

What is a public interest disclosure?

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What this guideline covers

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 for ensuring 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.

In NSW, that framework is the *Public Interest Disclosures Act 2022* (**PID Act**).

This guideline provides an overview of the PID Act. It also explains the categories of disclosures and how they can be made under the PID Act. There are more detailed guidelines on each of the concepts discussed in this guideline.

What does it mean for something to be a PID?

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

Whenever a report is made that is a PID (that is, it has all the required features of a PID), it is imperative that the recipient quickly recognises that they have received a PID. The agency must therefore have an effective assessment process in place to ensure it can identify whether a report has the features of a PID, and therefore whether it is a PID.

This assessment process is not for an agency to decide to *make* the report a PID or to decide whether the report *should be* a PID. Instead, the assessment process is to identify whether the report *is* a PID. If an agency has received a report that is a PID (because it has all the features set out in the PID Act), then the report is a PID from the moment it is made, whether or not the agency recognises it as a PID.

Protections

Accurately identifying PIDs is important because, if a report is a PID, the public official who made the report will have special protections under the PID Act.

These protections include:

- *Immunity from civil and criminal liability that might otherwise arise because they made the report*

For example, public officials are often subject to a duty of confidentiality that prevents them disclosing certain information they obtain, or become aware of, at work. Sometimes, in order to make a PID, public officials will need to breach or disregard these duties of confidentiality. The protections in the PID Act mean that, if that happens, the public official cannot be disciplined, sued or criminally charged for breaching confidentiality. This protection exists because the PID Act presumes that it is always in the public interest for a public official to make a PID, and this public interest overrides any public interest there might otherwise be in maintaining the usual confidentiality obligations of public officials.

- *Protections from detrimental action*

The PID Act contains robust protections to ensure that a person who has made a PID does not suffer detrimental action, such as bullying, harassment or dismissal, as a result. These include:

- a criminal offence of unlawfully taking detrimental action
- a right to compensation if unlawful detrimental action has been taken
- a power to seek a court order (injunction) where detrimental action is threatened or has occurred (for example, an order to prevent dismissal or to require reinstatement)
- where the PID is a voluntary PID, a duty on agencies to assess and take proactive steps to protect the maker from the risk of detrimental action.

Obligations

It is also critical for the agency to identify that a report it has received is a PID because, if the agency has received a *voluntary* PID, it will be subject to special obligations under the PID Act.

These include obligations:

- to investigate or otherwise appropriately deal with the PID
- to ensure that the identity of the person who has made the PID is not unlawfully revealed
- to keep the maker of the PID informed about how their report is being dealt with and the outcome of any investigation
- to provide information to the Ombudsman about the report and how it was dealt with.

Why do these special rules apply to PIDs?

Having a strong PID framework is important because those working for, or within, an agency will frequently be the best placed to see and report when wrongdoing occurs. Unless such people are willing to speak up, wrongdoing may continue undetected and unreported. It is imperative, therefore, that barriers to speaking up are removed.

Some of these barriers include a fear that the person will face detrimental action if they speak up, or a belief that their report will not be taken seriously and that nothing will happen to address the wrongdoing, even if they do speak up. The PID Act aims to remove these barriers.

If an agency fails to deal with a PID appropriately, there is a risk of detrimental consequences for the PID maker. In addition, the agency will have lost an opportunity to properly address serious wrongdoing. This will, over time, erode confidence in the integrity of the agency and the PID framework.

Importantly, the objects of the PID Act include to facilitate PIDs and ‘to promote a culture in which public interest disclosures are encouraged’.

An important note about other reports of wrongdoing that are not PIDs

Of course, just because a report of wrongdoing is *not* a PID (that is, does not have all of the prescribed features of a PID), that does not mean that it should not also be treated seriously. All legitimate reports of wrongdoing should be properly investigated or otherwise dealt with, and with appropriate care given to ensure the person who made the report does not suffer unfair detriment as a result of making the report.

In some cases, a report of wrongdoing that is not a PID may give rise to other legal obligations and protections. For example, where a person (whether or not a public official) makes a complaint to the Ombudsman, the Independent Commission Against Corruption (**ICAC**) or the Law Enforcement Conduct Commission, it is a criminal offence to take detrimental action against them (under the *Ombudsman Act 1974*, the *Independent Commission Against Corruption Act 1988* (**ICAC Act**) and the *Law Enforcement Conduct Commission Act 2016*, respectively).

More generally, a failure to properly deal with a report of wrongdoing (whether or not it is a PID) may itself constitute maladministration or even corrupt conduct — for example, if there is an attempt to conceal the wrongdoing and the report, or a failure to have robust internal processes to investigate reports of wrongdoing.

In the case of a report made by a staff member, the agency’s duties under work health and safety laws also mean that it will have positive obligations to ensure the staff member is not improperly harmed (such as through workplace bullying).

Types of PIDs

There are three types of PIDs in the PID Act. These are:

1. *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.
2. *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.
3. *Witness PID* — This is a PID where a person discloses information during an investigation of serious wrongdoing following a request or requirement of the investigator.

The *protections* in the PID Act for a person who makes a PID will generally apply to all these types of PIDs.

This makes sense, because a person who has made a PID might be at risk of reprisal or other detrimental action whether or not they disclosed information because they thought it was the right thing to do (*voluntary*), because it was their job to report (*mandatory*), or because they were asked to give evidence in an investigation (*witness*).

However, most of the *obligations* on agencies in the PID Act relate specifically to voluntary PIDs. These include the obligations in the PID Act about 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 concept of serious wrongdoing

All PIDs must relate in some way to serious wrongdoing:

- A *voluntary PID* must be a disclosure of information that the maker honestly, and on reasonable grounds, believes shows or tends to show serious wrongdoing.
- A *mandatory PID* must be a disclosure of information about serious wrongdoing (which means that it either contains an allegation of wrongdoing or otherwise shows or tends to show serious wrongdoing).
- A *witness PID* must be made in the context of an investigation of serious wrongdoing.

The concept of serious wrongdoing is therefore central to the operation of the PID Act.

Under section 13 of the PID Act, 'serious wrongdoing' means one or more of the following:

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

Important note: The categories of serious wrongdoing set out in the PID Act — corrupt conduct, serious maladministration and so on — are 'serious wrongdoing' *by definition*. This means that, provided the alleged conduct in question falls within one of those terms (for example, 'corrupt conduct' or 'serious maladministration') then the definition of serious wrongdoing has been met, and there is no separate or extra requirement that the matter must also be assessed as having any degree of seriousness. Agency recipients of PIDs should therefore not get caught up in asking themselves whether a report is 'serious enough' to be covered by the PID Act. If it meets the definition, then it is.

When is a report a voluntary PID?

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

They involve a public official making 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 set out in sections 24 to 27 of the PID Act:

	Feature	<i>A report will be a voluntary PID only if it:</i>
1.	Who <i>makes</i> the report? See	... is made by a <i>public official</i> AND
2.	Who <i>receives</i> the report? See	... is made to one of the following: <ul style="list-style-type: none"> • the person’s manager • the head of any agency • a disclosure officer of any agency • a Minister or Minister’s office (but only if in writing) • <i>only in very limited circumstances</i>, to a journalist or Member of Parliament (MP) AND
3.	What is the <i>content</i> of the report?	... discloses information that the person honestly and on reasonable grounds believes, shows or tends to show serious wrongdoing AND
4.	In what way is the report made?	... is made in writing or orally (An exception is a report to a Minister or ministerial staff, which will be a voluntary PID only if made in writing.) AND
5.	Is the report <i>voluntary</i> ?	... is voluntary, in the sense of not being a mandatory PID or a witness PID.

This assessment is objective — that is, a report either has all of these features or it does not. There is no discretion or subjectivity on the part of the recipient who is assessing the report. If one person or agency assesses a report and forms the view that it is a PID, and another person or agency assesses it and forms the view that it is not a PID, then one of them is wrong.

Ultimately, only a court of law can determine authoritatively whether a report is a PID. However, given the serious ramifications for agencies if they fail to recognise a report as a PID, if there is doubt as to whether a report is PID, an agency should generally err on the side of caution and treat the report as a PID. This way they ensure they comply with their obligations under the PID Act and that the maker of the PID is appropriately protected.

There is a separate and important power conferred on the heads of agencies in certain circumstances to *deem* that a report is a voluntary PID even if the report does not strictly and objectively meet all of the features above.

1. Who makes the report?

To be a voluntary PID, the report must have been made by a 'public official'.¹

Even though an MP is a public official as defined in the PID Act, section 25 of the PID Act expressly states that a MP cannot make a voluntary PID. This means that a report of serious wrongdoing by a MP is not a voluntary PID.

Important note: A public official can make a PID about serious wrongdoing relating to *any* agency, not just the agency they are working for.

1. *Public Interest Disclosures Act 2022*, s 25.

2. Who receives the report?

To be a voluntary PID, the report must have been made to one or more of the following recipients listed in section 27 of the PID Act:

- the person's manager
- a 'disclosure officer' in *any* agency, which includes:
 - 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 Ombudsman, 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).

The disclosure officers of an agency, together with their contact details, will be set out in the agency's PID policy on its website. In the case of integrity agencies (including the Ombudsman and ICAC) all staff who handle complaints will be designated as disclosure officers.

Important note: If a person wishes to make a report to an agency but is unsure who to send it to, they can send written correspondence to the agency's registered address, general email address or other address for the receipt of electronic communications. It should be addressed to the 'head of the agency' or 'PID disclosure officer'.

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.² Managers can do this by either:

- giving the report (or contemporaneous notes of the report, if it was made orally) to a disclosure officer, or
- if the person who has made the report prefers, accompanying the person to meet with a disclosure officer.

If a public official tries to make a report *orally* to a Minister or their staff (and it appears that the report would otherwise have all of the features of a PID), the Minister or their staff have an obligation to help the person by directing them to an appropriate integrity agency or to a disclosure officer within an agency that is responsible to the Minister.³ This is done so that the person can then make (or if necessary remake) the report so that it is a voluntary PID.

In limited circumstances, a report of wrongdoing made to a Member of Parliament (other than a Minister) or a journalist could also be a voluntary PID. However, the requirements for such a report to be a voluntary PID are far more onerous, including a requirement that the person must have previously made the same report to one of those other recipients.

2. *Public Interest Disclosures Act 2022*, s 51(1).

3. *Public Interest Disclosures Act 2022*, s 52(c).

3. What is the content of the report?

To be a voluntary PID, the maker of the report must honestly, and on reasonable grounds, believe that the disclosure shows or tends to show serious wrongdoing.⁴

Accordingly, a report may be a voluntary PID, whether or not any serious wrongdoing has occurred.

It is also not necessary for the maker to provide information to establish conclusively, or to any legal or investigative standard of proof, that the serious wrongdoing occurred. On the other hand, a bare allegation or suspicion that is unsupported by any relevant evidence would not be sufficient.

The relevant question is: could a reasonable person, in the position of the person making the report, have formed the belief that the information being reported shows or tends to show that serious wrongdoing has occurred?

Important note: Given the beneficial purpose of the PID Act, and its object of facilitating and encouraging PIDs, agencies should not seek to question or test the honesty of a person who has made a report. This undermines the purpose of the legislation and diverts agency resources away from dealing with the report.

If a person's belief is based on reasonable grounds, and there is no evidence to the contrary, then their honesty can be assumed.

4. *Public Interest Disclosures Act 2022*, s 26(1).

4. In what way is the report made?

To be a voluntary PID, a report can be made in a number of ways.

A public official can make a PID:

- *in writing* — an email, letter, online form or even an SMS to a suitable recipient or
- *orally* — having a discussion with a suitable recipient, face-to-face, via telephone or virtually. It will usually be a private discussion, but may occur in the context of a broader discussion that may involve other persons.

However, a PID to a Minister or their staff can only be made in writing.⁵ If a person tries to make a report orally to a Minister or their staff, the Minister or the staff member is obliged to help the person by directing them to an integrity agency, or to the right person in an agency that reports to the Minister and to whom the person is able to make a PID.

A report can be a PID whether or not the person making the report identifies themselves and provides contact details. A PID can be made anonymously.⁶

Important note: A PID could be made partly orally and partly in writing. For example, a person might send an email containing some information that does not, of itself, establish reasonable grounds to believe it shows or tend to shows serious wrongdoing. However, that person might then provide the email recipient with additional information orally that, together with what was disclosed in writing, does establish reasonable grounds for believing that serious wrongdoing has occurred.

5. *Public Interest Disclosures Act 2022*, s 24(3)(c).

6. *Public Interest Disclosures Act 2022*, s 24(2)(b).

5. Is the report voluntary?

To be a voluntary PID, the report must not be a mandatory PID nor a witness PID.⁷

In other words, a voluntary PID is a report that a person has been made voluntarily, in the sense that when they made the disclosure:

- they were not acting under a legal or statutory duty to make the report
- they were not meeting the ordinary requirements of their role or functions
- they were not responding to a request or requirement of an investigator during an investigation of serious wrongdoing.

7. *Public Interest Disclosures Act 2022*, s 24(3)(a)–(b).

When is a report a mandatory PID?

Some public officials have a legal duty to report certain types of serious wrongdoing, while others may have a role or undertake functions where it is an ordinary requirement for them to report serious wrongdoing.

For example, heads of agencies are under a legal duty to report suspected corrupt conduct under section 11 of the ICAC Act. An internal auditor, as an ordinary part of their functions, is required to detect and report fraud.

Reports in these situations may constitute mandatory PIDs (as distinct from voluntary PIDs). A mandatory PID provides the same protections against detrimental action as a voluntary PID.

The features of a mandatory PID are set out in section 23 of the PID Act. These features are:

	Feature	<i>A report will be a mandatory PID only if it:</i>
1	Who <i>makes</i> the report?	... is made by a <i>public official</i> AND
2.	What is the <i>content</i> of the report?	... discloses information about serious wrongdoing AND
3.	Is the report <i>mandatory</i> ?	... made either: <ul style="list-style-type: none">• while meeting the ordinary requirements of the official's particular role or functions, or• under a statutory or other legal obligation. However, this does not include obligations imposed <i>only</i> by a code of conduct.

Important note: The codes of conduct of many agencies provide that staff must report certain serious wrongdoing in certain situations. A person who reports serious wrongdoing is not considered to be making a mandatory PID merely because their code of conduct imposes such an obligation.⁸ Accordingly, provided the report has all the features of a PID, it will be a voluntary PID instead of a mandatory PID.

8. *Public Interest Disclosures Act 2022*, s 23(2).

When is a report a witness PID?

During an investigation into serious wrongdoing, a person may be requested, or be compelled, to provide information. If they provide information in response to that request or requirement, they are making a witness PID.⁹

All information provided by a person in these circumstances constitutes a witness PID (provided the person is not wilfully providing false information). Even if the information the person provides shows that there was no serious wrongdoing or that the person does not know anything about any alleged wrongdoing, the disclosure of that information will be a witness PID.

Section 22 of the PID Act sets out the criteria for a disclosure to be a witness PID, which is simply that it was made during an investigation of serious wrongdoing at the request of, or in response to a requirement of, the investigator or investigating agency.

Important note: Witness PIDs can be made by anyone, not only by a public official. The information might be provided, for example, during an interview or in response to a statutory notice. A witness's responses are recognised as a form of PID to ensure that people who provide information during an investigation of serious wrongdoing are provided with the protections under the PID Act and can feel confident in coming forward and cooperating as witnesses. The investigation does not have to arise from a voluntary PID or otherwise relate to a voluntary PID.

9. *Public Interest Disclosures Act 2022*, s 22(1).

When is a report deemed a voluntary PID?

Under section 29 of the PID Act, the head of an agency has a discretionary power, in certain circumstances, to deem a report to be a voluntary PID even if the report does not otherwise have all the features of a voluntary PID.

This power allows heads of agencies to ensure that a person who makes a report of serious wrongdoing does not miss out on PID protections on purely technical grounds. This also encourages people to come forward with reports of wrongdoing, even if they would not typically attract the protections under the PID Act.

This power can also be delegated by the head of the agency to other officers of the agency.¹⁰ Particularly for larger agencies, the head of the agency should consider delegating this power at least to the agency's disclosure coordinator.

The circumstances in which this power can be used to deem that a report is a voluntary PID include:

- where the person who made the report is not a public official as defined in the PID Act

For example, the head of an agency might decide to deem that a report of serious wrongdoing made by a former public official is a voluntary PID where it relates to wrongdoing they became aware of in their previous role as a public official.

- where the report was made to someone who is not listed in the PID Act as one of the people to whom a voluntary PID can be made

For example, the head of an agency might decide to deem a report of serious wrongdoing made by a public official to the chief legal officer or another senior officer of their agency to be a PID, even though the recipient was not the person's manager or a disclosure officer of the agency.

However, the head of an agency (or delegate) can only deem that a report is a voluntary PID if they themselves form the belief, honestly and on reasonable grounds, that the report shows or tends to show serious wrongdoing.¹¹

Important note: Once the head of an agency deems that a report is a voluntary PID, it will continue to be a PID even if it is referred to another agency for investigation. The agency to which the report is referred will be required to recognise it as a PID and will have the usual obligations that apply to any voluntary PID.

10. *Public Interest Disclosures Act 2022*, s 80(1).

11. *Public Interest Disclosures Act 2022*, s 29(2)(c), (3).

