

Detrimental action offences and how to refer evidence of detrimental action offences

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What this guideline covers

Despite an agency's duty to assess and manage the risk of detrimental action occurring, there may nevertheless be instances where a detrimental action offence takes place. If this happens, agencies are required to refer evidence and information to certain agencies under the *Public Interest Disclosures Act 2022* (**PID Act**).

Agencies also need to be able to detect when a detrimental action offence has occurred so that appropriate action can be taken in response.

This guideline explains elements of the detrimental action offence and how agencies can refer evidence of detrimental action offences to a relevant agency for investigation.

Agencies must also, of course, ensure that their own actions (or inactions) do not constitute or involve unlawful detrimental action.

Detrimental action offence

Under section 33 of the PID Act, it is a criminal offence to take detrimental action against both PID makers and investigators. The offence applies to detrimental action taken against:

- (a) a person who has made a public interest disclosure (**PID**), whether that be a voluntary PID, mandatory PID or witness PID,
- (b) a person who others suspect or believe has made a PID (even if they have not) or who others suspect, believe or know may make a PID in the future, and
- (c) a person who is, has been or may be investigating, or proposes to investigate, serious wrongdoing. This is not limited to an investigation that relates to or arises from a voluntary PID or constitutes dealing the voluntary PID.

A person will have committed a detrimental action offence if the following 3 elements are proven:

1. the person has taken detrimental action, which includes dismissal, bullying, harassment or discrimination,
and
2. the person suspected, believed or was aware when taking the detrimental action that the other person:
 - o has made, may have made, may make or proposes to make a PID, or
 - o is, has been or may be investigating, or proposes to investigate, serious wrongdoing, whether or not the investigation relates to or arises from a voluntary PID or constitutes dealing with the voluntary PID,and
3. this suspicion, belief or awareness is a contributing factor to the taking of the detrimental action.¹

In a prosecution for the offence, the prosecution must prove (beyond a reasonable doubt) that the person took detrimental action and, if applicable, that it was not reasonable management action.

If a person accused of taking detrimental action raises that the action taken was reasonable management action, the prosecution will additionally have to prove that the action taken was not reasonable management action.

However, once that has been proven, the accused person bears the onus of proving (on the balance of probabilities) the following:

- a) that the accused did not have the suspicion, belief or awareness of a PID being made (including the suspicion, belief or awareness that a person may have made, may make or proposes to make a PID) when taking that detrimental action, or
- b) if the accused did have the suspicion, belief or awareness of a PID, that it was not a contributing factor to the taking of that detrimental action.²

Proceedings for a detrimental action offence can be commenced within 3 years after the offence is alleged to have been committed. The maximum penalty for this offence is 200 penalty units or 5 years imprisonment, or both.

If a person accused of taking detrimental action raises that the action taken was reasonable management action, the prosecution will additionally have to prove that the action taken was not reasonable management action.

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

2. *Public Interest Disclosures Act 2022*, s 33(4).

Reasonable management action taken by someone in relation to a person who made or may make a PID is not considered to be an offence under this section. Further information on reasonable management action can be found in the guideline *Assessing and managing the risk of detrimental action*. This means that reasonable management action (such as justified performance appraisals) can continue to be taken against someone who has made a PID (provided the action is reasonable, and the PID itself is not a contributing factor for taking any such action).

Important note: A person who suffers detrimental action may bring a claim for damages against the person who allegedly took the detrimental action against them. This is separate to the process outlined in this guideline. Further information on the right to compensation can be found in the guideline *Protections in the PID Act*.

Elements of the detrimental action offence

(1) What is detrimental action?

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

Detriment to a person includes:

1. injury, damage or loss
2. property damage
3. reputational damage
4. intimidation, bullying or harassment
5. unfavourable treatment in relation to another person's job
6. discrimination, prejudice or adverse treatment
7. disciplinary proceedings or disciplinary action, or
8. any other type of disadvantage.⁴

(2) Suspicion, belief or awareness

The fact the suspicion, belief or awareness regarding the PID was mistaken is not a defence to a prosecution for a detrimental action offence.⁵ This means that even if a person has not made a PID, if someone takes detrimental action against them with the mistaken belief that they did, this may constitute a criminal offence under the PID Act.

The offence also includes action that is taken because of a belief or suspicion that a person may (i.e., in the future) make a PID. This means the offence covers pre-emptive detrimental action – like dismissing someone before they get a chance to make the PID.

(3) What does 'contributing factor' mean?

There may be several reasons why someone takes detrimental action against a person. The person's suspicion, belief or awareness of the PID does not need to be the sole or main reason they took detrimental action, however it needs to have contributed to the decision to take detrimental action. To prove that it was a contributing factor, there must be a link between the person's mental state (i.e., their suspicion, belief or awareness) and the detrimental action they then took.

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

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

5. *Public Interest Disclosures Act 2022*, s 33(2).

When do agencies need to refer evidence about detrimental action offences

Under section 34(1) of the PID Act, if an agency has evidence of a detrimental action offence, then the agency must refer that evidence to:

1. the Commissioner of Police, and
2. depending on the evidence, either:
 - o the Law Enforcement Conduct Commission (LECC) but only if the evidence relates to a member of the NSW Police Force or the NSW Crime Commission, or
 - o the Independent Commission Against Corruption (ICAC), in all other cases.⁶

If after receipt and review of the evidence referred by an agency, the Commissioner of Police, ICAC or LECC form the opinion that a detrimental action offence has been committed, they must refer the alleged offence to the Director of Public Prosecutions and provide a brief of evidence relating to the alleged offence. However, if the alleged offence relates to the Director of Public Prosecutions, the alleged offence and brief of evidence must instead be referred to the Attorney-General.⁷

The below table explains the evidence that should be referred and how it should be referred to each person/agency when referring evidence under section 34(1) of the PID Act.

| Person/agency | What evidence should the agency provide? | How should the evidence be provided? |
|------------------------|---|---|
| Commissioner of Police | <p>The Commissioner has provided the following information regarding referral of evidence:</p> <p>When agencies refer evidence of a detrimental action offence to the Commissioner of Police they should include details about the alleged offence including:</p> <ul style="list-style-type: none"> o the name and contact details of the victim and alleged offender, as well as their relationship i.e. manager and direct report o the type of ‘detriment’ that was taken and the timeframe it occurred o specific dates of any significant incidents o details of any interim risk management strategies implemented by the agency to reduce the likelihood of any further detrimental action to the victim, and o confirmation as to whether witnesses are prepared to attend court to give evidence <p>Agencies should also provide a written assessment as to how the evidence meets the criteria for detrimental action under the PID Act, as well as any supporting material such as emails, file notes, complaint documents, statements by investigators, statements by witnesses, relevant CCTV and relevant rostering information (if available).</p> | <p>An agency may provide the materials listed under ‘What evidence should the agency provide?’ to the Commissioner of Police by providing them to police within the agency’s local Police Area Command/Police District.</p> |

6. *Public Interest Disclosures Act 2022* s 34(1).

7. *Public Interest Disclosures Act 2022* s 34(2).

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| <p>ICAC</p> | <p>ICAC has provided the following information about referral of evidence:</p> <p>In practice, many matters that are reportable to the ICAC under section 34(1) of the PID Act will also be reportable under section 11 of the <i>Independent Commission Against Corruption Act 1988 (ICAC Act)</i>, which requires principal officers of NSW public authorities to report “any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct”. This is because evidence of a detrimental action offence could also fall within the definition of corrupt conduct as set out in ss 7-9 of the ICAC Act. In this regard:</p> <ul style="list-style-type: none"> • agencies are not expected to report the same matter to the ICAC in two different ways • when reporting, it would assist the ICAC if agencies identified which matters are classified as falling within s 34(1) • if in any doubt, the best approach is to report early, with as much detail as possible, and • agencies should advise whether any alleged detrimental action is ongoing or historical, and what measures are in place to limit the detrimental action. | <p>Agencies can refer to the ICAC’s published “Section 11 reporting guidelines for principal officers” to manage reports that must be made under s 34(1): <u><i>Reporting guidelines for principal officers</i></u>.</p> |
| <p>LECC (but only if the evidence relates to a member of the NSWPF or NSW Crime Commission)</p> | <p>The LECC has provided the following information about referral of evidence:</p> <p>Referrals of detrimental action should be provided to the LECC in writing and this should include any supporting evidence.</p> | <p>Agencies can refer evidence to the LECC by email to <u>contactus@lecc.nsw.gov.au</u>. The email should be addressed to the Director Oversight Investigations.</p> <p>Evidence can also be sent to the LECC’s mailing address, GPO Box 3880, Sydney, NSW 2001. Any correspondence should be addressed to the Director Oversight Investigations.</p> |

Notifying the Ombudsman of reportable events concerning detrimental action

An agency must notify the Ombudsman as soon as reasonably practicable after the agency:

- becomes aware of an allegation that a detrimental action offence has been committed by a public official associated with the agency
- has referred evidence to the Commissioner of Police, ICAC or LECC under s 34(1) of the PID Act
- becomes aware of the outcome of a prosecution against a public official associated with the agency for the commission of a detrimental action offence, or
- otherwise becomes aware of a detrimental action offence that has been committed or alleged and arises from a public interest disclosure relating to the agency.⁸

An agency is considered to be “aware” of one of the above matters if a disclosure officer for the agency is either aware or ought reasonably be aware of the matter.⁹

Further guidance on notifications to the Ombudsman can be found in the guideline *Reporting to the Ombudsman*.

8. *Public Interest Disclosures Act 2022* s 34(4).

9. *Public Interest Disclosures Act 2022* s 34(6).

