

**Review of the *Public Interest Disclosure Act 2013***

**Submission to the Moss Review of the PID Act**

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# Role of the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security (IGIS) is an independent statutory officer whose primary function is to oversee and review the activities of the following agencies:

* Australian Security Intelligence Organisation (ASIO)
* Australian Secret Intelligence Service (ASIS)
* Australian Signals Directorate (ASD)
* Australian Geospatial-Intelligence Organisation (AGO)
* Defence Intelligence Organisation (DIO)
* Office of National Assessments (ONA).

While each of these agencies is a separate entity with a distinctly different mandate collectively they form what is colloquially known as the Australian Intelligence Community (AIC).

The roles and functions of the IGIS are prescribed in the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act); in cognate legislation (such as the *Intelligence Services Act 2001* and the *Australian Security Intelligence Organisation Act 1979*); and in Acts which have wider application than the AIC but make special provision for the handling of sensitive information about the AIC. The *Public Interest Disclosure Act 2013* (PID Act) falls into the latter category.

The overarching purpose of IGIS’s activities is to provide assurance to responsible ministers that each of the AIC agencies acts legally and with propriety, complies with ministerial guidelines and directives, and acts consistently with human rights.

This outcome is achieved by the IGIS conducting inquiries into the activities of the AIC agencies as necessary or appropriate, responding to complaints about the conduct of these agencies, conducting a rolling program of existing and new inspection activities, and undertaking special projects which focus on the operational and other business activities of the AIC agencies.

Details of the activities of the IGIS office are set out in an unclassified annual report to parliament. The most recent IGIS annual report was tabled in October 2015 and is available on the IGIS website at <http://www.igis.gov.au>.

# Purpose and scope of IGIS submission

The purpose of this submission is to set out the special statutory role the IGIS plays in overseeing the operation of the PID Act within the AIC, and to highlight a number of issues which the PID Act Review may wish to take into consideration when contemplating options for improvements to the PID Act.

While this submission formally sets out the views of my office, for which I take responsibility, it also draws upon informal input we have received from the AIC agencies on their experiences in managing disclosures under the PID Act.

It should be noted that the Defence intelligence group of agencies (that is, ASD, AGO and DIO) have also formally contributed their views to the submission made by the Department of Defence to this review.

# Responsibilities of the IGIS under the PID Act

The Commonwealth Ombudsman (Ombudsman) and the IGIS are each accorded significant statutory powers and responsibilities under the PID Act. These powers, while largely analogous, are not identical.

The essential difference is that the Ombudsman is generally responsible for:

* the operation of the PID scheme across the entire Commonwealth employment sector
* setting PID Standards
* raising general awareness of the PID scheme, and
* reporting annually to Parliament on the operation of the PID Act,

The IGIS’s responsibilities under the PID Act are limited to exercising certain powers with respect to the AIC agencies.

In addition to processing any public interest disclosures made to, or about the activities of the IGIS, the IGIS is required under the PID Act to:

* receive notifications of every PID which is allocated to any of the AIC agencies
* receive notifications from any AIC agency where the Principal Officer of that agency has exercised a discretion not to investigate, or not investigate further, a disclosure which has been allocated to that agency for investigation
* receive, allocate and investigate authorised internal disclosures made about an AIC agency by a current or former public official
* where appropriate, deem an individual to be a public official so as to be afforded statutory protection under the PID Act, from possible reprisal action
* make decisions about the granting of extensions of time to AIC agencies to complete investigations conducted under the PID Act
* provide assistance, education and awareness programs on the operation of the PID Act to the AIC agencies
* assist the Ombudsman in relation to the performance of the Ombudsman’s functions under the PID Act (primarily through coordinating input from the AIC agencies for inclusion in the Ombudsman’s annual report to Parliament on the operation of the PID Act).

The IGIS can choose to use investigative powers under either the PID Act, or the IGIS Act, when investigating disclosures under the PID Act.

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## Receiving and allocating disclosures which relate to AIC-agencies

Under the PID Act a public official who wishes to complain about purported ‘disclosable conduct’[[1]](#footnote-1) involving an intelligence agency, or which necessarily involves the communication of intelligence information, can only lawfully do so, under the PID Act, by making an internal disclosure to an authorised internal recipient.

While a supervisor of the public official, or an authorised officer in the AIC agency where the public official currently is employed, or has previously worked, can receive disclosures of this kind, there will be situations where an individual with such information would prefer not to approach an AIC agency directly with their concerns.

In these circumstances a public official may make a disclosure directly to the IGIS about wrongdoing relating to any AIC agency (who believes, on reasonable grounds, that it would be appropriate for the IGIS to investigate the matter).

Unless special circumstances exist, the IGIS may allocate a disclosure from a public official to another appropriate agency for handling under the PID Act, including the agency to which the disclosable conduct relates, or the agency where the public official currently works, or has worked.

This is consistent with a key principle under the PID scheme that an agency should handle disclosures internally and that disclosers should be protected from reprisals.

## When will the IGIS investigate a disclosure?

The IGIS may decide to investigate an authorised internal disclosure about an agency that is made to an authorised officer in OIGIS or allocated (with consent) to the IGIS by another agency.

The IGIS will consider whether special reasons exist to conduct an investigation, or allocate the matter to the agency where the disclosable conduct is alleged to have occurred.

If the IGIS does decide to investigate a disclosure, the investigative powers under the IGIS Act will generally be used rather than the powers under the PID Act.

When investigating a disclosure the IGIS may, where appropriate, use the full suite of investigative powers provided under the *Inspector-General of Intelligence and Security Act 1986*. These powers include but are not limited to, requiring the production of documents or other written records, visiting AIC agency premises and inspecting documents, examining witnesses on oath or affirmation, and requiring questions to be answered truthfully or risk criminal sanctions.

## Making decisions about extensions of time

Under the PID Act, Commonwealth entities have 90 days to complete their investigation of a public interest disclosure, including preparing and finalising the investigation report.

The IGIS can grant extensions of time to an AIC agency either on request from a discloser or agency, or, alternatively, on IGIS’s own initiative.

The IGIS will not automatically grant an application for an extension. Each request is separately considered to determine if the additional time requested is reasonably necessary to ensure that the disclosure is properly investigated.

The IGIS will also take into account a range of other factors including: the availability of witnesses; the complexity of the investigation; the action already taken to progress it; and whether there have been any unreasonable or unexplained delays on the part of the agency. The IGIS will also take into account any views expressed by the discloser about the requested extension.

If an extension is granted, the IGIS will inform the discloser and give reasons for the extension (to the extent that this is consistent with any overriding security requirements). This does not apply if contacting the discloser is not reasonably practicable.

If an extension is not granted, the agency is still required to complete the investigation and prepare a report. However, if that is not completed before the relevant time limit (i.e. 90 days, or such longer period as previously granted by the IGIS) the discloser may be entitled to make a limited external disclosure under the PID Act.

## Complaints about agency actions under the PID scheme

One of the principal functions of the IGIS under the IGIS Act is to investigate complaints made about the actions and decisions of the AIC agencies. This may include complaints about how an agency has handled a public interest disclosure. The IGIS has ultimate discretion to investigate, or not to investigate, such complaints in accordance with section 11(2)(c) of the IGIS Act.

The IGIS also has power under the IGIS Act to conduct own motion investigations. This power could be used at the IGIS’s discretion, to investigate systemic issues, including how agencies have discharged their responsibilities under the PID Act.

## Complaints and notifications made to IGIS under the PID Act

The PID Act commenced operation on 15 January 2014. In the period since the Act commenced until the date of this submission IGIS has received eight authorised internal disclosures, and has been notified by the AIC agencies of a further 11 complaints which have been received and/or allocated to them for investigation.

With two exceptions, each of the disclosures made directly to IGIS were from current or former public officials.

Of the two exceptions, in one instance the discloser had worked very closely with an AIC agency over a number of years and was deemed to be a public official by IGIS, so as to remove any possible doubt about the standing of the individual. In the other instance, an anonymous complaint was received which contained sufficient information to persuade IGIS that the originator more than likely worked within an AIC agency.

Not all of the individuals who made disclosures to IGIS were aware of the PID Act, or claimed to be lodging complaints under the PID Act. This is likely to have occurred because of the relative newness of the legislation and/or because former officials might not be as aware of the PID Act, as current public officials.

In all instances where the identity of the discloser was known to IGIS, the disclosers were advised of the existence of the PID Act and the statutory protections which were potentially available to disclosers were the PID Act to be enlivened.

There has also been an effort by this office to alert disclosers to the advantages and disadvantages of disclosing their identity taking into account the limiting effect that non-disclosure of their identity would have on conducting an effective investigation which directly addresses the issues they have raised.

In the 2014-15 reporting period four disclosures were made to IGIS under the PID scheme.

* One disclosure was made by a former employee of an intelligence agency who raised concerns about the legality and propriety of operational activities allegedly undertaken a number of years earlier, in Australia, by an Australian intelligence agency, in cooperation with a foreign intelligence agency, at a specific location. Following investigation, the Inspector-General was satisfied that no evidence existed to substantiate the claim that conduct of the kind alleged by the discloser had in fact occurred. The investigation identified another matter, not raised in the original complaint, which was pursued separately with the agency.
* The second disclosure was made by an individual who had previously had a close working relationship with one of the intelligence agencies and was deemed to be a 'public official' for the purposes of the PID Act. This matter included a contractual dispute and also raised broader concerns about agency conduct which fell within the ambit of the PID Act. The IGIS found that there were serious gaps in the record keeping of the relevant agency which impeded the IGIS investigation and that in light of the seriousness of some of the concerns, better systems should have been in place to ensure these were detected and addressed earlier.
* The third disclosure revolved around claims of workplace bullying and harassment which were allegedly left unaddressed by management. This matter was allocated to the relevant agency, with the investigation report being provided to the IGIS at its conclusion.
* The fourth disclosure raised issues which had previously been the subject of thorough review, and the new issues raised in the disclosure were found not to meet the PID threshold.

In addition to the four disclosures made directly to the Inspector-General the intelligence agencies advised this office that four PID cases had been processed by the agencies during the 2014-15 reporting period.

# Issues which could be addressed by amendments to the PID Act

### General observations

Our experience, and input from the AIC agencies also suggests, that the PID Act is overly proscriptive and procedurally complex.

Despite having robust internal procedures and acting with good intent, it is very easy for supervisors, authorised officers, and principal officers, inadvertently to fail to comply with the requirements of the PID Act.

The complexity of the procedural requirements also encourages supervisors to adopt a practical approach to dealing with disclosable conduct at the less serious end of the scale, which in turn leads to potential under-reporting of disclosable conduct.

The principal concerns raised with us by the AIC agencies is that the threshold for determining whether or not a matter should be treated as a PID is too low, and the range of matters captured under the term ‘disclosable conduct’ is too wide. These propositions are explored in more detail below.

1. **The scope of ‘disclosable conduct’ covered by the PID Act is considered to be too broad**

The PID Act applies to agencies that employ officials under the *Public Service Act 1999*, non-APS public officials, and members of the Australian Defence Force.

The AIC agencies employ officials under each of these categories.

The definition of maladministration for the purposes of the PID Act is broad and can capture employment-related grievances of a fairly trivial or non-serious nature.

Our own experience and the feedback we have received from the AIC agencies, suggests that grievances of this kind where employment related grievances can be handled outside of the PID Act, should not enliven the PID Act.

Currently, public officials who are dissatisfied with an employment related decision might allege an officer or officers involved in the decision exhibited ‘disclosable conduct’ constituting, for example, maladministration[[2]](#footnote-2)’, ‘abuse of public trust’, or ‘conduct … that could, if proved, give reasonable grounds for disciplinary action against the public official[[3]](#footnote-3)’ (See s.29(1) of the PID Act, table items 1, 4, 5 and s.29(2)(b)).

A Principal Officer of an agency under the PID Act has discretion not to investigate disclosures which have been allocated to their agencies, on a range of grounds.

These grounds include if the information contained in the disclosure does not to any extent concern serious disclosable conduct, or the information is being, or has been investigated under another Commonwealth law or the executive power of the Commonwealth (See s.48(1)(c) and (f)-(g)).

However, before that point is reached there is a significant administrative impost on the agency which has received or been allocated that disclosure. More specifically, the receiving agency needs to take the following steps:

1. an authorised officer must determine whether or not the disclosure is an authorised ‘internal disclosure’, and if so make a decision to allocate the disclosure to the employing agency (s.43) – the disclosure qualifies for protections under the Act once it meets the criteria for an internal disclosure
2. an authorised officer must obtain consent from the discloser to the provision of their name and contact details to the principal officer of the employing agency (if those details are known to the authorised officer) (s.44(1)(d))
3. an authorised officer must give notice of the allocation to the agency, to the IGIS, and to the discloser (s.44(1),(1A) and (2))
4. a principal officer (or delegate) undertaking preliminary inquiries into the grievance before determining not to investigate the disclosure further on an applicable ground (s.48(1)), and
5. notice of reasons is required to be given to the discloser and to the IGIS (s.50A).

Where a discloser who is dissatisfied with an employment decision fails to exercise a right of review under the Public Service Act, a Determination by the Director-General of Security, the Director-General of ASIS, or under grievance handling processes for ADF members, agencies may also cease the PID Act investigation and undertake review action in reliance on s.47(3).

Individuals disclosing personal employment related grievances will ordinarily be seeking an outcome that directly benefits them, such as overturning a performance outcome or having action taken in response to a bullying complaint.

While serious matters such as bias, unfairness or inappropriateness can underlie these allegations, existing formal and informal procedures governing employment and engagement could allow individuals to seek action on these issues.

This office believes that the definition of ‘disclosable conduct’ should be narrowed to exclude conduct that is in the nature of a personal employment related grievance, unless the conduct is systemic in nature.

1. **How to make a PID - requirements to invoke the PID Act and role of supervisors**

To engage the PID Act, a public official is not required to state that they are making a PID (s.28(3)), however, the absence of a requirement that a public official needs to invoke the Act can create operational uncertainty.

Coupled with the breadth of conduct captured by ‘disclosable conduct’, the risk of technical non-compliance with the PID Act is high, particularly where minor work-place grievances are raised with supervisors.

This risk arises because supervisors are required to give information to a PID authorised officer if they have reasonable grounds to believe the information concerns, or *could* concern, an instance of ‘disclosable conduct’ (s.60A).

The term ‘disclosable conduct’ encompasses ‘maladministration’ and conduct that, if proved, could give reasonable grounds for disciplinary action.

The supervisor does not have to consider the conduct to be serious and the subordinate need not have intended that a formal procedure be commenced.

If the subordinate does not want to invoke a formal procedure under the PID Act, there is no ‘discloser’ leaving uncertainty in relation to the engagement of the notification and protection obligations under the Act.

One option to avoid possible technical non-compliance while ensuring the interests of disclosers are best served may be to maintain the present position, that is that a discloser need not express an intention that they are making a PID, but amend the mandatory obligation on a supervisor to give information to an authorised officer so that instead, a supervisor has a discretion to do so where they believe the information concerns ‘serious’ disclosable conduct (s.60A).

1. **Scope of ‘public official’ covered by the PID Act – individuals who may be deemed (strengthen discretion not to deem)**

A person who is, or has been, a public official may make a disclosure under the PID Act (s.26(1)(a)).

The Act also permits an authorised officer to deem an individual to be a ‘public official’ if satisfied on reasonable grounds that the individual has information that concerns ‘disclosable conduct’, and the individual was not a public official when they obtained the information (s.70).

Although this office has not received any formal deeming requests, consideration should perhaps be given to amending the PID Act to expressly permit an authorised officer to dismiss a deeming request if the information provided is not serious, or if the individual has another remedy available to them (e.g. review of action).

As a PID may be made anonymously it can be difficult for an authorised officer to be totally satisfied whether or not an individual is a public official.

Consideration could perhaps be given to amending s.70(1)(b)) of the PID Act to permit an authorised officer to deem a person to be a public official even if they are uncertain whether the individual is a public official.

1. **Authorise the IGIS to give section 51 report to an agency**

The IGIS may decide either to investigate a PID under the IGIS Act or under Part 3 of the PID Act (s.49). In the latter case, a report of the investigation made under s.51 must be given to the discloser (if contactable).

While the IGIS has, to date, chosen to investigate allocated PID complaints under the IGIS Act rather than the PID Act, there is no express provision made in the PID Act for a report to be given to an agency to which the conduct relates.

It may be sensible to insert an express authority to do so into section 51 of the PID Act, enabling IGIS to do so, on a discretionary basis.

1. **Amend annual report obligations**

Agencies are required to report to the Ombudsman at the end of each financial year on certain information about disclosures which is to be included in the Ombudsman’s Annual Report on the operation of the PID Act (s.76(2)(a)(iv) of the PID Act).

In the case of the AIC agencies, this information is submitted to IGIS, who prepares an unclassified, ‘whole of AIC’ response to the Ombudsman.

We understand that the Ombudsman has proposed/is proposing that s.76(2)(a)(iv) be removed and replaced by a requirement for agencies to report:

1. whether they made a finding of disclosable conduct in response to a PID investigation, and if so, in what category
2. whether any action was recommended to address a finding and, if so, what that action was and whether the action has been taken.

We have no concerns with such an amendment being made, so long as intelligence information, or information which identifies an AIC agency, can be removed or redacted by IGIS, as necessary or appropriate.

1. **Does section 45 (subsequent allocation) need to be broadened to enable an agency that has been allocated a disclosure to make a subsequent allocation?**

Section 45 permits an authorised officer of an agency, who has made an allocation decision under s.43, to make a subsequent decision to allocate the handling of a disclosure to one or more other agencies.

No provision explicitly empowers a receiving agency to make a subsequent allocation or allocations. While the power to do so might be might be implied, consideration could be given to whether it should be expressly stated.

1. **Expansion of notification requirement of an allocation decision**

Section 44(1A)(b) of the PID Act requires authorised officers to inform IGIS of any decision to allocate a PID to an intelligence agency. There is, however, no express provision requiring an authorised officer of an intelligence agency to notify IGIS, where their agency has received a PID and then allocated the matter to a non-intelligence agency for investigation.

The insertion of such a notification requirement could assist IGIS to monitor the appropriateness of PID handling procedures in the AIC agencies when making external allocations.

1. **Ombudsman and IGIS discretion to allocate a disclosure to an agency about which the conduct is concerned (s.43)**

It is intended that the agency with which the alleged conduct is concerned handles the disclosure and any investigation unless it would not be appropriate to do so.

A discloser can make a disclosure directly to the IGIS if they believe on reasonable grounds that it would be appropriate for the disclosure to be investigated by IGIS.

The IGIS can in turn allocate the disclosure to the agency with which the conduct is concerned through the allocation power (s.43).

It is implied that the discretion may be exercised where the IGIS is satisfied that another agency may properly investigate the disclosure having regard to the principles in s.43(3).

Disclosers could protest against decisions by the Ombudsman or the IGIS to allocate disclosures to other agencies.

The Review may wish to consider whether there is a need to clarify section 43(3)(b) of the PID Act to remove any doubt that IGIS can allocate a disclosure to another agency where it is considered that it would be appropriate for that agency to handle the disclosure.

1. The term ‘disclosable conduct’ is defined in a table in section 29 of the PID Act. [↑](#footnote-ref-1)
2. ‘Maladministration’ includes conduct that is ‘based in whole or in part on improper motives’ or is ‘unreasonable, unjust or oppressive’ – s.29 PID Act, table item 4. [↑](#footnote-ref-2)
3. Code of Conduct obligations on APS employees include behaving in a way that upholds the APS Values and APS Employment Principles, behaving honestly and with integrity, acting with care and diligence, treating everyone with respect and courtesy, and without harassment (s.13(1)-(3) & (11) Public Service Act). [↑](#footnote-ref-3)