

Overview of the new *Public Interest Disclosures Act 2022*

On 1 October 2023 there will be new public interest disclosure (PID) legislation in NSW which completely replaces the *Public Interest Disclosures Act 1994* (1994 Act). This information sheet will provide an overview of key components of the *Public Interest Disclosures Act 2022* (PID Act 2022 or the Act).

Background

Good government relies on public officials speaking up when they witness, or otherwise become aware of, wrongdoing in the public sector.

A strong ‘speak up’ culture that encourages public officials to report wrongdoing is important to ensure the integrity of the public sector.

An integral part of that ‘speak up’ culture is having in place a framework that facilitates public interest reporting of wrongdoing by:

- protecting those who speak up from detriment
- taking active steps to maintain the confidentiality of reports
- imposing duties on agencies who receive reports of wrongdoing to take appropriate action to investigate or otherwise deal with them.

From 1 October 2023 that framework will be the PID Act 2022.

The PID Act 2022 provides for public officials to have multiple pathways to report serious wrongdoing. This includes reporting to a disclosure officer, their manager and other agencies, such as integrity agencies.

The threshold for what is considered detrimental action has been lowered, and the associated penalties for the detrimental action offence have been increased, when compared to the 1994 Act.

Clarity is provided in the PID Act 2022 on what agencies are expected to do with a report when it is received, how they must deal with a report once it is identified

that it is a PID and what they must do if serious wrongdoing is found to have occurred. The PID Act 2022 also outlines when an agency must communicate with a PID maker and with the NSW Ombudsman.

Under this framework, all agencies must ensure they have:

- systems in place to manage confidentiality
- welfare support mechanisms for PID makers and,
- procedures for assessing the risk of detrimental action and implementing risk mitigation strategies.

Categories of PIDs

When a public official reports suspected or possible wrongdoing in the public sector, their report will be a PID if it has certain features which are set out in the Act.

The Act recognises that there are 3 types of PIDs, and that some people who are not public officials, may also make reports or provide information and require protection from detrimental action.

Under the Act, there are 3 types of PIDs. These are:

Voluntary PID: This is a PID where the report has been made by the public official because they decided, of their own accord, to come forward and disclose what they know.

Mandatory PID: This is a PID where the public official has made the report about serious wrongdoing because they have a legal obligation to make that

report, or because making that report is an ordinary aspect of their role or function in an agency.

Witness PID: This is a PID where a person discloses information in the course of an investigation of serious wrongdoing following a request or requirement of the investigator.

Most of the obligations on agencies in the Act relate specifically to voluntary PIDs – these include how a voluntary PID must be assessed, what information must be given to the maker of the voluntary PID, how the voluntary PID must be investigated or otherwise dealt with, and what must be reported to the Ombudsman about voluntary PIDs.

The protection against detrimental action and immunity from civil and criminal liability for breaching a duty of secrecy or confidentiality when making a PID, apply to all 3 types of PID.

Serious wrongdoing

In order to ensure that agencies identify when they have received a voluntary PID, it is important to understand what serious wrongdoing is.

Serious wrongdoing is defined under section 13 of the Act as meaning one or more of the following:

- corrupt conduct
- serious maladministration
- a government information contravention
- a local government pecuniary interest contravention
- a privacy contravention
- a serious and substantial waste of public money.

Identifying a voluntary PID

Voluntary PIDs are the kind of PIDs most people have in mind when they think about public interest reporting and ‘whistleblowing’.

This is where a public official made a report because they have information that they believe shows (or tends to show) serious wrongdoing, where they are not under a legal obligation to make that report and where it is not an ordinary part of their role to report such wrongdoing.

A report is a voluntary PID if it has the following five features:

1. The report has been made by a public official
2. The report has been made to a suitable recipient

3. The report must disclose information that the person honestly and on reasonable grounds believes shows or tends to show serious wrongdoing
4. The report is made in writing or orally (but if it is made to a Minister or ministerial staff, it must be made in writing)
5. The report was made voluntarily, i.e., it is not a mandatory or a witness PID.

The Act contains a deeming provision which gives the head of an agency a delegable power to deem a report to be a voluntary PID, even if it does not have all 5 features of a PID. By deeming that a report is a voluntary PID, it ensures that reporters are provided with protections under the PID Act.

Recipients of PIDs

For a report to be a voluntary PID, it must have been made to one or more of the following people:

- the person’s manager
- a ‘disclosure officer’ in any agency – this could be:
 - the agency where the person works
 - the agency to which the wrongdoing related (if not the agency where the person works)
 - another agency, including an integrity agency (such as the NSW Ombudsman’s Office, the ICAC, or the Audit Office)
- the head of any agency
- a Minister or Ministerial staff (but only if the report is made in writing)
- a journalist or MP (in very limited circumstances).

Where a voluntary PID is made to the person’s manager, it is the manager’s responsibility to make sure the PID is communicated to a disclosure officer, as soon as reasonably practicable, so it can be properly assessed and dealt with.

The disclosure officers of an agency, together with their contact details, will be set out in the agency’s PID policy on its website.

Disclosure officers

Disclosure officers are one of the key people to whom a report will be made in an agency.

Disclosure officers are those identified as ‘disclosure officers’ in the agency’s PID policy, which can be found on the agency’s intranet and public website.

In addition to those listed in an agency's PID Policy, the following people are also disclosure officers under the Act:

- the head of an agency,
- the most senior ongoing employee who ordinarily works at a permanently maintained worksite where more than 1 employee works, and
- the member of an unelected governing body within an agency.

It is important that agencies nominate a sufficient number of disclosure officers for the size of the agency, and within the permanently maintained worksites across the agency. The purpose of this is to ensure that public officials have sufficient access to report serious wrongdoing.

Integrity agencies

The PID Act classifies certain agencies as 'integrity agencies'. Integrity agencies have an important role in the Act.

There is no requirement under the Act that a public official report serious wrongdoing to the 'right' agency for the report to constitute a PID. They may choose to make the report to an integrity agency (or any other agency) instead of to the agency they work in.

Generally, PIDs would be expected to be directed to the most relevant integrity agency – for example, a report of corrupt conduct would be reported to the ICAC, a report of serious maladministration to the NSW Ombudsman, and a report of a government information contravention to the NSW Information and Privacy Commission.

The integrity agency will make a decision on how it will deal with the report, which may include referring it back to the agency where the PID maker works or is otherwise associated with.

Protecting the identity of PID makers

Agencies have an obligation to ensure that information which identifies, or tends to identify, a person as the maker of a voluntary PID is not unlawfully disclosed. This is called "identifying information" in the Act.

The Act allows for circumstances in which a public official or agency can lawfully disclose identifying information. These circumstances include where the disclosure of the information is necessary for the report to be effectively dealt with.

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). Detriment includes, but is not limited to actions such as intimidation, bullying and reputational damage.

The Act contains robust protections to ensure that a person who has made a PID does not suffer detrimental action.

Under the Act it is a criminal offence to take detrimental action against a person based on the suspicion, belief or awareness that a person had made, may have made, or may make a PID. This is known as a detrimental action offence.

Agencies have a duty to assess the risk of detrimental action against a PID maker, and to minimise the risk of detrimental action, as soon as they become aware the voluntary PID has been made and on an ongoing basis while the matter is being dealt with.

Injunctions can be sought from the Supreme Court to prevent the commission of a detrimental action offence, or to stop a person committing a detrimental action offence. Generally, an injunction would be sought by a PID maker or an integrity agency, on their behalf.

If unlawful detrimental action is taken against someone, they are entitled to seek compensation through the courts for injury, damage or loss suffered.

Key terms

A glossary of key terms is contained in Appendix A.

Further information

This information is intended to provide an overview of the PID Act 2022 and introduce the core concepts of the Act. More information can be found on the [NSW Ombudsman website](#). Alternatively, you can send an email to pidadvice@ombo.nsw.gov.au.

Appendix A: Glossary of key terms

Key term	Definition
Agency	<p>‘Agency’ is defined in section 16 of the PID Act to mean any of the following:</p> <ul style="list-style-type: none"> • a Public Service agency • a group of staff comprising each of the following services, or a separate group of that staff: <ul style="list-style-type: none"> – the NSW Police Force – the Teaching Service of New South Wales – the NSW Health Service – the Transport Service of New South Wales • a statutory body representing the Crown • an integrity agency • a public authority whose conduct or activities are authorised to be investigated by an integrity agency under another Act or law • a State owned corporation or its subsidiaries • a Local Government Authority • a Local Aboriginal Land Council • the Department of Parliamentary Services, the Department of the Legislative Assembly and the Department of the Legislative Council • a Minister’s office is not an agency for the purposes of the PID Act.
Detriment	<p>Detriment is defined in section 32(1) of the Act as disadvantage to a person, including:</p> <ul style="list-style-type: none"> • injury, damage or loss • property damage • reputational damage • intimidation, bullying or harassment • unfavourable treatment in relation to another person’s job • discrimination, prejudice or adverse treatment • disciplinary proceedings or disciplinary action.
Detrimental action	<p>Detrimental action is defined in section 32(2) of the Act as 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).</p>
Identifying information	<p>Under section 64(1) of the Act, identifying information is information which tends to identify a person as the maker of a voluntary PID.</p>
Integrity agency	<p>The following are ‘integrity agencies’ as defined under section 19 of the PID Act:</p> <ul style="list-style-type: none"> • the Ombudsman • the Auditor-General • the Independent Commission Against Corruption • the Law Enforcement Conduct Commission • the Inspector of the Independent Commission Against Corruption • the Inspector of the Law Enforcement Conduct Commission • the Secretary of the Department of Planning, Industry and Environment (when exercising certain functions under the Local Government Act 1993) • the Privacy Commissioner • the Information Commissioner • a person or body declared by the regulations to be an integrity agency.

Public interest disclosure	<p>The term public interest disclosure is defined in section 21 of the PID Act to mean:</p> <ul style="list-style-type: none"> • a voluntary PID • a witness PID or • a mandatory PID.
Public official	<p>‘Public official’ is defined in section 14 of the PID Act as follows:</p> <ul style="list-style-type: none"> • a person employed in or by an agency or otherwise in the service of an agency • a person having public official functions or acting in a public official capacity whose conduct or activities an integrity agency is authorised by another Act or law to investigate • an individual in the service of the Crown • a statutory officer • a person providing services or exercising functions on behalf of an agency, including a contractor, subcontractor or volunteer • if an entity, under a contract, subcontract or other arrangement, is to provide services on behalf of an agency or exercise functions of an agency in whole or in part—an employee, partner or officer of the entity who is to be involved in providing the services in whole or in part, or who is to exercise the functions • a judicial officer • a member of Parliament, including a Minister • a person employed under the Members of Parliament Staff Act 2013.

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