

Reporting to Members of Parliament and journalists

1. Objectives

- To outline the reporting pathway available in certain circumstances under the *Public Interest Disclosures Act 1994* (PID Act) to Members of Parliament (MPs) or journalists.
- To provide advice on how to respond when a public authority becomes aware that a staff member has reported wrongdoing to an MP or a journalist.
- To emphasise the importance of public authorities in keeping reporters informed of the progress of any investigation.

2. Why is this important?

The PID Act applies to reports of wrongdoing by staff if they are made to a principal officer, nominated internal people or positions, investigating authorities or, in limited circumstances, MPs or journalists. See *Guideline B4: Reporting pathways*.

Public authorities or investigating authorities are in most situations best placed to act on reports of wrongdoing by investigating and resolving problems, and the focus of the PID Act on reporting to these authorities is a reflection of that. This approach also helps to maintain the confidentiality of all involved, where possible and appropriate, and protect the reputation and interests of staff who are the subjects of reports, particularly if the allegations turn out to be unfounded.

Although most public sector staff who currently report wrongdoing do so internally, the PID Act recognises that it is in the public interest that staff are able to report to MPs or journalists where other reporting channels have failed to effectively deal with issues in a timely manner. Many of the protections available to reporters under the Act aim to address the risks that can arise when information about wrongdoing becomes public or known within the workplace – such as the threat of defamation action, or disciplinary or criminal action for breaching confidentiality.

This alternative avenue for the making of public interest disclosures (PIDs) also serves as an incentive for authorities to listen to reporters, act promptly on their concerns and support them. Trust in the authority encourages reporting through internal channels and distrust makes external reporting more likely.¹

The *Whistling While They Work* research found that almost all reporters bring wrongdoing to the attention of management before looking elsewhere for solutions:

- Journalists and MPs receive 1.8% of reports – although only 0.5% of reports are made to them initially.
- Almost all reporters (97%) first report wrongdoing inside their organisation.
- Less than 12% of reporters ever go outside their organisation.²

3. Legal and management obligations

3.1 PID Act

a) When does the PID Act apply to reports to MPs or journalists?

Section 19 of the PID Act provides that reports of wrongdoing made to MPs or journalists are only PIDs if the following conditions are met:

- The reporter must have made substantially the same disclosure to an investigating authority, public authority or appropriate officer of a public authority.
- The investigating authority, public authority or an officer to whom the disclosure was made or referred either:
 - › decided not to investigate the matter
 - › decided to investigate but did not complete their investigation within six months of the disclosure being made
 - › recommended not taking any action after investigating the matter
 - › failed to tell the reporter whether the matter was to be investigated within six months of the disclosure being made.
- The reporter has reasonable grounds for believing that the disclosure is substantially true.
- The disclosure must be substantially true.

Section 4 of the PID Act defines:

- 'Investigate' as including to inquire or audit.
- 'Journalist' as a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media.³

b) What does it mean that the reporter has 'reasonable grounds for believing'?

A belief is more than a suspicion. This means that the person accepts that the allegations are substantially true.

The test applied for 'reasonable grounds' is whether, from an objective viewpoint, the basis for the person's belief is reasonable. That is, would a reasonable person in the circumstances believe that wrongdoing had occurred? The belief cannot be based on personal favouritism, animosity or prejudice.

c) What does 'substantially true' mean?

In practice, the requirement that the disclosure must be 'substantially true' will generally be very difficult to determine. The standard of proof is that it is more probable than not that the allegations are true.⁴

The requirement for a disclosure to be 'substantially true' generally relates to circumstances where a reporter may seek the protections of the PID Act to defend themselves against defamation or disciplinary or criminal action or when seeking compensation because detrimental action has been taken against them in reprisal for reporting wrongdoing to an MP or journalist. The reporter must be able to conclusively prove in the relevant tribunal or court that the substance of the disclosed allegations is true.

For example, a staff member makes allegations about the corrupt conduct of their manager to a journalist who publishes them in a newspaper article. The manager then sues the staff member and the journalist for defamation. The staff member only has a defence of absolute privilege under s.21 of the PID Act if they are able to prove to the satisfaction of the court that the alleged corrupt conduct of the manager actually occurred, and that the staff member had already raised the issue with either their organisation or the Independent Commission Against Corruption (ICAC).

d) What is the role of MPs under the PID Act?

Section 4A(1)(b) of the PID Act provides that an MP is a public official under the Act, 'but not for the purposes of a disclosure made by the member' – that is, MPs cannot make PIDs, but can receive PIDs and have PIDs made about them.

As a public official, MPs can refer PIDs that they receive to the relevant public authority or investigating authority. Section 26 of the PID Act provides that, if a public official receives a disclosure and does not belong to the public authority or investigating authority to which the disclosure relates, they must refer the disclosure to the principal officer of the authority concerned or to an investigating authority for investigation or other action. The public official may communicate to the public authority or investigating authority any information that they have obtained during any investigation of the matter.

However, section 23 of the PID Act states that nothing in the Act affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.

4. What does this mean for public authorities?

4.1 Internal reporting policy

An internal reporting policy needs to detail all external reporting pathways available to staff.

Staff should be encouraged to report wrongdoing within the authority, but should also be given clear advice that they can make a PID to an external investigating authority, or to an MP or journalist in certain circumstances and what these circumstances are. In particular, staff should be told that, for a report of wrongdoing to an MP or journalist to be protected under the PID Act, they will need to be able to prove that they have reasonable grounds for believing the disclosure is substantially true and are in a position to be able to prove that it is in fact substantially true.

See the *Model internal reporting policy – state government* and *Model internal reporting policy – local government*.

4.2 Providing reporters with information

It is important reporters are kept informed of what decisions are made in relation to wrongdoing they have reported and that relevant advice is provided on the progress of dealing with the report.

While the PID Act requires an internal reporting policy to include that a copy of the policy and a written acknowledgement be provided to a person reporting wrongdoing within 45 days of the report being made, an authority should acknowledge the report much sooner in practice. We recommend that the policy include a commitment to attempt to get this information to the reporter as soon as practicable, and preferably within two working days from the date they make their report.

It is also important to ensure that the reporter is provided with information about whether a decision has been made to investigate the matter or, after investigating the matter, any recommended actions, as well as the reasons for these decisions. Failing to provide the reporter with information about the response within six months of the PID being made may trigger a subsequent report to an MP or journalist as provided for in the PID Act. Without sufficient information to demonstrate that adequate and appropriate action was taken or proposed in relation to their PID, it will be difficult for a reporter to properly assess whether it is warranted or appropriate to disclose to an MP or journalist. See *Guideline D2: Information, advice and feedback to reporters*.

4.3 Responding to reports made to MPs and journalists

An authority may become aware that a staff member has reported wrongdoing to an MP or journalist because an MP or investigating authority has referred the matter to the authority, or the matter has been raised in public. If a genuine PID has been made, the authority should respect the staff member's decision to report in this way and make every effort to resolve their concerns.

a) Assess the report

When an authority becomes aware of a report made to an MP or journalist – and it has not already been assessed by an investigating authority – it should consider:

- whether the report is likely to be a PID
- whether it is a PID or not, if action needs to be taken in response to the report, taking into consideration:
 - › the history of the matter
 - › whether the issues raised have previously been addressed
 - › whether the report warrants further action or investigation and, if so, who the appropriate staff are to do this.

See *Guideline C3: Assessing and streaming internal reports*.

b) Assess and manage the risks

The reasons the reporter went to an MP or journalist needs to be considered as well as the resulting impact on the reporter, the subjects of the report and the authority. For example:

- What is the likelihood of the staff member being exposed to reprisal if their identity is known?
- Is there a risk of related conflict or other disruption in the relevant workplace?
- What systems and strategies should be established to prevent and contain any such risk of reprisals and related workplace conflict?
- Has the report damaged the reputation of the subjects of the report?

- How will the authority appropriately and ethically manage any risks to its reputation given the public nature of the allegations?

See *Guidelines C4: Managing risk of reprisal and conflict*
D4: Preventing and containing reprisals and conflict
C1: People the subject of a report

If the reporter has been identified in the media, it could be assumed that their identity is 'generally known' – see section 22 of the PID Act. This is an exception to the confidentiality requirements on public authorities, investigating authorities or public officials who receive a PID. In these circumstances, it may be better to adopt a proactive approach to managing potential workplace conflict. See *Guideline C7: Confidentiality*.

Even if the source of the information is not known, it may be appropriate to proactively manage the relevant workplace and communicate with staff about any action the authority is taking. See *Guideline D4: Preventing and containing reprisals and conflict*.

c) Communicate with the reporter

The authority should communicate with reporters if their identity is known. When assessing the report and related risks, they should be contacted to obtain further information and determine what outcome they expect. The authority should also offer to appoint a support person to assist the reporter in the workplace. Depending on how the matter is being dealt with, it may be appropriate to liaise with any relevant investigating authority.

Continue to communicate with the reporter by:

- providing them written advice about any action that has been taken or will be taken in response to the report
- keeping them regularly informed about the progress of the matter, if relevant
- informing them of the outcomes of any investigation conducted, and any remedial action or organisational reform taken in response to the findings.

See *Guideline D2: Information, advice and feedback to reporters*.

4.4 What should an MP do if wrongdoing is reported to them?

The vast majority of enquiries that MPs receive and try to resolve on behalf of constituents will not be PIDs. However, if MPs receive a report of wrongdoing by a public official, they should determine whether the report is likely to be a PID.

See *Guideline C3: Assessing and streaming internal reports*.

MPs do not have the authority to investigate reports of wrongdoing. If an investigation appears warranted, the MP can decide which public authority or investigating authority can appropriately deal with the report, taking into account the information provided, and refer the matter to them. MPs can contact a public authority or investigating authority to discuss the information they have received, whether the authority is already investigating the matter and appropriate referral options.

MPs have the discretion to raise the information in Parliament at any time, in which case the reporter's identity may then become public. Section 23 of the PID Act provides that nothing in it affects the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament. However, MPs might wish to consider the likelihood that the identity of the reporter will remain confidential, the status of any ongoing investigation, and any possible damage to the reputation of the subjects of the report prior to the completion of

an investigation before raising information contained in a PID in Parliament (see text box). The reporter may not be aware of the full circumstances of the alleged wrongdoing.

While they do not apply in NSW, the *Standing rules and orders of the Legislative Assembly* in Queensland provide guidelines for MPs about when and how PIDs should be revealed in a parliamentary proceeding. They state that MPs should exercise care to avoid saying anything inside the house about a PID which:

- could lead to the person who made it being unnecessarily identified – unless such people have consented to the disclosure of their identity
- could cause unnecessary damage to the reputation of people before any investigation has been completed
- may jeopardise any investigation of a PID by the appropriate entities.

If an MP refers a PID to an appropriate entity to investigate, they should avoid revealing the substance of the PID or the referral in any public parliamentary proceedings, unless:

- after inquiry with an appropriate entity, the MP is not satisfied that the matter is being investigated or otherwise resolved
- the MP has a reasonable belief that further disclosure in a parliamentary proceeding is justified to prevent harm to any person
- the MP decides to also bring the PID to the attention of a committee of the House that has responsibility for the area about which the matter relates.⁵

5. Your questions answered

What advice should we provide to staff members who are considering reporting to an MP or journalist?

Public sector employees have a duty to keep official information confidential, as do most contractors as part of their employment agreements. The PID Act permits reports to MPs and journalists, but only as a last resort.

Staff reporting to an MP or journalist should be certain that their disclosure will meet the conditions outlined in s.19 of the PID Act if they wish to rely on the protections provided by the Act. In particular, they should seek appropriate advice about whether the Act would apply in their individual circumstances. Before reporting, they could consider contacting the authority dealing with their report to inquire about the status of any action taken in response.

Staff should also be aware that they have no control over how their information will be treated once it is provided to an MP or journalist – and consider carefully the risk that their identity could become public knowledge. MPs have the discretion to raise the information in Parliament at any time and journalists are not required to maintain confidentiality because s.22 of the PID Act does not apply to them.

Does the PID Act apply to a report made to the Minister responsible for an authority?

A report of wrongdoing to the Minister responsible for an authority is considered to be identical to a report to any other MP. Importantly, this means that the conditions outlined under s.19 of the PID Act must be met for a report to be considered a PID.

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Authorities should advise the Minister's office to encourage staff to make any reports of wrongdoing directly to the authority or to an external investigating authority.

Does the PID Act apply to a report about the conduct of an MP?

For the PID Act to apply, any reports about the conduct of an MP (including a Minister) must be made in accordance with an official procedure established by the Department of Parliamentary Services, the Department of the Legislative Assembly or the Department of the Legislative Council – see section 14(2A). Reports can be made either to the principal officer or another nominated officer of these public authorities. The conduct reported must constitute corrupt conduct, maladministration or a serious and substantial waste of public money.⁶ Such reports can also be made to the ICAC in relation to alleged corrupt conduct.

The PID Act will only apply to reports about the conduct of a Minister in their capacity as an MP if these conditions are met. This means that the Act will not apply if a report is made to the authority for which they are responsible about their conduct in their capacity as a Minister – because the Minister is not an employee of the authority.

Does the PID Act apply to a report made by an MP or Minister?

Section 4A(1)(b) of the PID Act provides that an MP is a public official under the Act, 'but not for the purposes of a disclosure made by the member'. This means that – although an MP is not prevented from reporting any of the matters set out in the Act – their report will not be a PID and none of the obligations or protections under the Act will apply.

However, MPs are protected by parliamentary privilege if they raise their concerns in Parliament. MPs, like any member of the public, may also receive protections – that are largely equivalent to those provided in the PID Act – for raising or reporting wrongdoing to an external investigating authority, such as under the *Ombudsman Act 1974* or the *Independent Commission Against Corruption Act 1988*.

A report of wrongdoing made by a staff member was assessed as a PID and they were notified that it would be investigated. However the investigation is ongoing seven months later. Will the PID Act apply if the reporter discloses the same information to an MP or journalist before the investigation is finalised?

This highlights the importance of maintaining regular contact with reporters throughout any investigation process. Even if certain details cannot be provided to them, it is important that reporters are aware of the steps that have been taken and will still be taken in response to a PID.

In this situation, it would appear as though the first two conditions under s.19 of the PID Act have been met – the reporter made substantially the same disclosure to a public authority which decided to investigate but did not complete their investigation within six months of the disclosure being made.

However, in seeking the protections provided by the PID Act, the reporter would have to be able to prove to the satisfaction of a court or tribunal not only that they have reasonable grounds for believing that their disclosure is substantially true, but also that the disclosure is indeed substantially true. If the investigation by the public authority did not end up substantiating the reporter's allegations, it is likely to be difficult for them to prove to the satisfaction of a court or tribunal that their disclosure is 'substantially true' in the face of opposing evidence.

6. Additional resources

- *Model internal reporting policy – state government*
- *Model internal reporting policy – local government*
- *Guideline B4: Reporting pathways*
- *Guideline C1: People the subject of a report*
- *Guideline C3: Assessing and streaming internal reports*
- *Guideline C4: Managing risk of reprisals and conflict*
- *Guideline C7: Confidentiality*
- *Guideline D2: Information, advice and feedback to reporters*
- *Guideline D4: Preventing and containing reprisals and conflict*
- *Independent Commission Against Corruption Act 1988*
- *Ombudsman Act 1974*
- *Public Interest Disclosures Act 1994*

Endnotes

- 1 McLain, DL & Keenan, JP 1999, 'Risk, information, and the decision about response to wrongdoing in an organisation', *Journal of Business Ethics*, vol. 19, no. 3, pp. 255–271.
- 2 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, pp. 88, 91, 92.
- 3 The *Evidence Act 1995* defines 'news medium' as a medium for the dissemination to the public or a section of the public of news and observations on news.
- 4 *Henry v British Broadcasting Corporation* [2006] EWHC 386 (QB).
- 5 Legislative Assembly of Queensland 2004, *Standing rules and orders of the Legislative Assembly*, Brisbane.
- 6 MPs do not have obligations under the *Government Information (Public Access) Act 2009* and *Local Government Act 1993*. However MPs can be public officials in another capacity – such as a local councillor.

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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