

What's not a public interest disclosure?

1. Objectives

- To provide clear advice that the *Public Interest Disclosures Act 1994* (PID Act) does not apply to staff reports that deliberately provide false or misleading information, primarily question the merits of government policy, are not made voluntarily or are made to avoid dismissal or disciplinary action.
- To provide advice on how organisations should deal with reports where the PID Act does not apply.

2. Why is this important?

While the PID Act only applies to reports about certain categories of wrongdoing (see *Guideline B2: What should be reported?*) made to specific people or organisations (see *Guideline B4: Reporting pathways*), staff should be encouraged to report all wrongdoing. The difference with matters under the PID Act is that the public official who makes the report has certain statutory protections.

However, the credibility of an organisation's internal reporting system depends on staff understanding that it is not to be used to make misleading reports. This is important for organisational justice – the internal reporter, the person who is the subject of the report, and their colleagues in the workplace need to see that procedures are followed and are fair, reasonable and appropriate regardless of the outcome.

Misinterpreting the motives of reporters – for example, if staff perceive reporters as vengeful or seeking to protect themselves by damaging others – can also undermine an organisation's internal reporting system.

3. Legal and management obligations

3.1 PID Act

a) False or misleading reports

It is an offence for a public official – when making a public interest disclosure (PID) under the PID Act – to wilfully make any false statement or to mislead or attempt to mislead (s.28). The maximum penalty is \$5,500 or imprisonment for 12 months or both.

b) Reports questioning the merits of government policy

In addition, a public official reporting wrongdoing does not receive the statutory protections of the PID Act if the report principally involves questioning the merits of government policy (s.17), or is made solely or substantially with the motive of avoiding dismissal or other disciplinary action (s.18).

c) Reports made voluntarily

Another requirement is that PIDs must be made voluntarily. This means that the PID Act does not apply to reports that public officials have a duty to make by or under an Act (s.9). This includes reports of possible corrupt conduct made to the Independent Commission Against Corruption (ICAC) under s.11 of the *Independent Commission Against Corruption Act 1988* (ICAC Act), and the mandatory reporting of child protection related allegations to the NSW Ombudsman under Part 3A of the *Ombudsman Act 1974*.

4. What does this mean for your organisation?

4.1 False or misleading reports

To discourage misuse of your organisation's internal reporting system, your policy should draw attention to the sanctions for making false or misleading reports – that it is a criminal offence under the PID Act to wilfully make a false or misleading statement when reporting wrongdoing.

Your organisation's assessment of whether an internal reporter provided false or misleading information must be based on sufficient evidence. It is very unlikely that you will be in a position to make such a decision when a report is first made. However, information collected during the course of an investigation may later indicate that the internal reporter wilfully provided false and misleading information – and so the protections of the PID Act will not apply.

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

- notify the ICAC of possible corrupt conduct under s.11 of the ICAC Act
- notify the NSW Ombudsman's Public Interest Disclosures Unit
- take, at a minimum, disciplinary action
- consider referring the matter to the police for criminal action.

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4.2 Reports questioning the merits of government policy

The PID Act does not provide a definition of government policy other than to say it includes the policy of the governing body of a local government authority.

For state government public authorities and officers, it is likely that this excludes from the PID Act any reports which, at their core, criticise the formal policies of the executive arm of government – for example, the Cabinet, the Premier or another Minister.¹

For a council or county council, the PID Act specifically excludes reports that essentially criticise any formal policy of the council's governing body – that is, the elected councillors.

Government policy should not be confused with organisational or administrative policy, which concerns the procedural issues or routine practices of an organisation. These policies do not set the agenda for an organisation but provide the mechanisms for achieving the agenda set by elected representatives.

The PID Act may apply to reports relating to government policy if they focus on the adequacy of the advice given by a public official or organisation. However, they cannot principally involve questioning the merits of the adopted policy.

For example, a report alleging that the government's decision to close a particular school was wrong because it had an unfair impact on a vulnerable group of children – who would have to travel a longer distance to attend the next closest public school – would most likely fall outside the coverage of the PID Act.

However if the report was that a relevant public authority wilfully refused to consider the likely impact of that decision on the vulnerable group of children, the PID Act could apply and the public official who made the report might be able to seek the protections of the PID Act.

4.3 Reports not made voluntarily

Public interest disclosures must be 'voluntary', so the PID Act does not apply to reports that public officials have a duty to make by or under legislation. These 'required' reports include:

- the duty of the principal officer to disclose corrupt conduct to the ICAC under s.11 of the ICAC Act
- reporting child protection related allegations to the NSW Ombudsman under Part 3A of the [Ombudsman Act 1974](#)
- mandatory reports under child protection legislation
- some reports made by health professionals about certain conduct of their colleagues.

In practice, this criteria is irrelevant to most public officials as they are not required by legislation to make these reports. Reports made in accordance with an adopted code of conduct or internal reporting policy are considered voluntary under the PID Act.

4.4 Reports made to avoid dismissal or disciplinary action

Some staff members may make a report because they have been involved in wrongdoing and want to set up a defence that any subsequent dismissal or disciplinary action is a reprisal. [Guideline D3](#) also provides advice about dealing with internal reporters involved in wrongdoing.

Deciding whether a report was made solely or substantially to avoid dismissal or disciplinary action is a difficult issue because it requires you to assess the motive of the internal reporter. The fact that making the report had the effect of avoiding such consequences is not sufficient – your organisation must be able to prove that this was the intention of the internal reporter.

If your organisation believes that a PID has been made with the intention of avoiding dismissal or disciplinary action, the rules of procedural fairness require that the internal reporter is given an opportunity to be heard (whether by a hearing or in writing) before the final decision is made.

Your internal reporting policy should advise staff that the PID Act does not apply to reports of wrongdoing made with the sole or substantial motive of avoiding dismissal or other disciplinary action. However your procedures should note that this information may still be reliable and require investigation or other action – even if the motives of the internal reporter mean the report is not a PID.

4.5 Reports where the PID Act does not apply

If staff suspect something wrong is happening in their organisation, they should report it. Potentially, reports can include workplace disputes, harassment or bullying complaints and health and safety concerns. Staff need to understand that there are multiple avenues in your organisation for reporting different types of concerns and that each may need to be dealt with differently.

Staff should be given training, information and guidance – including through your internal reporting policy – about:

- the types of reports and concerns that the PID Act does not apply to
- more appropriate avenues – such as internal grievance, performance management, bullying and harassment, or occupational health and safety processes – for resolving those reports and concerns that do not meet the criteria of a PID.

If your disclosures coordinator or principal officer makes an assessment that a report is not a PID, your organisation still has an obligation to ensure that the report is properly addressed and the person who made it is appropriately supported (see [Guideline C3: Assessing and streaming internal reports](#)).

Similarly, disclosures officers and other staff who receive reports of wrongdoing under an organisation's internal reporting policy should be trained to refer internal reporters to other appropriate policies if they raise concerns that are not PIDs.

For example:

- If staff believe there is a risk in the workplace, they should be referred to their organisation's occupational health and safety policy.
- If they believe they are being discriminated against, they should be referred to the equal opportunity policy.
- If they wish to lodge a grievance, they should be referred to the grievance policy.

5. Your questions answered

Does the PID Act apply if the internal reporter persistently makes the same allegations, even though the organisation has already investigated and found them to be unsubstantiated?

Some internal reporters who do not get the outcome that they expected may refuse to accept the organisation's decision. They may either reframe their report in an attempt to have it taken up again or raise a range of minor or technical issues, arguing that these call into question the merits of the decision.

Organisations should provide a right of review so staff who are unhappy with the response to their report can appeal against the decisions made. Dissatisfied internal reporters are also entitled to raise the matter with investigating authorities.

In some cases, the internal reporter may become unreasonably persistent despite repeated attempts by your organisation to resolve the matter. Strategies for dealing with unreasonable persistence are about saying 'no'. They involve communicating clearly and transparently, and not allowing internal reporters to reframe their report to re-enter the process – unless they raise new and important issues.²

Organisations that find they are devoting disproportionate resources to responding to an unreasonably persistent internal reporter can find advice on dealing with this situation in the NSW Ombudsman's [Managing unreasonable complainant conduct practice manual](#).

Does the PID Act apply if the motives of the internal reporter are questionable?

There are a wide range of reasons why staff will report wrongdoing that is occurring within their organisation. Our experience suggests that people can be spurred to speak out about wrongdoing because their relationship with the organisation or their colleagues or manager has deteriorated or broken down. Private interest motivations – such as vindication, remorse, revenge and malice – can still produce disclosures that are very much in the public interest.

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

The fact that an internal reporter's motive may be improper or inappropriate often has little bearing in practice on whether the information provided or disclosed is of value. The information could be potentially useful business intelligence about your organisation, regardless of the reporter's motive.

Determining the motive of an internal reporter is particularly difficult. When assessing a report it is therefore generally best – at least initially – to focus solely on its content and accuracy, not the possible motives of the reporter.

However, questionable motives may result in selectivity, inaccuracy or misinterpretations in the reported information. If an inappropriate motive for a report is known or reasonably suspected, this may affect the weight that is put on the information in the report during an investigation – and further verifying information may often be needed.

Does the PID Act apply if the content of the report is frivolous?

If the actual content of the report is frivolous, the PID Act will not apply because it only applies to reports about serious matters (see [Guideline B2: What should be reported?](#)).

6. Additional resources

- [Guideline B2: What should be reported?](#)
- [Guideline B4: Reporting pathways](#)
- [Guideline C3: Assessing and streaming internal reports](#)
- [Guideline D3: Internal reporters involved in wrongdoing](#)
- [Managing unreasonable complainant conduct practice manual](#)
- [Independent Commission Against Corruption Act 1988](#)
- [Ombudsman Act 1974](#)
- [Public Interest Disclosures Act 1994](#)

7. Last updated

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8. Endnotes

1 For example, see s.64 of the [Administrative Decisions Tribunals Act 1997](#) which defines government policy as policy adopted by the Cabinet, the Premier or other Minister that is to be applied in the exercise of discretionary powers by administrators.

2 NSW Ombudsman 2009, [Managing unreasonable complainant conduct practice manual](#), Sydney, pp. 12–13.