

People the subject of a report

1. Objectives

- To provide guidance to organisations in dealing with people who are the subjects of reports of wrongdoing.

2. Why is this important?

Much of our guidance material is aimed at providing protection and support to those who report wrongdoing. It is equally important that those who are the subjects of these reports are also treated fairly and reasonably, and where necessary provided with support.

It is important that staff have faith in an organisation's processes. They need to know that – if an allegation is made against them – it will be dealt with appropriately, they will be treated fairly, and they will be given an opportunity to have appropriate input.

Even when such processes are in place, a great deal of damage can be done to a person who is the subject of a report, particularly when they are found to have done nothing wrong.

3. Legal and management obligations

3.1 Inform staff of their rights and obligations

All staff, and in particular anyone who is the subject of a report that is being investigated, should be given adequate information about their rights and obligations under the *Public Sector Employment and Management Act 2002* (PSEM Act), the organisation's code of conduct, the organisation's internal reporting system, and any other relevant legislation.

3.2 PID Act

The *Public Interest Disclosures Act 1994* (PID Act) aims to deter people from taking detrimental action in reprisal for the making of a public interest disclosure (PID).

It is important staff who are the subjects of reports are aware that, under section 20 of the PID Act, it is a criminal offence to take detrimental action substantially in reprisal for the making of a PID.

Detrimental action is defined in s.20(2) as action that can cause, comprise or involve any of the following:

- injury, damage or loss
- intimidation or harassment

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

There is a reverse onus of proof for this offence. Once a person has demonstrated that they have made a PID and were subjected to detrimental action, it then lies on the defendant to prove that the detrimental action was not taken substantially in reprisal for the person making a PID – see s.20(1A).

3.3 Other legislation

Division 2 of the PSEM Act provides for the Public Service Commissioner to issue procedural guidelines for dealing with allegations of misconduct as disciplinary matters and taking disciplinary action. Chapter 9 of the *Public Sector Handbook* provides additional guidance.

Section 45 of the PSEM Act states that these guidelines are designed to ensure that a public official about whom an allegation of misconduct relates is advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken with respect to the officer. They should also be given an opportunity to respond to the allegation.

If the allegation is found to be true, section 46 states that the person is to be given a separate opportunity to make representations in relation to any proposed disciplinary action to be taken.

Similar requirements are included within Part 4A of the *Teaching Services Act 1980*, Chapter 14 of the *Local Government Act 1993*, and Part 9 of the *Police Act 1990*.

3.4 Work health and safety and duty of care requirements

Having a report of wrongdoing made about you 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* states that a person conducting a business or undertaking – which includes public sector departments, authorities and councils – has a primary duty of care to ensure the health and safety of workers and others. An organisation can fulfil this obligation by doing what it reasonably can in the circumstances to manage health and safety risks. All officers who can make decisions that significantly affect their organisation must exercise due diligence to ensure compliance. Failure to comply with health and safety duties is a serious offence that attracts significant penalties – see sections 31–33.

Organisations also have a duty of care under common law to provide a safe workplace for 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. Organisations have been successfully sued for compensation for breaching this duty of care where a staff member has become ill or suffered injury – physically or psychologically – as a result.

4. What does this mean for your organisation?

4.1 Internal reporting policies and procedures

Organisations should outline the support and information that will be provided to those who are the subjects of reports in their internal reporting policy and procedures.

The NSW Ombudsman's model policy states that the subjects of reports must be:

- treated fairly and impartially
- told their rights and obligations under the organisation's policies and procedures
- kept informed during any investigation – this will be general advice, and cannot prejudice the investigation
- given the opportunity to respond to any allegation made against them
- told the result of any investigation.

The same or similar provisions should be included in your organisation's internal reporting policy and procedures. For more information, see the [Model internal reporting policy](#) and [Model internal reporting policy \(local government\)](#).

4.2 Information, advice and feedback

Staff who are the subjects of reports should be advised to:

- Keep the matter confidential, and only discuss the matter with authorised people within the organisation, or their legal advisor and anyone providing them with support.
- Assist those dealing with the report, including supplying any information on request.
- Not take reprisals against another staff member whom they know or suspect has reported wrongdoing, and that doing so would be a disciplinary and criminal offence.
- Notify their manager if they suffer any detrimental action as a result of being the subject of a report.
- If necessary, seek support from their manager or supervisor or any available external support organisations or services.

4.3 Procedural fairness

The rules of procedural fairness are designed to ensure that decision-making is fair and reasonable. Procedural fairness involves informing people of the case against them, giving them a fair hearing, not being biased, and ensuring findings and decisions are based on logical and relevant evidence.

While the nature or substance of allegations must be put to any people they concern at an appropriate time, this does not mean that an organisation must inform such people before it undertakes any form of investigation or evidence gathering. Furthermore, there is no legal or procedural obligation on organisations to disclose that they have received a PID.

Before any final determination is made, a person who is the subject of a report has a right to be:

- told the substance of the allegation
- told the substance of any adverse comment arising out of an investigation that may be included in a report, memo or letter
- given a reasonable opportunity to answer any allegation and respond to any negative findings.

This gives them the opportunity to:

- deny the allegations
- provide any evidence to counter the allegations
- describe and explain any mitigating facts or circumstances.

Providing procedural fairness is an important part of any investigation. It can help an investigator to:

- identify major issues
- check facts
- expose any weaknesses in the investigation
- demonstrate any areas where the investigation may be criticised once it is finalised.

While a person should be told the substance of an allegation against them and any adverse comment made about them, they do not have to be given all of the information in relation to the investigation. Doing this could hinder an investigation and place the person who made the report at unnecessary risk of reprisals.

For more information about procedural fairness during an investigation, see [Guideline C5: Investigating public interest disclosures](#).

4.4 Confidentiality

The PID Act requires organisations to keep the identity of the person reporting confidential, subject to a number of exemptions – see [Guideline C7: Confidentiality](#). It is also important, where practical and appropriate, to try to maintain the confidentiality of people who are the subjects of reports. This may not be possible if the identity of the subjects are generally known or if some action needs to be taken by your organisation.

When an investigation does not substantiate a report, the fact that the investigation has been conducted, the results of the investigation, and the identity of the people who are the subjects of the report should be kept confidential where practical and appropriate. This may not apply in a situation where the subjects of a report ask that their colleagues be informed of the result of the investigation.

4.5 Risk assessment

Your organisation should consider the risks to the welfare of the subjects of reports. This does not mean that you should not take action or investigate, but you should consider how to minimise the impact on the subjects. This risk assessment should be conducted at the same time as assessing the risk for the internal reporter.

4.6 Management action

Conflict can lead to a total and irreparable breakdown in workplace relationships. There may also be concerns about the internal reporter's safety or wellbeing, or other factors that would make it impossible for all of the parties involved to remain in the workplace.

In these circumstances, you should consider whether it is practical to make changes to the employment arrangements of the internal reporter or the subjects of a report. For example, you could:

- assign a project that results in them not being present in the workplace during the ongoing investigation – this also allows for the underlying explanation of the person's removal from the workplace to be kept confidential
- implement new workplace reporting or supervisory arrangements
- relocate their workstation to another part of the premises or to separate premises
- relocate a manager or supervisor into the workplace for a period to help manage relationships and interactions
- relocate, transfer or second them to another part of the organisation
- relocate, transfer or second them to an equivalent position in another organisation
- grant them a leave of absence during any investigation and re-introduce them to the workplace in stages
- help them to obtain alternative employment
- negotiate a voluntary redundancy package.¹

If someone needs to be relocated, whether this is the internal reporter or the subjects of a report will depend on the circumstances. Other than in exceptional circumstances, you should only require someone to relocate if the new position has the same pay and conditions, at least equal seniority and responsibilities, and preferably the same accessibility between their home and place of work.

Any actions that directly affect a person's working arrangements should preferably be implemented with their agreement. It should then be made clear to staff that the action taken was at the request of the person and is not punishment. However, if there is an irreparable breakdown in working relationships and a high risk of reprisals, it may be necessary to relocate a person without first getting their agreement.

In some very limited circumstances where there is a very real risk of reprisal, it may be necessary to suspend the person who is the subject of a report. If this approach is taken, it should be consistent with your organisation's policies and procedures, and the reasons for taking this management action need to be clearly documented.

If you are contemplating taking other management action, you should be able to clearly demonstrate that:

- The action is reasonable, proportionate and, if relevant, consistent with action taken in similar circumstances in relation to staff who were not the subject of a report.
- The particular circumstances of the person have been taken into account.
- The action complies with your organisation's policies and procedures.

Your organisation has to be able to show the actions were taken for a legitimate reason. Make sure all actions taken and the reasons for any decisions are thoroughly documented.

4.7 Support services

Being the subject of a report of wrongdoing can often be very stressful. It is important that you provide necessary and appropriate advice and guidance to all those involved, whether they are the subjects of a report or the people making it. Your organisation should have staff identified to provide support and assistance, and this information should be provided to those involved once they become aware of any investigation that is taking place.

There is a real need for support when the allegations are found to be clearly wrong or unsubstantiated. In these situations, it is important that the person who was the subject of the allegation is provided with a clear statement of support from your organisation and senior management. What that statement will be will vary depending on the circumstances of the matter, but could include:

- a statement of support in a letter or an email sent to the person
- if the allegation is widely known within the organisation, a clear statement from senior management stating that the allegation is without foundation.

Your organisation also needs to ensure necessary support and advice is provided when allegations are substantiated.

For more information on possible support strategies, see [Guideline D1: Internal reporter support strategy](#).

5. Your questions answered

Can subjects of reports talk to anyone during the course of the investigation?

It is important to try and maintain the confidentiality of all of the parties involved in an investigation. This benefits everyone involved, as it will reduce the number of people who know about a report.

All those involved, whether they are the internal reporter or the subjects of a report, should only discuss the matter with those people authorised to deal with it. This would include the investigator, the disclosures coordinator and a support person if one is allocated to them. They may also speak with a legal advisor or anyone providing them with support outside the organisation.

Are subjects of reports entitled to all the information used in an investigation?

As outlined above, the rules of procedural fairness only require that a person likely to be affected by a final determination is provided with the substance of the allegation against them and an opportunity to respond to any adverse comment about them.

Someone who is the subject of a report should be provided with as much information as possible, but will not be entitled to all of the information obtained by the organisation or its investigator when looking into the matter. This is to ensure the confidentiality of any other parties involved can be maintained. It also maintains the integrity of the investigation process.

People the subject of a report

In many cases, the subjects of reports will want to know the name of the internal reporter. In order to maintain the internal reporter's confidentiality, they should only be provided with this information where it is essential to provide procedural fairness. For more information, see [Guideline C7: Confidentiality](#).

What happens if the allegation is not substantiated?

If a person who is the subject of the allegation is aware of the report and any subsequent investigation, your organisation should notify them of its findings. If the content of the report is well known within the workplace, senior management may consider informing other staff, whether in an email or at a staff meeting, that the matter has been finalised and that allegations have not been substantiated.

What happens if a report is found to be false or misleading?

It is an offence under the PID Act to wilfully make any false statement to, or mislead or attempt to mislead, an investigating authority, public authority or public official, when attempting to make a PID.

If it is proved to the required standard that a person wilfully provided false or misleading information, your organisation should do one or more of the following:

- notify the Independent Commission Against Corruption of possible corrupt conduct under section 11 of the [Independent Commission Against Corruption Act 1988](#)
- consider referring the matter to the police for criminal action
- notify the NSW Ombudsman's PID Unit
- at a minimum, take disciplinary action, whether or not the matter is referred for criminal action.

What can subjects of reports do if they feel they have been treated unfairly?

If the subjects of a report feel they have been treated unfairly or the allegations against them have been dealt with poorly, they should first raise their concerns with the organisation. If they have a support person allocated to them, the support person is likely to be the best starting point. The subjects of reports should also be made aware of any review mechanism an organisation has in place.

If the subject of a report does not receive a satisfactory response and thinks the process followed by the organisation was flawed, they can make a complaint to the NSW Ombudsman – see contact details below.

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.

Level 24, 580 George Street
Sydney NSW 2000

Email pid@ombo.nsw.gov.au

Web www.ombo.nsw.gov.au

General inquiries 02 9286 1000
Facsimile 02 9283 2911

Toll free (outside Sydney metro) 1800 451 524

Tel. typewriter (TTY) 02 9264 8050

Telephone Interpreter Service (TIS): 131 450
We can arrange an interpreter through TIS or you can contact TIS yourself before speaking to us.

6. Additional resources

- [Model internal reporting policy](#)
- [Model internal reporting policy \(local government\)](#)
- [Guideline C5: Investigating public interest disclosures](#)
- [Guideline C7: Confidentiality](#)
- [Guideline D1: Internal reporter support strategy](#)
- [Public Sector Handbook](#)
- [Independent Commission Against Corruption Act 1988](#)
- [Local Government Act 1993](#)
- [Police Act 1990](#)
- [Public Interest Disclosures Act 1994](#)
- [Public Sector Employment and Management Act 2002](#)
- [Teaching Services Act 1980](#)
- [Work Health and Safety Act 2011](#)

7. Last updated

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8. Endnotes

- 1 See the [Public Service Commissioner's guidance](#) for more information about voluntary redundancy.