

Responding to allegations of reprisal

Reprisal

This guideline provides advice to public authorities on responding to allegations of detrimental action in reprisal for the making of a public interest disclosure.

1. Why is this important?

Sometimes a report of wrongdoing can result in an individual being subjected to reprisal. Reprisal may also be directed at individuals who are believed to have made the report, even if they did not make the report themselves.

Staff are integral to revealing and addressing wrongdoing in the workplace. For many, their willingness to come forward will be based on their perception of whether they will face detriment for doing so. A survey of NSW state government employees found that only 49% of respondents said they were confident that they would be protected from reprisal for reporting misconduct/wrongdoing in the workplace.¹ It is therefore important for managers to take proactive action to ensure that reporters can readily make disclosures in safe, supportive reporting environments.²

Authorities should implement prevention strategies to reduce the risk of unacceptable behaviour occurring as a result of a report of wrongdoing (see *Guideline C4: Assessing risks of reprisal and conflict* and *Guideline D4: Strategies for managing risks of reprisal and conflict*). However, if allegations of reprisal are raised, it is crucial to effectively manage direct detrimental action as well as other workplace disharmony.

Authorities need to assess and respond to allegations of reprisal effectively and efficiently as this conveys to staff that the behaviour will not be tolerated.

2. Legal and management obligations

2.1. PID Act

The object of the *Public Interest Disclosures Act 1994* (PID Act) is to encourage and facilitate the reporting of wrongdoing in the public sector. One of the ways this is done is by protecting reporters from reprisals as a result of making such a report. Part 3 of the PID Act contains the provisions providing for protection against reprisals, compensation for reprisals and injunctions to prevent reprisals.

a) Criminal offence

Under s.20(1) of the PID Act, it is a criminal offence to take detrimental action substantially in reprisal for the making of a public interest disclosure (PID). In this context, the term substantially means that 'it formed an important real and actual basis for the alleged reprisal'.³

Detrimental action is defined in s.20(2) as action causing, comprising or involving any of the following:

- injury, damage or loss

1. Public Service Commission and ORC International 2016, People matter 2016: NSW public sector employee survey, p. 58.

2. For further information about dealing with misconduct, see Public Service Commission 2014, *Behaving ethically: A guide for NSW government sector employees*.

3. *DPP v Murray Kear* (unreported, New South Wales Local Court, Grogin G, 16 March 2016).

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- intimidation or harassment
- discrimination, disadvantage or adverse treatment in relation to employment
- dismissal from or prejudice in employment
- disciplinary proceedings.

The term 'reprisal' has been interpreted as denoting 'an act of revenge or retribution from an action of another'.⁴

There is a reverse onus of proof for the criminal offence under the PID Act. Once it has demonstrated that the reporter has made a PID and was subjected to detrimental action, the onus then lies on the defendant to prove, to the required evidentiary standard, that the detrimental action was not taken substantially in reprisal for the person making a report.

b) Misconduct

Section 20(1B) of the PID Act states that it is misconduct to take detrimental action substantially in reprisal for the making of a PID.

c) Liability for compensation

Under s.20A of the PID Act, a person who takes detrimental action against another person this is substantially in reprisal for the making of a PID is liable for damages for any loss that the other person suffers as a result of that.

d) Injunctions

Section 20B of the PID Act provides for an injunction as a remedy to prevent detrimental action against an internal reporter. Only an investigating authority – or a public authority with the approval of the Attorney General – can apply for an injunction in the Supreme Court. If the circumstances are significantly urgent, an ex parte application for an interim injunction can be made.

2.2. Work health and safety and duty of care requirements

Reporting wrongdoing can be a difficult process and, if not properly managed, can result in stressful interactions with colleagues and managers. Stress is a legitimate and serious workplace concern and may result in a staff member sustaining a serious injury.

The *Work Health and Safety Act 2011* (WHS Act) states that a person conducting a business or undertaking – which includes public authorities – has a primary duty of care to ensure the health and safety of workers and others. An authority can fulfil this obligation by

doing what they reasonably can to manage health and safety risks. All officers who can make decisions that significantly affect their authority must exercise due diligence to ensure compliance with the Act. Failure to comply with health and safety duties is a serious offence that attracts significant penalties (ss.31-33).

Authorities also have a duty of care under common law to provide a safe workplace for their staff. This means that managers and supervisors are responsible for taking all reasonable steps to prevent inappropriate behaviour at work – which includes harassment, bullying, discrimination and victimisation. Public authorities have been successfully sued for compensation for breaching this duty of care where the staff member has become ill or suffered injury – physically or psychologically – as a result.

Everyone in the workplace has a responsibility to ensure that it is a safe environment, including public officials who have made a report of wrongdoing. Workers have a duty to take reasonable care of their own health and safety and to cooperate with reasonable instructions, policies and procedures.

2.3. State government

Section 69 of the *Government Sector Employment Act 2013* (GSE Act) provides that taking any detrimental action against a person that is substantially in reprisal for the person making a PID is misconduct.

Misconduct also extends to the situation where the subject of allegations of misconduct takes any action substantially in reprisal for the reporter making the disclosure of alleged misconduct. Both the subject officer and the reporter must be employees of a government sector agency.

2.4. Local government

Sections 8.4-8.6 of the Office of Local Government's *Model code of conduct for local councils in NSW* provides that detrimental action must not be taken against a person substantially in reprisal for a complaint they have made or for exercising a function under the code.

3. What does this mean for public authorities?

Any concerns expressed by reporters about fear of reprisals should be seriously and promptly addressed. Ignoring or not dealing with alleged reprisals is, in effect, condoning such action – and problems in the workplace

4. *DPP v Murray Kear*.

are likely to escalate. This may also expose an authority to liability for damages for breaching its duty of care to the reporter if they suffer injury or other loss as a result, particularly if the individual is subjected to further reprisals because of the delay in responding.

If an allegation of reprisal is made, the initial assessment of the risk of reprisal and related workplace conflict should be reviewed – see *Template: PID risk assessment* and *Guideline C4*. Additional support or prevention strategies may need to be implemented – see *Guideline D1: Support strategy for reporters* and *Guideline D4*.

3.1. Principles for responding to allegations of reprisal

The following principles should underpin an authority's assessment and response to allegations of reprisal.

Principle	Action
Accountable and transparent	<ul style="list-style-type: none"> Acting in the best interests of employees. Ensuring accountability for decisions about what action to take. Acting fairly and impartially and without bias. Providing meaningful reasons for decisions to all relevant parties. Taking action in response to allegations. Referring matters where appropriate to the Independent Commission Against Corruption.
Consistent	<ul style="list-style-type: none"> Ensuring actions are consistent. Acting reasonably in response to the circumstances and facts of individual matters.
Proportional	<ul style="list-style-type: none"> Ensuring any action taken is proportionate to the seriousness of the conduct. Taking action to deter future reprisals. Taking remedial action.
Timely	<ul style="list-style-type: none"> Ensuring responses to allegations of reprisal and decision-making in relation to those are timely.

3.2. Conduct that may constitute reprisals

The PID Act provides protection from detrimental action taken in reprisal for the making of a PID. The 'detrimental action' is the negative action itself. The term 'reprisal' is the key – the motivation or the reason why the person took the action.

Most commonly, reprisals will involve a series of incidents or occurrences over time rather than a single event like termination of employment. Research has shown that the most common types of reprisal include: threats, intimidation, harassment or torment, undermining of authority, heavier scrutiny of work, ostracism, questioning of motives, unsafe or humiliating work, and being made to work with those involved in wrongdoing. The least common include: loss of entitlements, dismissal, suspension, demotion, performance management and assault.⁵

3.3. Perceptions of reprisal

A challenge for authorities is that reporters may perceive other people's behaviour towards them as reprisal for making a PID when, objectively, this is not always the case. This is key when deciding what action to take in response to allegations of reprisal. Despite this, an authority is responsible for treating all reporters respectfully and responding to any allegations of reprisal quickly, thoroughly and appropriately.⁶ Failure to do so may dissuade other staff from speaking up in future.

Some individuals will be more sensitive to perceptions of reprisal as a result of the stress they are under, deteriorating relationships in the workplace and feelings of isolation. This may be more likely if the reporter is not assured that the authority is treating the matter seriously or kept informed of progress.

Providing structured support to the reporter throughout the investigation process may also help prevent action being perceived as reprisal – see *Guideline D1*.

a) Reasonable management action

A reporter may perceive reasonable management action as retaliation for the making of a report. This may need to be discussed with a reporter and an explanation given as to why the proposed action is considered to be reasonable and justifiable.

Allegations of reprisal in the context of management action which an authority claims to be reasonable need to be taken seriously and carefully considered. It may

5. 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. 128–129.

6. Ethics Resource Centre 2012, *Retaliation in the workplace: Why it matters and what companies can do about it*.

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be possible that reprisals have been taken but those actions are presented as reasonable management action. It may also be possible that action is taken which has a detrimental impact but the impacts were not fully understood by management at the time (e.g. workplace restructuring following a PID).⁷

In some cases authorities may suspect that a reporter has made a pre-emptive disclosure or purported PID because they are concerned they will be subjected to management action in the future. An individual may later claim that management action has been taken against them in reprisal. An authority should respond to allegations of reprisal under these circumstances in the same way it would otherwise.

For further information about:

- independently verifying work performance see *Guideline D4*
- reasonable management action when a reporter is involved in wrongdoing see *Guideline D3: Reporters involved in wrongdoing*.

3.4. Assessing and responding to allegations of reprisal

Supervisors should notify the disclosures coordinator or principal officer if they suspect that reprisal against a staff member is occurring or has occurred or if any allegations are made to them. Where an authority is aware of reprisal action against a reporter, the authority has a responsibility to take all possible steps to stop that activity and protect the reporter.

Authorities should conduct an initial assessment and decide:

- whether the report of reprisal itself constitutes a PID
- whether to make a section 11 notification to the Independent Commission Against Corruption (ICAC) where they have formed a reasonable suspicion of corrupt conduct
- whether the matter warrants investigation or what other action should be taken to resolve the issues raised
- whether strategies need to be developed to support the reporter and prevent further reprisal action.

In many cases the most effective and appropriate response strategy will be some alternative to a formal investigation. However, an authority may need to conduct some preliminary fact finding in order to obtain information to make a fair and informed decision.

The reporter should be informed of any progress and the outcome of any investigation or other action taken in response to the allegation. Authorities must provide reasons for decisions to the reporter and other information and advice where appropriate.

a) Factors to consider

Consider the following factors in determining the appropriate response to allegations of reprisal.

b) Options for responding

If, on assessment, there is no evidence of reprisal or some other appropriate reason, an authority may decide to take no further action. The reporter should be provided with information and advice explaining this outcome. Feelings of isolation in the workplace may be best addressed by developing a support strategy in consultation with the reporter (see *Guideline D1*).

In circumstances where there is no evidence of reprisal as defined in the PID Act, but unreasonable conduct or concerning behaviour is identified or substantiated, the authority has a responsibility to take some action to remedy the situation.

Authorities have many options to consider when responding to allegations of reprisal and should consider what option would best address the issues raised. The authority needs to be guided by what is necessary and appropriate in the circumstances. Some alternatives to investigation are detailed in section 4.5 – although they are not exhaustive and may be used by authorities in conjunction with another informal or formal response.

If it appears that allegations of reprisal may have some substance or a more detailed process is required, public authorities could consider:

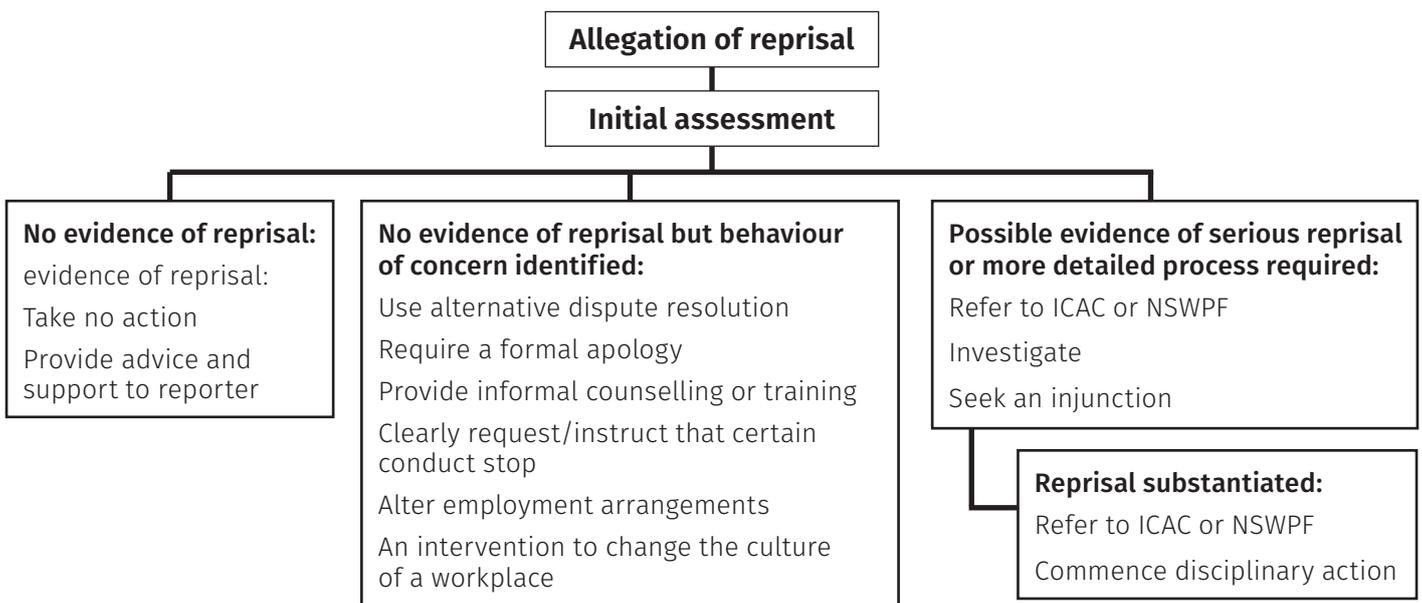
- immediately referring the evidence to the ICAC or the NSWPF
- conducting an investigation
- suspending the subject officer pending the outcome of an investigation
- seeking an injunction through the courts to prevent future or continuing conduct.

If any reprisal action or misconduct is substantiated the seriousness and type of the conduct that the reporter was subjected to will determine the authority's options to consider for responding to the conduct. However, authorities should consider commencing disciplinary action and referring the matter to the ICAC or the NSWPF.

7. Brown, p. 91.

Factor	Reason
Evidence in support of allegations	<p>Initial considerations may include the following:</p> <ul style="list-style-type: none"> • Does it appear as though a PID was made? • Is there any prima facie evidence of detrimental action having been taken? Has the reporter supplied enough information for you to identify what occurred and when? • Are there any witnesses? • Is there any evidence that the person alleged to have taken reprisals was aware that a PID had been made?
Seriousness of the alleged conduct	<p>The more serious the conduct that is alleged to have occurred, the greater the need to investigate it. In most cases, low level bullying and harassment could be resolved by management intervention and informal resolution. A more formal response may be required if the alleged conduct has been occurring for a long period of time. Serious conduct including termination of employment, physical violence or threats of physical violence should be investigated. Criminal matters should be referred to the NSW Police Force.</p>
Seniority of person(s) alleged to have engaged in reprisal	<p>The more senior the person who is alleged to have engaged in reprisal ('subject officer'), the more likely that the allegations should be investigated. If the subject officer is more senior than the reporter, there is likely to be a power balance between them and the reporter. The effect on the reporter is likely to be more serious and potentially ongoing.</p>
Number of people alleged to have engaged in reprisal	<p>If a whole team or work unit is involved in the reprisal then this is likely to be indicative of a widespread cultural issue for which informal resolution may not be appropriate. The reporter is also likely to suffer more significant detriment, including psychological harm, if multiple parties are involved.</p>
Motivation or intention of person(s) alleged to have engaged in reprisal	<p>It may be that the subject officer(s) inadvertently took the detrimental action – for example, because they did not know a report had been made or did not know it was detrimental action. In these cases, informal counselling or training may achieve a better resolution than a formal investigation.</p>
How public or overt the alleged conduct was	<p>Where reprisals are public or overt, there is a greater need for the authority to demonstrate their commitment to taking such matters seriously. Consider how others in the workplace would perceive any failure to take action and the influence this would have on the reporting culture.</p>
Expectations of the reporter	<p>What are the expectations of the reporter – for the conduct to stop, to receive an apology or vindication? While in many cases the desired outcome will not be clear initially, consider whether the intention is to restore workplace relationships or to address conduct via a formal disciplinary process.</p>
History of conflict and previous attempts at resolution	<p>If there is an existing and extensive history of conflict or dissatisfaction in the workplace which existed prior to the PID being made, it's unlikely that an investigation will be able to establish that the detrimental action was motivated by revenge or retribution for the making of the PID. In such cases it may be better for managers to concentrate on taking action to stop any further detrimental action, and attempt to repair the existing relationship between the two parties and resolve the issues between them.</p>
Ongoing working relationship	<p>If the allegations are not serious enough to lead to termination, it is highly likely that the parties involved will be required to continue to work together. In most cases where the parties need to maintain a professional working relationship, going through the process of investigation will damage relations in circumstances where they are already strained. An approach aimed at resolving the existing issues between the parties, such as alternative dispute resolution, may be most appropriate.</p>

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3.5. Alternatives to investigations

Alternatives to investigations may enable a quicker resolution of issues without creating further conflict or distress for the individuals involved. If the subject officer or colleagues are not dismissed following any investigation the working relationship between the parties may become so strained as to be untenable. Parties may be more inclined to be involved in a less formal approach and the process may be able to be conducted in a more confidential manner, as fewer people are involved.

The Public Service Commission has published guidelines for the NSW government sector to prevent and manage unreasonable behaviour and bullying. The guideline emphasises early resolution as soon as unreasonable behaviour occurs, focusing on restoring workplace harmony and productivity, and preventing recurrence of the behaviour. Formal action may result in a defensive position from the person facing allegations and possible sanctions, in fact limiting the opportunity to resolve the issues raised. In some cases, such as those involving allegations of serious harm and/or where it is unlikely that informal actions will achieve the desired outcomes, an investigation will be the appropriate response.⁸ See section 4.6 about investigations.

The below responses may also be appropriate following an investigation of allegations of reprisal if there remains a need to restore workplace harmony. Consider seeking advice from a human resources professional about the most effective technique to use given the circumstances.

a) Alternative dispute resolution

An important distinction between an investigation and alternative dispute resolution (ADR) such as mediation or conciliation is that:

- investigations are formal, they focus on the past and making findings/drawing conclusions
- alternative dispute resolution tends to be informal, and focuses on the future, possible options and repairing relationships between people.⁹

Depending on the circumstances and the people involved, including their willingness to participate, ADR may be the most appropriate and useful response as it involves the parties identifying and resolving the issues together confidentially.

b) Formal apology

Research has encouraged the use of formal apologies to employees who reported wrongdoing and experienced negative consequences as a result.¹⁰ In some circumstances, a formal apology from the principal officer of an authority, other appropriate senior officer or the

8. Public Service Commission 2017, *Positive and productive workplaces guideline: A guide for the NSW government sector to prevent and manage unreasonable behaviour and bullying*.

9. Hollier, F 2014 (5 November), 'Addressing complaints through mediation and conciliation', National Investigations Symposium, Sydney.

10. Brown, p. 92.

person responsible for taking reprisal can assist a reporter to put past experiences behind them and restore their reputation.¹¹ See *Apologies: A practical guide*.

c) Informal counselling or training

Informal counselling or training may be useful to raise awareness of how the authority handles certain issues. Where unreasonable conduct has occurred but it is not serious enough to warrant investigation, an authority may address the behaviour with counselling or training. In some cases there may be no evidence to warrant further action but an authority may identify a need to provide one or more people, or a team of people, with training in relevant policies and procedures such as the Code of Conduct in order to address certain problematic behaviour or just serve as a reminder of appropriate workplace conduct.

Authorities may need to remind the staff member(s) that it is unacceptable to take detrimental action in reprisal for the making of a report (including that it is a disciplinary and criminal offence), and advise them that the situation will be closely monitored to ensure inappropriate action is not taken.

In some cases, unreasonable conduct may not have been identified but informal counselling may be useful in order to discuss a person's behaviour and the impact they have on others if they are not aware of that. Rather than asserting that conduct was reprisal, the focus should be on how it has been perceived by others, such as the reporter.

d) Request or instruct that certain conduct stop

In some circumstances, an authority may need to issue work requests or instructions requesting that certain conduct stop. These may be issued to the subject officer, colleagues or in some cases the person making allegations of reprisal, if their behaviour is of concern. This response is most appropriate when there is some identifiable unreasonable conduct. It may also be necessary to issue work instructions prior to or during a formal investigation of allegations of reprisal in order to address conduct occurring contemporaneously.

Any breaches or alleged breaches of work requests or instructions will need to be considered by the authority and an assessment undertaken as to whether further action will need to be taken. In making this decision, consideration should be given to reasons, frequency or severity of the failure to adhere to work requests or instructions.

e) Alter employment arrangements

Making changes to employment arrangements such as relocation or reorganisation may be a useful response to reduce workplace tension but should be carefully considered. For example, it would not be useful to simply move a staff member to another location if the fundamental issue is poor workplace culture. If relocation is a temporary measure, an authority will need to take steps to address the problems which occurred prior to moving the staff member back. In some cases, it is appropriate for an authority to review and, if necessary, alter the current structure or supervisory arrangements of a business unit in order to bring about positive change.

For further information about changing employment arrangements refer to *Guideline D4*.

f) An intervention to change the workplace culture

An intervention designed to change the culture of the workplace through group discussion, individual counselling of staff and/or managers, engaging external facilitators or appropriate human resources professionals to encourage better communication and develop team norms, training in appropriate grievance processes, and review of staffing and resources.

3.6. Investigations

An authority should consider whether it's appropriate to combine an investigation of reprisal with the investigation of the initial report of wrongdoing. The investigation processes will, however, be similar in terms of planning the investigation and procedural requirements – including communication with all relevant parties and providing the subject officer with details of the evidence and an opportunity to respond before any adverse findings are made. Complete and accurate records that reflect the investigation process, critical thinking, decision-making and outcomes should be kept.

a) Who should conduct the investigation?

Where allegations of serious reprisal involve senior managers, authorities should consider engaging independent investigators with knowledge of the PID Act.

The person(s) responsible for an investigation into allegations of reprisals must be suitably skilled and have the appropriate authority to be able to establish facts and evidence relevant to inherently complex allegations and counter-allegations. The aim of an investigation is not only to gather evidence that might prove reprisal

11. House of Representatives Standing Committee on Legal and Constitutional Affairs 2009, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, Canberra, p. 98. Also see *Burns v Radio 2UE Sydney Pty Ltd & Ors* (No2) [2005] NSW ADT 24.

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has occurred but also identify issues and suitable remedies to any failing by the authority or other workplace issues. Therefore, a detailed understanding of how public authorities operate is also necessary.¹²

The investigator will need to identify relevant sources of information including individuals that should be interviewed or can contribute to further clarification of the circumstances. In addition to the reporter and subject(s) of the allegation, this may include supervisors, other staff, and/or the authority's human resources or workplace relations area.

For further information about conducting an investigation see *Guideline C5: Investigating public interest disclosures and Investigating complaints – A manual for investigators*.

b) Elements required to prove reprisal

There are four essential elements required to prove reprisal under the PID Act.

Was a PID made?

The investigator should first determine if a PID has been made. In the absence of a written assessment of the report against the criteria in the PID Act, further steps will need to be taken to establish whether or not a PID was made including clarifying with the reporter who they reported to and liaising with relevant staff such as the disclosures coordinator. For further information about assessing reports of wrongdoing against the criteria in the PID Act see *Guideline C3: Assessing and streaming internal reports*.

If the report does not meet the criteria to be considered a PID, further investigation and disciplinary action may still be warranted depending on what detrimental action was taken. For employees of government sector agencies, a finding of misconduct can be made if the subject of the allegations takes any action substantially in reprisal for the reporter making an allegation of misconduct (s.69(1)(c) of the GSE Act).

Was detrimental action taken?

In considering whether detrimental action has been taken, the following will need to be identified:

- what action(s) the reporter claims to be detrimental action
- who the reporter claims is responsible for the detrimental action
- whether the action(s) were taken following the making of a PID

- the reasons that action was taken, for example, details of any management action taken against the reporter including supporting documentation
- any other evidence including statements from witnesses to the alleged detrimental action.

Did the person who took the detrimental action know a PID had been made?

At this point in an investigation, it is necessary to consider whether the person identified as taking detrimental action against the reporter can reasonably be expected to have known or suspected a PID was made. In our view it is not necessary for the person who took detrimental action to know that the report has been assessed as a PID by the public authority, simply that a report of wrongdoing was made.

Authorities may consider the following in making this determination:

- which staff had knowledge of a PID being made and how they became aware
- whether confidentiality has been maintained including by the reporter
- any other evidence that may show that the subject officer(s) had knowledge of a PID being made.

Was the detrimental action taken substantially in reprisal for the making of the PID?

This is the most complex element required to prove reprisal as it requires the investigator to consider the motivation of the subject officer. There must be a causal link between the making of the PID and the detrimental action. It does not have to be the only cause, provided there is persuasive evidence that reprisal was the main reason for the detrimental action viewed in a common sense and practical way.

Case study

There is evidence an officer has engaged in bullying and harassing behaviour but that person is known to have behaved in a bullying and harassing manner prior to a report being made about them. For that reason it is difficult to prove that the detrimental action was 'substantially in reprisal' for the making of a PID.

Clear evidence showing reprisal is rare but might include:

- A written or verbal statement by the subject officer(s) stating that they took detrimental action because a PID had been made.

12. Brown, p. 94.

- A written or verbal statement by the subject officer(s) demonstrating bias towards the reporter because they made a PID, as well as evidence linking the bias to the detrimental action e.g. a verbal statement made by the subject officer(s) at the time of the detrimental action.

In the absence of clear evidence of reprisal, consideration may be given to matters such as:

- Whether the detrimental action would not have occurred had the PID not been made.
- The reason the subject officer(s) provides for the detrimental action other than reprisal. Any reason should be carefully assessed in its context and along with other available evidence.
- The period of time and timing of events between the report and the detrimental action. However, this is not definitive as action taken some time after a report was made may still have a strong casual connection for some other reason.¹³
- Comparative treatment of other employees who did not make a PID. For example:
 - › Was disciplinary action taken against the reporter for conduct that regularly goes undisciplined in that workplace?
 - › Where comprehensive restructures have affected many employees, was the detriment suffered by the reporter unique to them?

These matters will need to be balanced with all available evidence and considered at the required standard of proof prior to a decision being made as to whether the detrimental action was taken substantially in reprisal for the making of a PID.

c) Reasons for unsubstantiated allegations of reprisal

Research shows that the most common reason for unsubstantiated allegations of reprisal was insufficient evidence.¹⁴ Other reasons may include:

- The report was not a PID because it was not made in accordance with the PID Act or the authority's internal reporting policy.
- There was evidence of negative action(s) but there was not sufficient connection with the making of a PID (e.g. there was a history of bullying prior to the internal report).
- There was not sufficient evidence to identify the responsible person(s).
- There was evidence of negative action(s), but there was a legitimate or lawful explanation for it such as reasonable management action.

- The alleged conduct did not occur.

Where allegations of reprisal are unsubstantiated but there are issues with workplace conflict or unreasonable conduct is identified, the authority should nevertheless take action to resolve the issues to prevent escalation and other complications.

d) Monitoring outcomes

Following the completion of an investigation into reprisal it is imperative that the authority continues to monitor the workplace to ensure that any identified reprisal or other inappropriate conduct has stopped and to monitor if any other incidents arise.

4. Your questions answered

When do I refer allegations of reprisal to the ICAC?

Under s.20 of the PID Act, authorities must refer any evidence of an alleged offence to the ICAC or NSWPF. Taking reprisal action will in many circumstances constitute corrupt conduct as defined in sections 8 and 9 of the *Independent Commission Against Corruption Act 1988* (ICAC Act). Under section 11 of the ICAC Act, principal officers are required to report to the ICAC any matter they suspect on reasonable grounds to concern, or possibly concern, corrupt conduct.

There is no requirement to gather evidence before referring allegations of reprisal to the ICAC. A referral should be made at the earliest possible opportunity once a reasonable suspicion of corrupt conduct has been formed. Authorities can carry out necessary steps to determine the veracity of allegations before making a referral, but should do so cautiously so as not to detract from any investigative opportunities by the ICAC. Once a matter is referred, the ICAC will undertake an assessment and inform the authority as to the outcome.

What if the allegations made in the PID were unsubstantiated following investigation?

Under the PID Act, the reporter is only required to have an honest belief on reasonable grounds that their information shows or tends to show the conduct alleged. The reporter is therefore protected from reprisal whether or not the allegations of wrongdoing are substantiated.

What if the person who carried out the reprisal action didn't know about the PID?

It is important to determine whether any person identified as carrying out reprisal action against the reporter can reasonably be expected to have known or

13. U.S. Equal Employment Opportunity Commission 2016, *Enforcement guidance on retaliation and related issues*.

14. Brown, p. 227.

suspected a report had been made. This will inform decisions about the investigation process and the action to be taken in response.

Even if it cannot be proven that the person knew about the report, their conduct could still be an issue under other relevant legislation.

Can an allegation of reprisal itself be a PID?

Yes, provided it meets the criteria in the PID Act. See *Guideline C3 and Template: Assessment of an internal report against the criteria in the Public Interest Disclosures Act 1994*.

What if the person taking reprisal action was not the subject of a PID?

In many circumstances, claims of reprisal are levelled at management rather than the subject of the PID. Their conduct may still be an offence under the PID Act. However, it is likely to be difficult to demonstrate that the detrimental action was motivated by revenge or retribution.

What if reprisals are taken against a person because a person incorrectly believed or suspected that the other person made a PID?

The protection against reprisals in the PID Act extends to where the person who takes the detrimental action does so because they believe or suspect that the other person made or may have made a PID – even if the other person did not in fact make a PID (s. 20(1C)).

What if the reporter made a PID as well as lodging grievances?

As noted above, there needs to be a strong causal connection between the detrimental action and the making of a PID. In these circumstances, it may be difficult to demonstrate that conduct would not have occurred had the PID not been made.

5. Additional resources

- PID guidelines and templates
- *Apologies: A practical guide*
- *Investigating complaints: A manual for investigators*
- Office of Local Government's *Model code of conduct for local councils in NSW*
- Public Service Commission's *Behaving ethically: A guide for NSW government sector employees*
- Public Service Commission's *Positive and productive workplaces: A guide for the NSW government sector to prevent and manage unreasonable behaviour and bullying*
- Government Sector Employment Act 2013
- *Independent Commission Against Corruption Act 1988*
- *Public Interest Disclosures Act 1994*
- *Work Health and Safety Act 2011*

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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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Telephone Interpreter Service (TIS): 131 450

We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

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