



Australian Government
Tertiary Education Quality and Standards Agency



TEQSA



Procedures for Public Interest Disclosures

Introduction from TEQSA's Acting Chief Executive Officer

The Tertiary Education Quality and Standards Agency (TEQSA), its managers and staff are committed to the highest standards of ethical and accountable conduct. TEQSA recognises that support for staff who make a public interest disclosure will greatly influence the success of the public interest disclosure scheme, and gives TEQSA the best chance to fix problems directly.

These procedures are part of TEQSA's commitment. I encourage TEQSA staff and others working with TEQSA to familiarise themselves with the procedures and with the public interest disclosure scheme more generally. Further information about the scheme is provided in the Commonwealth Ombudsman's Guidelines at

http://www.ombudsman.gov.au/docs/Agency_Guide_To_PID_Act_V1_Dec_2013.pdf.



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Acting Chief Executive Officer

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1. Purpose

These procedures are made under section 59 of the *Public Interest Disclosure Act 2013* (PID Act). The purpose of these procedures is to outline how the PID Act will operate in TEQSA.

Consistent with the PID Act, TEQSA will:

- a) encourage and facilitate the making of disclosures by public officials in the Commonwealth public sector;
- b) ensure that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure;
- c) ensure that disclosures are properly investigated and dealt with.

The PID Act and these procedures complement other notification, investigation and complaint handling schemes in the Commonwealth public sector. These include TEQSA's Fraud Control and Anti-Corruption Plan, TEQSA's procedures for determining breaches of the APS Code of Conduct and arrangements in TEQSA for dealing with HR issues between individual staff members.

TEQSA staff and other public officials should use these procedures to make public interest disclosures relating to TEQSA.

2. What is a Public Interest Disclosure?

A disclosure of information is considered 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:

- a) is corrupt;
- b) contravenes a law;
- c) perverts the course of justice;
- d) results in the wastage of public funds or property;
- e) is an abuse of public trust;
- f) unreasonably endangers the health and safety of others;
- g) is maladministration including conduct that is unjust, oppressive or negligent.

Disclosable conduct does not include disagreement with a government policy, action or expenditure. Disclosable conduct by a public official must be conduct in connection with their position as a public official – in other words, conduct that is wholly private and has no bearing on their position as a public official is not disclosable conduct.

A disclosure made before the commencement of the PID Act on 15 January 2014 is not covered by the Act. However, a disclosure made after that date can relate to conduct that occurred at

any time before then. In other words, it is the date the disclosure is made, not the date of the conduct, that determines whether the PID Act applies.

A person's motive is not relevant to whether or not a person receives protection under the PID Act, or to whether or not an investigation of a disclosure is warranted. A person who reports disclosable conduct in compliance with the PID Act will receive the protections in the PID Act.

3. Who can make a Public Interest Disclosure?

The PID Act applies to 'public interest disclosures' made by public officials. 'Public officials' includes APS employees and statutory officeholders of TEQSA as well as TEQSA's contracted service providers and employees and subcontractors of those providers who provide services under a contract with TEQSA.

If a person who intends to make a disclosure was not a public official at the time they obtained the information they intend to disclose, they may be deemed to be a public official by an authorised officer who believes on reasonable grounds that the person has information that concerns disclosable conduct. If a person requests that an authorised officer makes a decision deeming the person to be a public official and the authorised officer rejects the request, the authorised officer must inform the person of the rejection and the reasons for the rejection.

4. To whom can a Public Interest Disclosure be made?

There are 4 types of public interest disclosures under the PID Act: internal disclosures, external disclosures, emergency disclosures and legal practitioner disclosures.

Internal disclosures

Generally public officials wanting to make a disclosure about misconduct by TEQSA or its public officials should make an 'internal disclosure' in the first instance (either to an Authorised Officer or to their immediate supervisor or manager).

The Authorised Officers to whom internal disclosures can be made in TEQSA are:

- a) TEQSA's CEO;
- b) The Director, Corporate; and
- c) The Chief Lawyer.

Internal disclosures may also be made to the Commonwealth Ombudsman (if the discloser believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman).

Other disclosures

External disclosures, emergency disclosures and legal practitioner disclosures may only be made in limited circumstances – for instance, external disclosures may only be made when an internal disclosure has previously been made. If a disclosure is made outside the circumstances provided under the PID Act the discloser will not receive the protections under the PID Act (see section 7 below). How can a Public Interest Disclosure be made?

Disclosures can be made orally or in writing. However making a disclosure in writing, accompanied by any relevant supporting information or evidence will facilitate the investigation of the disclosure. Relevant information to be provided with a disclosure may include:

- a) the nature of the wrongdoing;
- b) who the discloser thinks committed the wrongdoing;
- c) when and where the wrongdoing occurred;
- d) relevant events surrounding the issue;
- e) if the discloser did anything in response to the wrongdoing;
- f) others who know about the wrongdoing;
- g) if the discloser is concerned about possible reprisal as a result of making a disclosure.

Disclosures should be clear and factual, and avoid speculation, personal attacks and emotive language as they divert attention from the real issues. The discloser should not investigate a matter themselves before making the disclosure – doing so may hinder a future investigation. Disclosers should also be aware that the sooner they raise their concerns, the easier it may be for TEQSA to take action.

To assist in the appropriate handling of disclosures relating to TEQSA, TEQSA's preference is that those seeking to make a disclosure contact TEQSA's authorised officers either by:

- a) emailing security@teqsa.gov.au;
- b) telephoning 1300 739 585 and asking to speak to the Director, Corporate or the Chief Lawyer.

However this does not limit the means by which a protected disclosure may be made.

Disclosures may be made anonymously. However there are various reasons why a person should consider identifying themselves when making a disclosure, or at least providing a means of being contacted. These include the following:

- a) The PID Act requires agencies to keep a discloser's identity confidential, subject to limited exceptions including the discloser's consent. The person's identity may nonetheless become apparent if an investigation is commenced. If the person's identity needs to be disclosed or is likely to become apparent, TEQSA will discuss this with the discloser.
- b) It will be difficult to ensure protection from reprisal if the agency does not know the discloser's identity.
- c) The authorised officer who receives an anonymous report must have reasonable grounds to suspect the disclosable conduct has occurred in order to allocate the matter for investigation. If they cannot contact the person to seek necessary further information, the matter may not proceed.
- d) It may also be difficult to conduct an investigation if the discloser cannot be contacted for further information. An investigator has the discretion not to investigate, or investigate further, if the discloser does not provide their name and contact details or is unable to give the investigator further information or assistance if needed.
- e) A discloser who does not provide a means of contact cannot be updated on the progress of the matter, including the outcome of the investigation.

A person who has made an anonymous disclosure may come forward at a later stage to disclose their identity and seek the protections of the PID Act.

Disclosures do not have to make specific reference to the PID Act – it is sufficient for them to identify any matter that might constitute ‘disclosable conduct’. Further guidance is available at http://www.ombudsman.gov.au/docs/Speaking_up_about_wrongdoing.pdf.

5. Confidentiality

It is a criminal offence for a public official who is involved in handling a disclosure to reveal the discloser’s identifying information to anyone else without their consent or to use it for another purpose, unless it is for the purposes of the PID Act, another Commonwealth law or prescribed law, or if the information has already lawfully been published. The discloser’s identifying information must also not be disclosed to a court or tribunal except when necessary to give effect to the PID Act.

However, the discloser’s identity, or information that would effectively identify them, may need to be disclosed to certain other people if that is necessary:

- a) to investigate the disclosure effectively (for example, if the wrongdoing that was reported was directed solely against the discloser), or
- b) to protect the discloser against reprisals (for example, if there are concerns that it is impossible for them to remain in their current workplace).

Accordingly, the PID Act cannot provide absolute protection of a discloser’s identity in all situations. If it is necessary or highly likely that the discloser’s identity will be revealed, an Authorised Officer will discuss this with them before proceeding. This may involve seeking the discloser’s consent to reveal their identity to appropriate people.

It is also an offence for a person who has information obtained in the course of conducting a disclosure investigation or in connection with their powers and functions under the PID Act to disclose or use the information, unless one of the exceptions in subsection 65(2) of the PID Act applies (such as a use or disclosure for the purposes of the PID Act or a use or disclosure of information that has previously been lawfully published). Accordingly:

- a) Disclosures should be assessed and investigated discreetly, with a strong emphasis on maintaining confidentiality of both the discloser and any person who is the subject of the disclosure.
- b) All interviews should be conducted in private. In particular, any interviews with the discloser should be arranged discreetly to avoid identification by other staff.
- c) Care should be taken to avoid any unauthorised divulging of information. All information obtained, including documents and interview tapes, should be stored securely and be only accessible by those who need to see them. In particular:
 - i. all paper and electronic documents and files are secure and only able to be accessed by authorised officers, investigators and other officers involved in managing the disclosure;
 - ii. other materials such as interview tapes are stored securely with access only by officers involved in handling the disclosure;
 - iii. communications are not sent to an email address to which other staff have access or to a fax machine in an open area.

- d) Those who are interviewed should be advised that information about the matter is confidential, that release of information may jeopardise an investigation and that they may be committing an offence if they divulge any information that is likely to identify the discloser.

6. Procedure for handling and investigating disclosures

Managers and supervisors receiving disclosures should refer the disclosure to an Authorised Officer as soon as practicable and without delay.

An Authorised Officer will consider whether the information constitutes an internal disclosure under the PID Act. The Authorised Officer must allocate the matter to the CEO (or delegate) or to another agency unless they are satisfied there is no reasonable basis for considering the information to be an internal disclosure. An Authorised Officer must do so within 14 days of becoming aware of the disclosure. If the Authorised Officer is to allocate a disclosure to another agency then the other agency must consent to the allocation.

Once disclosure has been allocated to TEQSA, the CEO (or delegate) will consider whether to investigate the matter. Any decision not to investigate must be made in accordance with section 48 of the PID Act (for instance, where the information does not to any extent concern serious disclosable conduct, the disclosure is frivolous or vexatious or the information is the same or substantially the same as information that has been or is being investigated).

Where the CEO or their delegate considers that the matter warrants an investigation, the CEO or their delegate may investigate the matter. The investigation must be conducted in accordance with the Australian Government Investigation Standards and any other applicable requirements, including the Commonwealth Fraud Control Guidelines and TEQSA's procedures for APS Code of Conduct Determinations. In addition, when conducting an investigation:

- a) Any person against whom allegations are made is afforded procedural fairness in relation to the allegations. Where such a person is aware of the allegations or that there has been an investigation, the person must be formally advised of the outcome of the investigation.
- b) Any determination as to whether a fact is proved is based on:
 - i. relevant and logically probative evidence: material that tends logically to prove the existence of a fact; and
 - ii. the balance of probabilities: that it is more likely than not that the fact is true.
- c) If a person is interviewed as part of the investigation of a disclosure, the interviewee must be informed of the following:
 - i. the identity and function of each individual conducting the interview;
 - ii. the process of conducting an investigation;
 - iii. the authority of the principal officer under the Act to conduct the investigation;
 - iv. the protections provided by section 57 of the PID Act.
- d) An audio or visual recording of any interview conducted as part of the investigation is not made without the interviewee's knowledge.
- e) When an interview ends, the interviewee is given an opportunity to make a final statement or comment, or express a position.

- f) Any final statement, comment or position by an interviewee is included in the record of the interview.
- g) If a person suspects on reasonable grounds that information obtained through the disclosure or investigating the disclosure suggests that an offence has been committed, and the offence is punishable by imprisonment for life or by imprisonment for a period of at least 2 years, the person must notify a member of the responsible Australian police force.

When the investigation is completed, the CEO or delegate will provide a report to the discloser, as set out in the PID Act (section 51) and consistent with any associated requirements. Investigations into disclosures must address whether there may be a breach of the APS Code of Conduct and whether, in the event of a breach, misconduct proceedings should be considered.

An investigation report must be completed within 90 days of the matter being allocated for investigation, unless an extension is granted by the Ombudsman pursuant to subsection 52(3) of the PID Act. The report must, where relevant:

- a) identify whether there have been one or more instances of disclosable conduct;
- b) identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct relates;
- c) explain the steps taken to gather evidence;
- d) set out a summary of the evidence and other matters considered in the investigation, as well as any findings and recommendations made based on that evidence;
- e) set out any claims made about, and any evidence of, detrimental action taken against the discloser, and the agency's response to those claims and that evidence.

Those involved in handling and investigating a disclosure must keep records including:

- a) details about how and when a public interest disclosure was made. If the disclosure was given verbally, consideration should be given to asking the discloser to sign a record of the disclosure.
- b) a record of subsequent conversations where the disclosure is discussed.
- c) a unique reference number allocated to each disclosure.
- d) details of the risk assessment of reprisal, allocation, the investigation, notifications to the discloser and others. These include, in particular:
 - i. A record of the decision to allocate the handling of the disclosure including the name of each agency to which the disclosure is allocated, the reasons for the decision and, where relevant, any consent provided by the agency to which a disclosure is allocated.
 - ii. A record of the notification to the discloser of the decision on whether and how to allocate the disclosure including, where relevant, the reasons for not allocating the disclosure and any other courses of action that may be available to the discloser.
- e) any other records necessary to allow the Ombudsman to review the matter where required.

The records should be factual and free from unnecessary statements such as personal opinion.

The Director, Corporate must also provide the Ombudsman with information about disclosures TEQSA has handled in accordance with section 15 of the *Public Interest Disclosure Standard 2013*.

7. Information for the discloser

Those involved in handling a disclosure must keep the discloser up to date with reasonable information on what is being done in response to the disclosure. This includes:

- a) the decision to allocate the disclosure for investigation, or not allocate the disclosure because it has been determined not to be an internal disclosure;
- b) information about the CEO's discretionary powers to not investigate the disclosure, within 14 days of the disclosure being allocated to TEQSA;
- c) that TEQSA has decided to investigate a disclosure allocated to TEQSA;
- d) if the investigation is under the PID Act, the estimated length of the investigation;
- e) if TEQSA decides not to investigate a disclosure, the reasons for the decision and any action that might be available to the discloser under other Commonwealth laws;
- f) if an investigation is conducted under the PID Act and an extension of time is granted by the Ombudsman or IGIS, the progress of the investigation;
- g) a copy of the investigation report for the discloser after the report is completed, subject to making any necessary deletions as permitted by subsection 51(5) of the PID Act;
- h) details of the agency's response to the report.

8. Protection and support for disclosers

The PID Act provides the following protections for persons who make an internal disclosure:

- a) protection of the discloser's identity
- b) immunity from civil, criminal or administrative liability
- c) protection from reprisal.

These protections do not necessarily protect the discloser in relation to their own wrongdoing, including where they have been involved in the misconduct they are reporting.

Protection of the discloser's identity

It is an offence to disclose or use information that is likely to enable the identification of a discloser unless:

- a) the discloser consents;
- b) the identifying information has already been lawfully published;
- c) the use or disclosure is for the purposes of the PID Act;
- d) the use or disclosure is required under another Commonwealth law or a prescribed State or Territory law;

- e) the use or disclosure is in connection with the Ombudsman's functions under s 5A of the *Ombudsman Act 1976* or the Inspector-General of Intelligence and Security's functions under s 8A of the *Inspector-General of Intelligence and Security Act 1986*.

However as noted above, it may not be possible to fully investigate a matter without consent to identify the discloser and that, while utmost care may be taken, others may guess at the identity of the discloser.

Immunity from civil, criminal or administrative liability

A person who makes a public interest disclosure is not subject to any civil, criminal or administrative liability for making the disclosure. Additionally, no contractual or other remedy may be enforced and no contractual or other right may be exercised (including termination of a contract) against the person on the basis of making the disclosure.

This immunity does not apply if the disclosure contravenes a designated publication restriction without reasonable excuse or where the disclosure is knowingly false or misleading.

Protection from reprisal

It is an offence to cause detriment to a person because it is suspected or believed that they have made or will make a public interest disclosure. A discloser has the right to apply for an injunction to prevent a reprisal and to apply for compensation for loss, damage or injury suffered from a reprisal. A reprisal occurs if someone causes, by an act or omission, any detriment to another person because they believe or suspect that person, or anyone else, may have made or intends to make a public interest disclosure. 'Detriment' includes any disadvantage to a person, including dismissal, injury in their employment, discrimination between them and other employees or alteration of their position to their disadvantage. For example, it could include an action (or threat of action) that results in:

- a) a physical or psychological injury, including a stress-related injury
- b) intimidation, harassment or victimisation
- c) loss or damage to property
- d) disadvantage to a person's career (for example, denying them a reference or a promotion without appropriate reasons).

A discloser has the right to apply for an injunction to prevent a reprisal and to apply for compensation for loss, damage or injury suffered from a reprisal.

Other remedies 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.

Support for Disclosers

TEQSA will take steps to support those who make public interest disclosures. This includes:

- a) acknowledgement for having come forward with a report of wrongdoing;
- b) an assurance that the agency will take all reasonable steps necessary to protect them;

- c) reasonable access to information about the handling of the disclosure and the outcome of any investigation.
- d) information about what options are available, which may include access to the Employee Assistance Program (EAP), which provides professional counselling services to TEQSA staff on request.

Disclosers must be advised that they should be discreet about the fact that they have made a disclosure as well as about the contents of the disclosure, to ensure that they retain the protections in the PID Act. Authorised officers may also advise that a discloser can seek support from appropriate people (including family, friends, colleagues and EAP staff), but they should not provide any confidential information to any of those people, including information that would identify those alleged to have committed wrongdoing or other information that they have a duty to keep confidential. Disclosers may also disclose information to a lawyer for the purposes of seeking legal assistance in relation to making a disclosure (other than intelligence information, including sensitive law enforcement information) in accordance with the PID Act.

9. Risk assessment in relation to possible reprisals

As soon as possible after a disclosure has been received, the Authorised Officer must assess the possible risks of reprisals and put in place appropriate strategies to prevent or contain them. The risk assessment must consider the specific behaviour and circumstances that may result in reprisals, which will include not only the risk of direct reprisal against the discloser, but also the risk of related workplace conflict or difficulties. The approach to a risk assessment must have regard to the Guidelines on the Commonwealth Ombudsman's website at http://www.ombudsman.gov.au/docs/Agency_Guide_To_PID_Act_V1_Dec_2013.pdf.

10. Responsibilities of Managers and Supervisors

Managers or supervisors who receive information which they believe concerns, or could concern, disclosable conduct must refer the matter immediately to the relevant Authorised Officer. Allegations concerning an Authorised Officer should be referred directly to another Authorised Officer or to the CEO.

Where a manager or supervisor is aware that a person has made a public interest disclosure, they must monitor the work environment for signs of detriment and if necessary, take corrective action early. A manager or supervisor who is aware that a person has made a public interest disclosure must also take reasonable steps to support the discloser.

11. Review of process and outcome

Employees, and others, who are not satisfied with the review process or the outcome of an internal investigation may pursue a complaint with the Commonwealth Ombudsman. The Ombudsman may also investigate matters referred directly to the Ombudsman.

12. Questions

Questions on the policy should be directed to TEQSA's Chief Lawyer.