

Dealing with voluntary PIDs

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What this guideline covers

Dealing with a voluntary public interest disclosure (**PID**) appropriately is key to a healthy ‘speak up’ culture and a strong PID framework, because it is the type of disclosure made when a PID maker comes forward voluntarily to make a report of serious wrongdoing.

When an agency receives a voluntary PID, it must take action to decide how it will deal with the PID. The *Public Interest Disclosures Act 2022 (PID Act)* imposes a number of obligations on agencies when dealing with voluntary PIDs. When agencies act on disclosures, it provides an opportunity to:

- identify procedures and practices that need improving
- identify wrongdoing and misconduct by public officials, contractors and volunteers
- send a clear message to public officials that serious wrongdoing will not be tolerated and that reports will be acted upon
- strengthen the integrity of the agency and the public sector in general
- strengthen public perceptions about the integrity of the public sector.

These guidelines provide guidance to agencies on:

- how to determine what action they should take to deal with a voluntary PID
- the different ways in which agencies can deal with a voluntary PID
- the considerations to be considered when deciding to refer, or not to refer, a voluntary PID to another agency
- agency obligations to the makers of voluntary PIDs
- an agency’s reporting and notification obligations to the Ombudsman in relation to voluntary PIDs.

The PID Act provides that agencies must have regard to the Ombudsman’s guidelines when considering what action or proposed action it will take to deal with a voluntary PID.

When does an agency ‘receive’ a disclosure?

An agency’s obligation to decide how to deal with a voluntary PID commences from the time the report is received.

The report is taken to have been received by an agency when it is:

- made to a disclosure officer of the agency, including the head of the agency
- communicated to a disclosure officer of the agency by a manager, a Minister or a Minister’s staff member
- communicated to a disclosure officer of the agency by another agency that is referring the PID to the agency, or
- otherwise communicated to the agency in accordance with an applicable law, policy, procedure or arrangement.¹

At times, it will be immediately clear that a report is a voluntary PID. It is clear that the agency therefore has an obligation to deal with these reports as voluntary PIDs.

Other times, the agency will have to undertake an assessment to check whether the report is a voluntary PID. However, there is an obligation to deal with the report as a voluntary PID as soon as it is received as long as:

- the report is about serious wrongdoing, and
- the report is made by a person who is or appears to be a public official, and
- the report is not a mandatory or witness PID.²

This means that as soon as an agency receives a report that *may* be a voluntary PID, it should be dealt with as if it were a voluntary PID, unless and until it is assessed as not being a voluntary PID. This ensures that reports are dealt with appropriately from the time they are received by an agency. This is an important safeguard for both makers of PIDs and for agencies, as it ensures that they will have been complying with their obligations under the PID Act in the event that the disclosure is actually a voluntary PID. It should be noted that these obligations arise as soon as the PID is received and are not delayed until after it has been assessed and recognised by the agency to be a PID.

¹ *Public Interest Disclosures Act 2022*, s 50.

² *Public Interest Disclosures Act 2022*, s 49(1).

When does a disclosure ‘relate to’ an agency?

Public officials who wish to make a voluntary PID would generally be expected to make it to:

- the agency they work for or are associated with
- the agency where the suspected serious wrongdoing occurred, or
- an integrity agency.

However, a voluntary PID can be made by *any* public official about *any* agency to *any* agency, in line with the ‘no wrong door’ approach of the PID Act.

When an agency receives a voluntary PID, the way the agency decides to deal with it will depend on whether the PID relates to that agency or not.

A voluntary PID relates to an agency if it is about serious wrongdoing by the agency or by a public official employed by, or otherwise associated with, the agency.³

A voluntary PID also relates to an agency if it is about serious wrongdoing by someone else that otherwise affects, or might affect, the exercise of the functions of the agency.⁴ Examples could include serious wrongdoing by another entity (such as another agency or a consultant) that has influenced or caused an agency to make an incorrect decision or to procure a particular product or service.

³ *Public Interest Disclosures Act 2022*, s 20(3)(a)-(b).

⁴ *Public Interest Disclosures Act 2022*, s 20(3)(c).

Deciding what action to take when the disclosure relates to the agency

An agency that receives a voluntary PID that relates to that agency (whether directly from the PID maker or following a referral from another agency) has an obligation to decide how to deal with it.⁵

The PID Act provides that an agency can decide to deal with the voluntary PID in one or more of the following ways:

- *Investigating the serious wrongdoing itself*
 - in accordance with an applicable law, procedure or policy — for example, the agency may have an existing policy on how internal investigations are to be conducted, which will govern the investigation process and the choice of appropriate investigator; the investigation of misconduct matters may be governed by legislation and a separate professional standards regime
 - by conducting other investigative action, such as an audit, inquiry or assessment. These could be conducted on a preliminary or formal basis and may include further enquiries to assist in clarifying the scope of any eventual investigation and to better understand all the allegations within a report.⁶
- *Referring the report to an integrity agency* — It may be appropriate to refer the PID to an integrity agency for it to consider investigating, if the information contained in the report relates to the type of conduct that the integrity agency typically investigates.⁷
- *Referring the report to another agency with which the receiving agency has an arrangement in place*, under which it has been agreed that the second agency exercises the functions of the first agency under the PID Act (under s 81(2)).⁸
- *Referring the report to another agency to which it relates, if the disclosure relates to more than one agency* — The receiving agency may receive a PID that contains allegations of serious wrongdoing by multiple agencies or multiple public officials associated with different agencies. In these circumstances, it may be appropriate to refer the report (or relevant part of the report) to another agency to which the report relates, so that that other agency can also investigate or deal with the relevant parts that relate to it.⁹

If an agency decides to deal with a voluntary PID by referring it to any other agency, there are certain steps it must take before doing so.

⁵ *Public Interest Disclosures Act 2022*, s 55(1).

⁶ *Public Interest Disclosures Act 2022*, s 55(2)(a).

⁷ *Public Interest Disclosures Act 2022*, s 55(2)(b).

⁸ *Public Interest Disclosures Act 2022*, s 55(2)(d).

⁹ *Public Interest Disclosures Act 2022*, s 55(2)(e).

Important note: While the PID Act requires agencies to decide how to deal with a voluntary PID, including whether to investigate, it does not confer any additional power on the agencies to conduct investigations. Accordingly, any investigation would need to be conducted in accordance with any applicable laws, policies and practices that apply to the agency in relation to suspected serious wrongdoing, however the agency becomes aware of it. This is also generally the case for integrity agencies. For example, if the Independent Commission Against Corruption (**ICAC**) conducts an investigation after becoming aware of possible corrupt conduct as a result of receiving a PID, the ICAC's investigation will be conducted (like any other investigation of corrupt conduct by the ICAC) under and in accordance with the *Independent Commission Against Corruption Act 1988 (ICAC Act)*.

However, section 58 of the PID Act does give the Ombudsman certain additional powers to investigate voluntary PIDs that relate to other integrity agencies and gives the ICAC additional powers to investigate voluntary PIDs that relate to the Ombudsman.

Important note: Agencies can consult with the Ombudsman or another integrity agency if they require assistance when deciding what action to take regarding a voluntary PID.¹⁰ This can be helpful when agencies are trying to determine whether they should refer a report to an integrity agency. You may be concerned about maintaining the confidentiality of the report when discussing the report with the integrity agency. Under section 83 of the PID Act, agencies can share information with an integrity agency (and any other agency) about a disclosure if it is reasonably necessary for the agency to decide how to deal with a disclosure or to exercise another function under the PID Act.

¹⁰ *Public Interest Disclosures Act 2022*, s 54(2).

Deciding what action to take when the disclosure does not relate to the agency

An agency may receive a voluntary PID that does not relate to the agency.

That is, an agency may receive a voluntary PID about serious wrongdoing not committed by that agency or a public official associated with that agency, and that does not otherwise affect the exercise of the agency's functions.

This might happen because, rather than making their PID directly to the agency to which it relates, a public official might choose to make the PID:

- to their own agency — that is, the agency they are employed by, or associated with
- to an integrity agency or to another agency that they think might be able to investigate the serious wrongdoing, or
- to any other agency where they feel comfortable and safe reporting the PID.

If the agency that receives the voluntary PID is authorised to investigate or otherwise deal with the suspected serious wrongdoing, then it can decide to deal with the PID by doing that. This will be the case if:

- The agency is an integrity agency and is authorised to investigate.
- The agency is not an integrity agency but is authorised by another Act or law to investigate or otherwise deal with relevant serious wrongdoing. An example is the NSW Public Service Commission, which has a broad power under section 83 of the *Government Sector Employment Act 2013 (GSE Act)* to conduct an inquiry into any matter relating to the administration or management of a government sector agency.
- The agency received the PID after referral from the agency to which it relates, and those agencies have an agreement under section 81 of the PID Act that allows the agency that has received the referred PID to deal with it pursuant to that agreement.

Otherwise, any agency that receives a voluntary PID that does not relate to that agency and that relates instead to another agency, must decide to deal with the PID by doing one or more of the following:

- referring the disclosure to an integrity agency
- referring the disclosure to a person or body that is authorised by another Act or law to investigate the relevant serious wrongdoing, or
- referring the disclosure to the agency to which the disclosure relates.¹¹

If an agency decides to deal with a voluntary PID by referring it to any other agency, there are certain steps it must take before doing so.

Important note: Even if a report does not relate to the agency that has received it, that agency should assess it to identify whether it is a voluntary PID. The receiving agency should also keep comprehensive records of the considerations taken into account and the decisions made as to how the matter should be dealt with. This includes records of communications with the maker of the PID and other agencies.

¹¹ *Public Interest Disclosures Act 2022*, s 56(1).

Investigating PIDs

The PID Act does not confer evidence gathering powers for the purpose of an investigation, nor does it set out how such an investigation is to be carried out. Investigations under the PID Act are carried out in the same way as other internal investigations, such as misconduct investigations. However, the PID Act does include some special obligations in relation to investigations into a PID, including obligations to:

- manage risks of detrimental action
- keep the PID maker informed
- protect the PID maker's identifying information
- report to Ombudsman, and
- take corrective action.

Agencies can use the following resources which provide information on conducting internal investigations:

- [*Factfinder: a guide to conducting internal investigations*](#). This is available on the ICAC website.
- [*Handling Misconduct – A human resource manager's guide Chapter 8: Investigation and determination*](#). This is available on the Australian Public Service Commission website.

When does an agency need to take corrective action?

Under section 66(1) of the PID Act, an agency must take corrective action if the outcome of an investigation into a voluntary PID includes a finding that serious wrongdoing or other misconduct occurred. Corrective action taken by an agency should appropriately respond to the serious wrongdoing or misconduct that has occurred.

An agency is not required to take corrective action if no serious wrongdoing or other misconduct is found to have occurred within the agency.¹²

What corrective action can an agency take?

Under section 66(4) of the PID Act, corrective action includes:

- an action under section 69(4) of the GSE Act such as:
 - terminating the employment of an employee, either with or without giving them the opportunity to resign
 - imposing a fine on an employee which may be deducted from their pay
 - reducing the remuneration payable to an employee
 - reducing the classification or grade of an employee
 - assigning an employee to a different role within the agency
 - cautioning or reprimanding an employee
- an action which is authorised by the law, procedures or policies which allowed the serious wrongdoing to be investigated
- issuing a formal apology
- enacting reforms within the agency in response to the serious wrongdoing, such as:
 - improvements to policies and procedures
 - structural change
 - the reallocation of resources, or
 - additional training or educational measures
- publishing the findings of serious wrongdoing or other misconduct and a report in support of the finding
- paying compensation to people affected by serious wrongdoing or other misconduct.

Important note: The PID Act does not authorise agencies to take corrective action that they are not otherwise authorised to take.¹³

Providing information about corrective action to makers of voluntary PIDs

If an agency completes an investigation into serious wrongdoing, it must provide the PID maker with:

- a description of the results of the investigation, and
- details of corrective action that has been taken by the agency, or corrective action that is proposed or recommended.¹⁴

Further guidance can be found in the guideline Updating the makers of voluntary PIDs and providing supports.

¹² *Public Interest Disclosures Act 2022*, s 66(3).

¹³ *Public Interest Disclosures Act 2022*, s 66(5).

¹⁴ *Public Interest Disclosures Act 2022*, s 59(2)(f).

Referring a voluntary PID to another agency

A voluntary PID can be referred to another agency regardless of whether the receiving agency has commenced an investigation.¹⁵ This means that the referral can occur before an investigation has commenced, after a decision has been made to commence an investigation, and during the life cycle of an investigation.

A voluntary PID can also be referred even if it has been previously referred, and it can also be referred to more than one other person or body.¹⁶

If an agency refers a PID, it must provide details of the referral to the maker of the PID.¹⁷ Details of the referral include:

- the date of the referral
- the information included in the referral
- the agency to which the referral was made
- the recipient of the referral
- a contact person within the agency that has received the referral.

Referral to an integrity agency

An agency that receives a voluntary PID may refer the PID to the relevant integrity agency. This should particularly be done if the PID alleges serious wrongdoing involving the head of the agency or its senior executive staff.

An agency should not, however, refer a PID to an integrity agency for the purpose of avoiding responsibility for investigating or dealing with incidents of serious wrongdoing itself.

Even if an agency refers a voluntary PID to an integrity agency, it can still decide to investigate or otherwise deal with alleged serious wrongdoing itself. It would be prudent for an agency to check with the integrity agency first, before proceeding to take any investigating action itself. This will help to ensure that any actions the agency might take will not jeopardise any possible investigation by the integrity agency, or unnecessarily risk a loss of confidentiality with, or detrimental action to, the maker of the PID.

Information about PID Act referrals and reporting obligations imposed by other legislation

In some cases, an agency will be required to report serious wrongdoing to an integrity agency because of an obligation that arises under a separate piece of legislation.

For example, under section 11 of the *Independent Commission Against Corruption Act 1988 (ICAC Act)*, the principal officer of a public authority has a duty to report to the Independent Commission Against Corruption (ICAC) any matter where there is a reasonable suspicion that corrupt conduct has occurred or may occur. This obligation to report corrupt conduct to the ICAC is distinct from any action or decision taken under the PID Act. If an agency were to decide to refer a voluntary PID to the ICAC in addition to its duty to report corrupt conduct, it should make clear in any covering correspondence that it is making a PID Act referral as well as a report under the ICAC Act.

Important note: Unless the referral of a voluntary PID is mandatory under another Act or law, an integrity agency must not refer a voluntary PID to another integrity agency without first considering the views of the other integrity agency.¹⁸

¹⁵ *Public Interest Disclosures Act 2022*, s 57(4)(a).

¹⁶ *Public Interest Disclosures Act 2022*, s 57(4)(b)-(c).

¹⁷ *Public Interest Disclosures Act 2022*, s 59(2)(d).

¹⁸ *Public Interest Disclosures Act 2022*, s 57(3).

Referral to another agency to which the PID relates, or which is otherwise considered better placed to investigate or deal with it

The key principles an agency must consider when deciding whether to refer a voluntary PID to another agency are:

- whether the disclosure would be more appropriately dealt with by that other agency
- the risk of detrimental action being taken against the maker of the PID because of the referral or failure to refer the disclosure.¹⁹

An agency can both refer a voluntary PID to another agency and decide to investigate or otherwise deal with the alleged serious wrongdoing itself. If it decides to do that, the agency should ensure that it informs the other agency of the action that it is proposing to take.

When deciding whether to refer a disclosure, agencies can work together to determine which agency is the most appropriate to investigate or deal with the matter. This can include sharing information about the disclosure under section 83 of the PID Act, if this will assist in determining which agency is the most appropriate to deal with it. Any information shared should be done securely and efforts should be made to keep the identity of the maker confidential.

However, if an agency receives a report relating to alleged serious wrongdoing by or in another agency, the receiving agency should consider why the PID maker chose not to make their PID directly to that other agency and whether it might place the maker at potential risk of detrimental action if the PID is referred to that other agency.

In most cases, if there is an integrity agency that has relevant jurisdiction to investigate or deal with the matter, it would be prudent to refer the matter to that integrity agency, rather than directly to the agency to which the matter relates. The integrity agency will likely be better placed to decide whether the agency to which the matter relates should be made aware of the matter, and to take appropriate steps to assess and manage the risks to the PID maker if that agency is made aware.

Considering the risk of detrimental action if the matter is, or is not, referred, is clearly important and ensures that agencies continue to consider their obligations to ensure the PID maker is proactively protected against the risk of detriment.

Where practicable, an agency should consider seeking the views of the PID maker before deciding to refer the PID to another agency — and especially before referring the PID to the agency in which the serious wrongdoing is alleged to have occurred.

The questions that should be considered may include:

- Why did the maker choose not to report directly to the agency to which the PID is proposed to be referred?
- Has the agency previously had the opportunity to investigate or deal with the reported serious wrongdoing, and failed to do so?
- Which agency has the appropriate authority, powers and resources to investigate or otherwise deal with the report?
- Does the maker fear that detrimental action will be taken against them for making the disclosure internally within the agency?
- Have threats already been made against the PID maker?
- What is the relationship between the PID maker and the person(s) about whom the report concerns?

It may be appropriate for the agency in receipt of the disclosure to deal with that disclosure if it is within their authority to do so, and if it is considered that the risk of detrimental action would be heightened if a referral occurs.

¹⁹ *Public Interest Disclosure Act 2022*, s 57(2).

What to do when you decide not to investigate, or to cease investigating, a voluntary PID

The PID Act anticipates that suspected serious wrongdoing that has been reported in a voluntary PID will be investigated — either by the agency that has received the PID deciding to investigate the PID itself, or by that agency referring the PID to another agency that is better placed to investigate.

However, the PID Act does allow for the possibility that an agency may decide to deal with a voluntary PID by:

- neither investigating the serious wrongdoing itself nor referring it elsewhere for investigation (with the result that there will be no investigation), or
- commencing an investigation but deciding to stop before the investigation is complete, and not referring it elsewhere for investigation (with the result that there will be no completed investigation, and no findings in relation to the serious wrongdoing).²⁰

There may be legitimate reasons as to why an agency may decide to take this course of action. For example, it may be that (unknown to the PID maker) the serious wrongdoing has already been comprehensively investigated and action taken in respect of it. It may be that the alleged serious wrongdoing is very historical, and there would be no public interest or practical utility in commencing an investigation now. However, these would be exceptional cases.

If an agency makes one of these decisions, it must immediately notify and provide written reasons to the Ombudsman as soon as reasonably practicable after their decision has been made.

When providing written reasons to the Ombudsman, an agency should include the following:

- information about the disclosure, including how it was received and the content of the disclosure
- a description of additional information/documents received by the maker and/or collected by the agency concerning the disclosure
- what (if any) investigative steps were taken by the agency
- reasons why the agency either did not investigate or ceased investigating the disclosure (without referring it to another agency to complete the investigation).²¹

Right of internal review

The agency must also provide its reasons for this decision to the PID maker.²²

If the PID maker does not agree with the decision, they may seek internal review of the decision.²³ The application for internal review must be made within 28 days of the day they are informed of the decision, must be made in writing, and must contain the PID maker's reasons as to why they consider the decision ought not to have been made.²⁴

The agency should appoint an internal reviewer who was not substantially involved in the decision not to investigate, or to cease investigating.

²⁰ *Public Interest Disclosure Act 2022*, s 55(3).

²¹ *Public Interest Disclosure Act 2022*, s 55(3).

²² *Public Interest Disclosure Act 2022*, s 59(2)(c).

²³ *Public Interest Disclosure Act 2022*, s 60(1)(c).

²⁴ *Public Interest Disclosure Act 2022*, s 60(2).

When is an investigation complete?

The term 'investigation' is not defined in the PID Act and takes on its ordinary meaning. Because the PID Act refers to 'commencing' and 'completing' or 'ceasing' an investigation, it is apparent that 'investigation' refers to an end-to-end process. That is, merely taking some sort of investigatory action does not necessarily constitute 'an investigation'.

An investigation will comprise a number of steps, starting with the appointment of an investigator and including the undertaking of various investigatory actions. Most critically, it will involve the making of conclusions or findings. The primary purpose of an investigation is to conclude whether the serious wrongdoing raised by the PID did, or did not, occur, and to what extent. Accordingly, the findings of an investigation will generally be to conclude that particular serious wrongdoing either did, or did not, occur. However, the PID Act notes, for the avoidance of doubt, that an investigation can be completed even if it does not result in a conclusion as to whether, or to what extent, serious wrongdoing occurred.²⁵ This may be the case if, after exhausting all reasonable investigatory actions, the investigator concludes that it is not possible to conclude whether serious wrongdoing did or did not occur.

If an investigation ends because the investigator forms a view that they cannot reach a conclusion as to whether serious wrongdoing occurred, there may be a grey area between characterising this as:

- the investigator has *ceased* the investigation, based on their view that continuing the investigation would likely never result in a conclusion as to whether serious wrongdoing occurred, or
- the investigator has *completed* the investigation, with a conclusion that it is not possible to determine whether serious wrongdoing occurred.

If, after commencing an investigation, an agency finds itself unable to determine whether serious wrongdoing has occurred, the agency should generally err on the side of caution and say that it has 'ceased' the investigation rather than purporting to have 'completed' an investigation, with no conclusions. By ceasing the investigation, the matter will be reported to the Ombudsman and the PID maker will have a right of internal review.

To say that an investigation was 'completed' (despite no conclusion as to whether serious wrongdoing occurred) will generally only be appropriate where the investigation:

- was conducted by an integrity agency, another external agency with statutory investigatory powers or a professional external investigator
- was comprehensive, in the sense of taking all reasonably appropriate investigatory actions (such as, by considering all available documents and witness testimony)
- resulted in the production of a formal investigation report, explaining why no conclusion as to whether serious wrongdoing occurred, or its extent, has been possible.

²⁵ *Public Interest Disclosures Act 2022*, s 55(4).

Ceasing to deal with a disclosure as a voluntary PID

Agencies may cease to deal with a disclosure as a voluntary PID if the following requirements are met:

1. the agency decides the disclosure is not a voluntary PID, and
2. the disclosure is *not* in fact a voluntary PID.²⁶

If an agency ceases to deal with a disclosure as a voluntary PID based on the above in a matter where the maker has made a purported PID, the agency must provide the maker with reasons for its decision.²⁷

A purported PID is a disclosure:

- that is made in accordance with section 27 of the PID Act that is, the maker made the disclosure to a recipient of voluntary PIDs such as their manager or disclosure officer
- that is not a mandatory or witness PID, and
- the maker stated that the disclosure is a PID, whether or not it is in fact a PID.²⁸

If an agency receives a purported PID and decides that it is not in fact a voluntary PID and will not be dealt with as a voluntary PID, reasons for the agency's decision should be given to the maker of the purported PID as soon as possible after that decision is made. The agency should also inform the maker that they may apply for an internal review of the agency's decision.²⁹

When giving reasons, an agency should use simple terms and be as clear as possible. It may be necessary to meet with the maker to discuss the agency's reasons.

²⁶ *Public Interest Disclosures Act 2022*, s 49(2).

²⁷ *Public Interest Disclosures Act 2022*, s 59(4).

²⁸ *Public Interest Disclosures Act 2022*, sch 2 Dictionary.

²⁹ *Public Interest Disclosures Act 2022*, s 60(1)(b).

Obligations to makers of voluntary PIDs

An agency that is dealing with a voluntary PID has obligations to the maker of the voluntary PID. This includes providing information and regular updates to the maker.³⁰

In addition, agencies have obligations to take proactive steps to protect the maker of a voluntary PID from the risk of detrimental action.

This obligation applies to both:

- the agency to which the voluntary PID relates, and
- the agency that employs the PID maker or with which the PID maker is otherwise associated.³¹ (Of course, in some cases, this will be the same agency).

³⁰ *Public Interest Disclosures Act 2022*, s 59.

³¹ *Public Interest Disclosures Act 2022*, s 61(1)(b).

Internal review of some agency decisions

Requesting an internal review

A person who has made a disclosure can request an internal review of some agency decisions made under the PID Act. As long as a person has made a disclosure, and an agency has made an applicable decision, they can apply for an internal review of that decision.

What decisions can be reviewed?

Under section 60(1) of the PID Act, makers of disclosures can seek internal review of the following agency decisions:

- A decision that the agency is not required to deal with the disclosure as a voluntary PID.
- A decision to stop dealing with the disclosure because the agency decided it was not a voluntary PID.
- A decision to not investigate the serious wrongdoing and not refer the disclosure to another agency.
- A decision to cease investigating the serious wrongdoing without either completing the investigation or referring the disclosure to another agency.

When an agency notifies the maker of one of the above decisions, the reporter should also be informed of their right to an internal review and the application process.

What decisions cannot be reviewed under the PID Act?

The maker of a disclosure can only apply for an internal review of the decisions specified at section 60(1) of the PID Act. This means that a disclosure-maker does not have a right under the PID Act to request an internal review of decisions such as:

- A decision regarding the outcome of an investigation.
- A decision to refuse to deem a disclosure to be a voluntary PID.
- Certain other decisions about how an agency deals with a voluntary PID such as by referral, investigation or both (Note: this does not include an agency decision to cease dealing with a voluntary PID.)

Important note: Although there is no right under the PID Act to an internal review of decisions such as those listed above, this does not stop agencies from providing avenues for the internal review of such decisions. If an internal review is granted, it should be conducted by someone who is appropriately authorised and was not substantially involved in the original decision. Alternatively, if the maker of a disclosure is dissatisfied with a particular decision, they may raise their concerns with the Ombudsman.

How to request an internal review

The person seeking an internal review (**the applicant**) must make an application in writing within 28 days of being informed of the agency's decision.³² The application should be sent to the agency that made the decision and should state the reasons why the applicant considers the agency decision should not have been made.³³ The applicant may also submit any other relevant material with their application and this material must be considered by the reviewer.

³² *Public Interest Disclosures Act 2022*, s 60(2)(a).

³³ *Public Interest Disclosures Act 2022*, s 60(2)(b).

Conducting an internal review

The PID Act does not include detailed information about how a review is to be conducted. However, it appears that the purpose of a review is to determine if the agency has acted in accordance with the PID Act.

Agencies need to consider how they will manage internal reviews, including where applications should be sent, which person or unit within the agency will conduct the review and what timeframes the agency will set for completion of the review. Agencies should document their internal review processes and include them in their PID policy and on their intranet and website.

Who should conduct the review?

The person within the agency who deals with the internal review (**the reviewer**) must not be someone who was substantially involved in making the decision or dealing with the disclosure which is the subject of the review.³⁴ So long as the reviewer meets this requirement, an agency is free to decide who will undertake the review. The reviewer should be advised how to do the review. It would also be preferable that they have some knowledge of the PID Act. When deciding on a reviewer, the agency should be mindful of any applicable confidentiality considerations, especially when the disclosure is a voluntary PID.

Can an agency arrange for someone outside the agency to do the internal review?

Under section 81(2) of the PID Act, an agency may arrange for another agency to exercise the agency's functions under the Act on behalf of the agency. The provision is broad and would appear to allow for an agency to arrange for another agency to exercise the agency's function of internal review. If an agency enters into an arrangement with another agency, it must notify the Ombudsman of the arrangement.³⁵

In contrast, the PID Act does not allow an agency or agency head to delegate, authorise or arrange for an entity that is not an agency to exercise the function of internal review. While section 81(3) enables an agency to arrange for an entity to exercise some functions on its behalf it does not include internal reviews.

However, the PID Act does not prevent an agency from engaging a third party, such as a law firm, to advise the reviewer. Any advice given to a reviewer should include all relevant facts that must be considered in making a decision. Importantly, the reviewer must still turn their mind to all relevant facts and actually make the decision (i.e. the reviewer must not simply "rubber-stamp" the advice given by the entity).

What information does the reviewer need to consider?

Section 60(3) of the PID Act states that the reviewer must consider relevant material submitted by the applicant. In practice, the reviewer will likely need to consider the original decision and any relevant materials, as well as the applicant's submitted materials.

³⁴ *Public Interest Disclosures Act 2022*, s 60(2)(c).

³⁵ *Public Interest Disclosures Act 2022*, s 81(4)(b).

What can the reviewer decide?

After completing the internal review, the reviewer can either:

1. decide to confirm the agency's decision, or
2. decide that the disclosure should be dealt with, or continue to be dealt with, as a voluntary PID.³⁶

If the reviewer decides the disclosure should be dealt with, or continue to be dealt with, as a voluntary PID, the agency must give effect to this decision.³⁷

The applicant must be notified of the reviewer's decision.³⁸ The reviewer should write to the applicant to explain the decision and provide information about what the decision means in practice.

³⁶ *Public Interest Disclosures Act 2022*, s 60(4).

³⁷ *Public Interest Disclosures Act 2022*, s 60(6).

³⁸ *Public Interest Disclosures Act 2022*, s 60(5).

Voluntary dispute resolution

Under section 74(1) of the PID Act, an agency may request that the Ombudsman conciliate a dispute that arises in connection with a disclosure that is or may be a voluntary PID. Conciliation is a voluntary process and works best when both the agency and PID maker (**parties**) have a willingness to resolve the dispute.

In a conciliation, the parties – with the assistance of staff at the Ombudsman’s office or an Ombudsman-appointed mediator – identify the issues in dispute, develop options, consider alternatives, and try to reach an agreement. The person conciliating can provide advice on the matters in dispute and/or options for resolution but will not make a determination.

Any statements or admissions made during the conciliation process are not admissible in any court proceedings or investigations arising from the PID.³⁹ A party to the conciliation may withdraw at any time.⁴⁰ The Ombudsman may charge the agency reasonable fees for the conciliation services provided.⁴¹

Disputes that may be considered for conciliation include:

- a dispute about whether a disclosure is in fact a voluntary PID
- a dispute about whether conduct or proposed conduct constitutes a detrimental action offence relating to a disclosure, and
- a dispute that arises under the PID Act or a PID policy in connection with a disclosure that is or may be a voluntary PID.⁴²

Important note: Agencies should contact the NSW Ombudsman’s Office to discuss whether a dispute would be appropriate for conciliation.

³⁹ *Public Interest Disclosures Act 2022*, s 74(5).

⁴⁰ *Public Interest Disclosures Act 2022*, s 74(4).

⁴¹ *Ombudsman Act 1974*, s 38A.

⁴² *Public Interest Disclosures Act 2022*, s 74(9).

