

# Protections under the PID Act

## Contents

What this guideline covers .....	3
Overview of protections under the PID Act .....	4
Detrimental action .....	5
Seeking an injunction to prevent, stop or remedy a detrimental action offence.....	6
Compensation – detrimental action .....	7
Immunity from civil and criminal liability .....	8
Confidentiality .....	9
Protection from liability for own past conduct.....	10

ISBN: 978-1-922862-20-4

NSW Ombudsman, Level 24, 580 George Street, Sydney NSW 2000

Email [pidadvice@ombo.nsw.gov.au](mailto:pidadvice@ombo.nsw.gov.au)

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

General inquiries 02 9286 1000

Toll free (outside Sydney metro) 1800 451 524

© State of New South Wales, July 2023

This publication is released under a Creative Commons License CC BY 4.0

## What this guideline covers

People who report wrongdoing need to be confident they will be protected from harm or disadvantage as a result of making a disclosure. Agencies need to accurately and quickly identify that a disclosure is a public interest disclosure (**PID**) because, if a report is a PID, the public official who made the report will have special protections under the *Public Interest Disclosures Act 2022* (**PID Act**). These protections apply from the time the PID is received by the agency.

This guideline explains these protections and outlines which are available to the makers of voluntary, mandatory and witness PIDs.

# Overview of protections under the PID Act

The table below provides an overview of the protections available for each category of PID.

Investigators of serious wrongdoing are also protected from detrimental action<sup>1</sup> and can apply for an injunction to prevent the commission or possible commission of a detrimental action offence.<sup>2</sup>

Protection	Voluntary PID	Mandatory PID	Witness PID
<b>Detrimental action</b> — It is an offence to take detrimental action against a person based on a suspicion, belief or awareness that a person has made, may have made or may make a PID.	✓	✓	✓
<b>Right to compensation</b> — A person can initiate proceedings and seek compensation for injury, damage or loss suffered because of detrimental action being taken against them.	✓	✓	✓
<b>Ability to seek preventive injunction</b> — An injunction can be sought to prevent the commission or possible commission of a detrimental action offence against a person.	✓	✓	✓
<b>Ability to seek remedial injunction</b> — If a person has suffered unlawful detrimental action, an injunction can be applied for to remedy that offence (for example, to reinstate the person’s employment).	✓	✓	✓
<p><b>Confidentiality</b> — Information that may identify a person as the maker of a voluntary PID cannot be disclosed by a public official or an agency except in specific circumstances.</p> <p>* However, where possible and provided it does not hinder an investigation, it is best practice for agencies to maintain confidentiality of a maker’s identity whether it is a mandatory or witness PID, or some other type of complaint.</p>	✓	✗*	✗*
<p><b>Immunity from civil and criminal liability</b> — A person will not incur civil or criminal liability in relation to making a disclosure. This means that legal action cannot be taken against a person for:</p> <ul style="list-style-type: none"> <li>breaching a duty of secrecy or confidentiality, or</li> <li>breaching another restriction on disclosure.</li> </ul>	✓	✓	✓
<p><b>Protection from liability for own past conduct</b> — If a person discloses their own wrongdoing or misconduct while they are making a PID, they are <i>not</i> protected from liability for their own past conduct.</p> <p>However, the Attorney General may give the maker of the PID a <i>conditional</i> or <i>unconditional</i> undertaking that the disclosure of their own conduct will not be used against them.</p>	Can only be provided by the Attorney General	Can only be provided by the Attorney General	Can only be provided by the Attorney General

1. *Public Interest Disclosures Act 2022*, s 31(2).

2. *Public Interest Disclosures Act 2022*, s 33(1)(a)(ii).

## Detrimental action

The PID Act contains protections to ensure that a person who has made a PID does not suffer detrimental action such as bullying, harassment or dismissal, as a result. These protections extend to people who are suspected by others of having made a PID (even if they have not) or of potentially making a PID in the future.

Detrimental action against a person is an *act or omission* that causes, comprises, involves or encourages detriment, or a threat of detriment, to a person (whether express or implied).<sup>3</sup>

This means that even if someone encourages another person to cause detriment or threaten detriment to a person, that encouragement will itself be considered detrimental action.

Detriment to a person includes:

- injury, damage or loss
- property damage
- reputational damage
- intimidation, bullying or harassment
- unfavourable treatment in relation to another person's job
- discrimination, prejudice or adverse treatment
- disciplinary proceedings or disciplinary action, or
- any other type of disadvantage.<sup>4</sup>

Under section 33 of the PID Act, it is a criminal offence to take detrimental action against a person based on a suspicion, belief or awareness that a person has made, may have made or may make a PID. In order to prove the offence, that belief, suspicion or awareness needs only to be a contributing factor in taking the detrimental action.

It is also an offence to take detrimental action against a person who has been, may be or proposes to investigate serious wrongdoing. The investigation into serious wrongdoing does not need to have arisen from the making of a voluntary PID or constitute dealing with a voluntary PID. This means the protection applies to investigators who are investigating serious wrongdoing that has been reported in other ways.

The offence has a reversed onus of proof. This means that if someone is prosecuted for having committed a detrimental action offence, the onus will be on the defendant to show that their suspicion, belief or awareness was not a contributing factor for the taking of the detrimental action.

**Important note:** Where the PID is a voluntary PID, there is a duty on agencies to assess and take proactive steps to minimise the risk of detrimental action against the maker of the PID and the person who is the subject of the disclosure.

3. *Public Interest Disclosures Act 2022*, s 32(2).

4. *Public Interest Disclosures Act 2022*, s 32(1).

# Seeking an injunction to prevent, stop or remedy a detrimental action offence

An injunction can be sought to *prevent* the commission of a detrimental action offence against a person, or to *stop* a person committing a detrimental action offence.<sup>5</sup> An injunction can also be sought to require a person to do something to *remedy* conduct that is a detrimental action offence.

An application for an injunction must be made to the Supreme Court. An application for an injunction can be made by:

- the maker of a PID
- another person that detrimental action has been, or may be, taken against
- an integrity agency (for example, the Independent Commission Against Corruption or the Ombudsman)
- another agency — but only with prior written approval from the Attorney General.<sup>6</sup>

The following terms of an injunction may be ordered by the court:

- An order restraining a person from engaging in conduct that would constitute a detrimental action offence. This can include an order restraining detrimental action that would result in termination of someone's employment.
- An order requiring a person to do an act or thing to remedy conduct that constitutes a detrimental action offence. This can include:
  - a formal apology to the person who suffered detrimental action, or
  - reinstating someone to the same or similar role if their employment has been terminated.<sup>7</sup>

Additionally, where the PID maker applies to a court seeking an injunction, they are generally not liable to pay costs incurred by another party to the proceedings.<sup>8</sup>

**Important note:** When integrity agencies apply for injunctions, they do so on behalf of the person who alleges a detrimental action offence has or will occur against them.

5. *Public Interest Disclosures Act 2022*, s 37(1).

6. *Public Interest Disclosures Act 2022*, s 37(1).

7. *Public Interest Disclosures Act 2022*, s 37(4).

8. *Public Interest Disclosures Act 2022*, s 38(1).

## Compensation – detrimental action

If unlawful detrimental action is taken against someone, they are entitled to seek compensation. Under section 35 of the PID Act, a person can initiate court proceedings and seek compensation for injury, damage or loss suffered as a result of the detrimental action being taken against them.<sup>9</sup>

Proceedings for compensation must be commenced against the person who took the detrimental action (**defendant**). Damages recovered may include exemplary damages.<sup>10</sup>

The court may order that the employer of the defendant is liable to pay damages if the court is satisfied that damages are recoverable under section 35 and the person who took the detrimental action did so in connection with their position or role as an employee.<sup>11</sup>

The defendant will be found liable in damages if the court is satisfied that:

- They had the requisite suspicion, belief and awareness when taking the detrimental action that:
  - the person has made, may have made, may make or proposes to make a PID, or
  - is, has been or may be investigating, or proposes to investigate serious wrongdoing (note, the investigation does not need to be in response to the making of a voluntary PID).
- The suspicion, belief or awareness of the defendant was a contributing factor in taking the detrimental action.<sup>12</sup>

There is a reversed onus of proof for compensation proceedings.<sup>13</sup> The person seeking compensation must show that they suffered detriment by the action, or inaction, of the defendant. Once they have done that, the onus shifts to the defendant who must prove that they either did not have the suspicion, belief or awareness of a PID having been made or if they did have a suspicion, awareness or belief of a PID being made, that this was not a contributing factor in taking the detrimental action.

---

9. *Public Interest Disclosures Act 2022*, s 35(1).

10. *Public Interest Disclosures Act 2022*, s 35(6).

11. *Public Interest Disclosures Act 2022*, s 36.

12. *Public Interest Disclosures Act 2022*, s 35(1).

13. *Public Interest Disclosures Act 2022*, s 35(4).

## Immunity from civil and criminal liability

Public officials are often subject to a duty of confidentiality that prevents them from disclosing certain information they obtain or become aware of through their work as a public official. This duty of confidentiality does not have to be legislated and may be an obligation which is set out in another document, such as a code of conduct. There may also be 'secrecy provisions' in the legislation which governs their work, including some legislation that makes the unauthorised disclosure of information a criminal offence.

Sometimes, in order to make a PID, public officials will need to breach or disregard such confidentiality duties. The protections in the PID Act mean that, if that happens, the public official cannot:

- be sued for breaching a duty of confidentiality, secrecy or another restriction on disclosure of the information
- be criminally charged for breaching a law or code of conduct that imposes a duty of confidentiality in relation to disclosure of information
- have disciplinary action taken against them.<sup>14</sup>

This protection exists because the PID Act presumes that it is always in the public interest for a public official to make a PID, and this public interest overrides any public interest there might otherwise be in maintaining the usual confidentiality and secrecy obligations imposed upon public officials.

---

14. *Public Interest Disclosures Act 2022*, s 40(1).



# Confidentiality

Under section 64(1) of the PID Act, public officials and agencies must not disclose information that identifies or tends to identify a person as the maker of a voluntary PID, unless the disclosure is permitted by the PID Act.

Information tending to identify the maker of a voluntary PID is known as *'identifying information'*. It can include the maker's name, their role, their contact details or other things that, along with other information, might reveal someone as having made a PID. Even specific information in the disclosure, or the very fact that a disclosure has been made, might amount to identifying information.

Identifying information about the maker of a voluntary PID can only be disclosed by a public official or an agency in the following circumstances:

- The maker consents in writing to disclosure of the identifying information.
- It is generally known that the person is the maker because they have voluntarily self-identified as the maker.
- The public official or agency reasonably considers, after consulting with the maker, that disclosure of identifying information is necessary to protect a person from detrimental action.
- It is necessary to disclose the identifying information to a person whose interests are affected by the PID.
- The identifying information has previously been lawfully published.
- The identifying information is disclosed to a medical practitioner or psychologist for the purpose of the practitioner or psychologist providing medical or psychiatric care, treatment or counselling to the individual disclosing the information.
- The identifying information is disclosed for the purpose of court or tribunal proceedings.
- The disclosure of the identifying information is necessary to deal with the disclosure effectively.
- it is otherwise in the public interest to disclose the identifying information.<sup>15</sup>

**Important note:** While the confidentiality obligation only applies to voluntary PIDs, it is best practice for agencies to attempt to maintain confidentiality over a maker's identity wherever possible, whether it is dealing with a mandatory or witness PID, or some other type of complaint or report.

An agency's PID policy must identify what processes it intends to use to ensure that identifying information is not disclosed in breach of the PID Act.

15. *Public Interest Disclosures Act 2022*, s 64(2).

## Protection from liability for own past conduct

A person is not protected against civil and criminal liability for their own past conduct that is disclosed when they make a PID.<sup>16</sup> For example, if a person provides information to a disclosure officer that reveals misconduct or wrongdoing that others have engaged in and the maker has also engaged in that misconduct or wrongdoing, the maker will not be protected from criminal or civil liability relating to their own past conduct that has been disclosed.

However, the Attorney General may give the person an undertaking that the disclosure or the fact of the disclosure (whichever is applicable) will not be used in evidence against them in civil or criminal proceedings (except if proceedings are brought where the disclosure is false).<sup>17</sup> This applies to voluntary, mandatory and witness PIDs.

An undertaking can be given either before the information is provided or after it has been disclosed.<sup>18</sup>

An integrity agency can make a recommendation to the Attorney General that a person be given such an undertaking.<sup>19</sup>

**Important note:** An agency may consider sharing information with an integrity agency under section 83 of the PID Act if the information relates to a recommendation for an undertaking.

---

16. *Public Interest Disclosures Act 2022*, s 41(1).

17. *Public Interest Disclosures Act 2022*, s 41(2), (4).

18. *Public Interest Disclosures Act 2022*, s 41(2).

19. *Public Interest Disclosures Act 2022*, s 41(3).

