act will not apply. If a report is assessed as being frivolous and it will not be dealt with under the PID Act, the reporter should still be notified of the outcome. It should be noted that the reporter may not agree that the content of their report is frivolous. Accordingly, such interactions will need to be handled sensitively. See *Guideline B2: What should be reported?*

Does the PID Act apply if the motives of the reporter are questionable?

There are a wide range of reasons why staff will report wrongdoing that is occurring within their authority. Our experience suggests that people can be spurred to speak out about wrongdoing because their relationship with the authority or their colleagues or manager has deteriorated or broken down. Personal interest motivations such as vindication, remorse, revenge and malice can still produce disclosures that are very much in the public interest.

The fact that a reporter's 'motive' may be improper or inappropriate often has little bearing in practice on whether the information provided or disclosed is of value to the authority. The information could be potentially useful business intelligence about the authority, regardless of the reporter's motive.

Determining the motive of a reporter is particularly difficult. When assessing a report it is therefore generally best – at least initially – to focus solely on its content and accuracy, not the possible motives of the reporter. However, questionable motives may result in selectivity, inaccuracy or misinterpretations in the reported information. If an inappropriate motive for a report is known or reasonably suspected, this may affect the weight that is put on the information in the report during an investigation – and further verifying information may often be needed.

Does the PID Act apply if the reporter persistently makes the same allegations, even though the reporter is aware that the authority has already investigated and found them to be unsubstantiated?

Some reporters who do not get the outcome that they expected may refuse to accept the decision. They may either reframe their report in an attempt to have it taken up again or raise a range of minor or technical issues, arguing that these call into question the merits of the decision.

Authorities should provide a right of review so staff who are unhappy with the response to their report can appeal against the decisions made. Dissatisfied reporters are also entitled to raise the matter with investigating authorities.

In some cases, the reporter may become unreasonably persistent despite repeated attempts to resolve the matter. Strategies for dealing with unreasonable persistence are about communicating the authorities views clearly and transparently, and not allowing reporters to reframe their report to re-enter the process – unless they raise new and important issues.²

Authorities that find they are devoting disproportionate resources to responding to an unreasonably persistent reporter can find advice on dealing with this situation in our *Managing Unreasonable Complainant Conduct Practice Manual*.

6. Additional resources

- *Guideline B2: What should be reported?*
- *Guideline B4: Reporting pathways*
- *Guideline C3: Assessing and streaming internal reports*
- *Guideline D3: Reporters involved in wrongdoing*
- *Managing unreasonable complainant conduct manual*
- *Independent Commission Against Corruption Act 1988*
- *Ombudsman Act 1974*
- *Public Interest Disclosures Act 1994*
- *Template - Letter for public authorities - Concerns raised*

Endnotes

1. For example, see s.64 of the *Administrative Decisions Tribunals Act 1997* which defines government policy as policy adopted by the Cabinet, the Premier or other Minister that is to be applied in the exercise of discretionary powers by administrators.
2. NSW Ombudsman 2012, *Managing Unreasonable Complainant Conduct Practice Manual, 2nd ed, 2012*, Sydney, pp.12-13.

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