



# Express law

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## Public Interest Disclosure Act 2013 commences on 15 January 2014

**The *Public Interest Disclosure Act 2013* (PID Act) establishes a new legislative scheme for the investigation of allegations of serious wrongdoing in the Commonwealth public sector.**

The PID Act:

- establishes a framework to encourage and facilitate the reporting of wrongdoing by public officials in the Commonwealth public sector
- ensures that Commonwealth agencies will properly investigate and respond to reports of serious wrongdoing by Commonwealth public officials
- provides protection (including civil and criminal immunity) to public officials who report, in accordance with the PID Act, allegations of wrongdoing in the Commonwealth public sector.

### ***What does the PID Act apply to?***

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The PID Act applies to 'public interest disclosures' made, or proposed to be made, by public officials. 'Public officials' for the purposes of the scheme is broadly defined: it covers persons working in, or with a relevant connection to, the Commonwealth public sector. This includes all APS agency heads and APS employees; the directors, CEOs and employees of Commonwealth authorities (under the *Commonwealth Authorities and Companies Act 1997*); and employees in Commonwealth intelligence agencies and Commonwealth law enforcement agencies. Individual contracted service providers to the Commonwealth and Commonwealth authorities are public officials, and the employees of a contracted service provider to the Commonwealth or a Commonwealth authority will also be public officials if they provide services for the purposes of the contract.

### ***What is a public interest disclosure?***

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In essence, a disclosure of information will be a 'public interest disclosure' if the disclosure is made by a current or former public official and the information tends to show, or the official believes on reasonable grounds that the information tends to show, one or more instances of 'disclosable conduct'. 'Disclosable conduct' includes a wide range of wrongful conduct engaged in by an agency or a public official in connection with his or her position as a public official. It includes (but is not limited to) conduct that constitutes a contravention of law, maladministration or abuse of public trust, or conduct that results in wastage of public money or property. Conduct by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official is also disclosable conduct.

There are 4 types of public interest disclosures: internal disclosures, external disclosures, emergency disclosures and legal practitioner disclosures. Generally public officials should make an 'internal disclosure' at first instance (either to an 'authorised internal recipient' or to

the person's supervisor). An 'external disclosure' (including to the media) will only be justified in limited circumstances and only when an internal disclosure has previously been made.

### ***Protections provided under the PID Act***

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The PID Act will provide the following protections for persons who make a public interest disclosure:

- the person is not subject to any civil, criminal or administrative liability for making the disclosure (although this immunity does not apply where a designated publication restriction is contravened without reasonable excuse or where the disclosure is knowingly false or misleading)
- no contractual or other remedy may be enforced or sanction imposed on the person on the basis of making the disclosure
- the person has absolute privilege (for the purpose of defamation proceedings) in respect of a public interest disclosure
- a contract to which the person is a party must not be terminated on the basis that the disclosure constitutes a breach of contract
- it will be a criminal offence for a person to take, or threaten to take, reprisal action against a person who has made, or who is thought to have made, a public interest disclosure
- other remedies, including compensation and injunctions, may also be available in respect of reprisal actions under the PID Act or the *Fair Work Act 2009* (although an application may only be made under one Act)
- the general workplace protections offered by Part 3-1 of the *Fair Work Act 2009* will apply in relation to the making of a public interest disclosure by a public official who is an employee within the meaning of that Act
- the person's identity will be protected.

### ***Other important provisions in the PID Act***

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The PID Act also provides that:

- a public interest disclosure may be made either orally or in writing, and may be made anonymously
- conduct is not 'disclosable conduct' if it relates only to government policy or to an action taken by a Minister (for example) with which the person disagrees
- an obligation is imposed on the 'principal officer' of an agency to investigate public interest disclosures made under the PID Act within a set time period
- however, there is a discretion not to investigate a disclosure if certain criteria are satisfied, such as in situations where the disclosure is frivolous or vexatious, does not concern serious disclosable conduct, or relates to conduct that is already being investigated under either another Commonwealth law or the Commonwealth's executive power
- a number of notification requirements must be met, including to advise the discloser of the outcome of an investigation and to provide reasons when a decision is made not to investigate (or not to investigate further)
- the Commonwealth Ombudsman will handle disclosures made directly to the Ombudsman and will have oversight responsibilities including setting standards for

procedures and investigations of disclosures made under the PID Act and assisting all parties in the operation of the scheme

- the Inspector-General of Intelligence and Security has the same role in relation to intelligence agencies (although the standards are determined by the Ombudsman in consultation with the Inspector-General).

The substantive provisions of the PID Act commence on 15 January 2014. Various amendments to other Commonwealth Acts will commence immediately after the commencement of the substantive provisions of the PID Act. In particular, APS agencies should be aware that s 16 of the *Public Service Act 1999* (which relates to whistleblower reports) will be repealed at this time.

### ***Getting your Agency PID Act ready***

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Agencies need to put in place various arrangements to ensure that they will comply with their obligations under the PID Act. The AGS PID Act Checklist identifies each task that will need to be completed in time for the PID Act's commencement on 15 January 2014. Contact us for a copy.

The Ombudsman may determine standards relating to different matters under the PID Act, such as agency procedures and the conduct of investigations. The Ombudsman will shortly release a number of these standards, and agencies will need to ensure that their PID Act procedures and other arrangements comply with them.

### ***Training***

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AGS is offering half-day training sessions on 10 and 11 December 2013 in Canberra on the operation of the PID Act. The sessions will focus on a typical staff complaint to explore how the various obligations of supervisors, authorised officers and investigators should be carried out. Details of the training can be found at <http://www.ags.gov.au/training/outlines/Public-Interest-Dec2013.pdf>

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