

CHAPTER 3: CONDUCT

3.6. PUBLIC INTEREST DISCLOSURE

The Australian Centre for International Agricultural Research (ACIAR) is committed to building a diverse and inclusive culture where all employees are respected and accountable for their actions. ACIAR encourages and supports the reporting of misconduct or other wrongdoing and will take active steps to support and to protect persons who make public interest disclosures (disclosure) under the *Public Interest Disclosure Act 2013* (PID Act).

3.6.1. AUTHORITY

The PID Act provides a means for protecting public officials and former public officials from adverse consequences of disclosing information that, in the public interest, should be disclosed and provides for the investigation of matters that are disclosed. Any person who makes a disclosure will be protected from detriment, or threats of detriment, relating to their disclosure.

In accordance with the PID Act, the Human Resources Manager, the General Manager Corporate and the Chief Executive Officer (CEO) are Authorised Officers and the CEO is also the Principal Officer and may delegate the Principal Officer functions to another person.

3.6.2. DISCLOSABLE CONDUCT

The full definition of disclosable conduct is set out in section 29 of the PID Act. In the ACIAR context this can be summarised as conduct that:

- contravenes the law, including laws of a foreign country that apply to ACIAR or its staff
- perverts, or attempts to pervert, the course of justice or involves corruption of any other kind
- constitutes maladministration or is an abuse of public trust
- is fabrication, falsification, deception, or misconduct in relation to scientific research
- results in the wastage of public money or public property
- unreasonably results in, or increases the risk of, a danger to the health and safety of a person or to the environment
- is prescribed by the PID Rules or engaged in by a public official that:
 - involves abuse of the public official's position
 - could, if proved, give reasonable grounds for disciplinary action against the public official

3.6.3. PROTECTION FOR DISCLOSERS

The PID Act provides immunity from civil, criminal or administrative liability for disclosers. It also makes it an offence to take a reprisal or threaten to take a reprisal against a person

because of a disclosure, whether that disclosure has been made, proposed or suspected. A reprisal can involve dismissal of an employee, injury, alteration of a position, or discrimination between employees.

The CEO must take reasonable steps to protect the discloser from detriment, or threats of detriment, relating to a disclosure. Administrative action that is reasonable to protect the discloser from detriment is not a reprisal, for example, where a person has made a disclosure in relation to their immediate work area, it may be appropriate to transfer them to another work area to ensure they are not harassed or victimised.

A person who makes a public interest disclosure is protected from reprisal in the following ways:

- it is a criminal 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
- a discloser has the right to apply for compensation for loss, damage or injury suffered from a reprisal.

Making a disclosure also does not exclude the discloser from reasonable management action for any unsatisfactory performance, such action is not a reprisal.

3.6.4. MAKING A DISCLOSURE UNDER THE PID ACT

All ACIAR employees, contracted service providers and other public officials – including anyone who formerly held any of those positions – are entitled to make disclosures under the PID Act. Disclosures may be made anonymously or openly and may be made verbally or in writing, noting that once a disclosure has been made, it cannot be withdrawn. A disclosure may be made without the discloser asserting that it is a disclosure under the PID Act.

Disclosures may be made to a supervisor or an Authorised Officer, or in certain circumstances, to the Ombudsman. A person who receives a disclosure must deal with it in accordance with the PID Act, the Public Interest Disclosure Standard 2013 and these procedures. Anyone considering making a disclosure should contact an Authorised Officer for more information, including the protections given to disclosers under the PID Act.

The information contained in a disclosure should be clear and factual, and should, as far as possible, avoid speculation, personal attacks and emotive language. It should contain supporting evidence, where available, and should, where possible, identify any witnesses.

A person who knowingly makes a false or misleading disclosure will not have any protections under the PID Act and may be subject to disciplinary action.

3.6.5. PROCEDURES FOR SUPERVISORS

Supervisors that receive information they believe is disclosable must, as soon as practicable, provide that information to an Authorised Officer. The supervisor must make a written record that a disclosure has been made, and if the disclosure is not in writing, make a written record of the details of the disclosure including the time and date and have the discloser sign the

record, where practicable. When the disclosure is provided to the Authorised Officer, the supervisor will provide the Authorised Officer's name and contact details to the discloser.

The supervisor must also prepare a written assessment of any risks of reprisal action that might be taken against the discloser and provide this assessment to the Authorised Officer.

3.6.6. PROCEDURES FOR AUTHORISED OFFICERS

Where a person discloses information to an Authorised Officer which may be considered disclosable conduct and the person is unaware of the PID Act, the Authorised Officer must (if the disclosers contact details are provided):

- inform the person that the disclosure could be treated as an internal disclosure
- explain to the person what the PID Act requires for a disclosure
- explain to the person their protections provided by the PID Act
- advise the person of any orders or directions that may affect disclosure

Deciding to allocate a disclosure

When a disclosure is made directly to an Authorised Officer, they must make a written record that a disclosure has been made, and if the disclosure is not in writing, make a written record of the details of the disclosure including the time and date and have the discloser sign the record, where practicable.

The Authorised Officer must, before allocating the disclosure, ask the discloser if they consent to their name and contact details being provided to the CEO or delegate and if they wish the disclosure to be investigated. The discloser's responses (if any) must be documented. Where a discloser does not respond within seven days, they are taken **not** to have consented to their name and contact details being provided or to the disclosure being investigated.

The Authorised Officer must use their best endeavours to decide on the allocation of the disclosure within 14 days. They may obtain information and make inquiries for the purposes of deciding on the allocation of the disclosure.

An Authorised Officer must allocate the handling of a disclosure either within ACIAR or to the appropriate agency, unless they are satisfied, on reasonable ground, that there is no reasonable basis on which the disclosure could be considered to be an internal disclosure.

If an Authorised Officer decides that a disclosure is not to be allocated, they must advise the discloser of their decision providing the discloser with the reasons for their decision.

Allocating an internal disclosure

Where an Authorised Officer allocates a disclosure to an agency (including within ACIAR) they must complete 'Notification of allocation' form and send it to the CEO, the discloser and to the Ombudsman's Office. They must also conduct a risk assessment based on a checklist of risk factors and having regard to the discloser's supervisor assessment.

3.6.7. ANONYMOUS DISCLOSURES

A disclosure is anonymous if the identity of the discloser is not revealed. It is also anonymous if the discloser does not disclose their name but does provide contact details. Anonymous disclosures are still treated as disclosures for the purposes of the PID Act.

Where an Authorised Officer receives an anonymous disclosure, they must determine if the person who has disclosed the information is a public official. However, if the Authorised Officer cannot contact the discloser, no determination can be made as the Authorised Officer is unable to give written notice of the determination to the individual. The Authorised Officer should make this decision having regard to whether it is in the public, ACIAR's or the discloser's interest to have the disclosure dealt with under the PID Act. The Authorised Officer should inform the discloser of their decision where contact details are provided.

3.6.8. DECIDING WHETHER OR NOT TO INVESTIGATE

The CEO must, as soon as practicable after receiving an allocation of a disclosure, consider whether or not to investigate the disclosure under the PID Act.

The CEO may decide not to investigate or to discontinue an investigation if:

- the discloser is not a current or former public official
- the information does not to any extent concern serious disclosable conduct
- the disclosure is frivolous or vexatious
- the disclosure is substantially the same as a disclosure that has already been investigated under the PID Act or is currently being investigated, under another law of the Commonwealth, and:
 - it would be inappropriate to conduct another investigation at the same time
 - the CEO is satisfied that there are no matters that warrant further investigation
- the discloser has indicated that they do not want the disclosure to be pursued and the CEO is reasonably satisfied that there are no further matters concerning the disclosure
- it is impracticable to investigate the disclosure because:
 - the discloser has not revealed their name and contact details
 - the discloser has refused or is unable to give the investigator information
 - of the age of the information

Decision not to investigate

Where the CEO decides under section 48 of the PID Act not to investigate a disclosure they must, as soon as reasonably practicable, inform the Ombudsman of that decision, and of the reasons for that decision, by completing the 'Notification of decision not to investigate' form. If the CEO decides not to investigate the disclosure under the PID Act, it does not prevent the information disclosed from being investigated under other ACIAR procedures.

Where the CEO decides not to investigate a disclosure, and where they have been given the name and contact details of the discloser, they must, as soon as practicable, inform the discloser of that decision, the reasons for the decision and of other courses of action available under other laws of the Commonwealth.

Decision to investigate

Where the CEO has decided to investigate the disclosure, and where they have been given the name and contact details of the discloser, they must inform the discloser that they are required to investigate the disclosure and the estimated time required for the investigation.

If the CEO starts to investigate the disclosure but then decides not to investigate the disclosure further, the CEO must inform the discloser and the Ombudsman's office of the decision and the reasons for the decision.

3.6.9. PROCEDURES FOR INVESTIGATORS

Where the CEO has decided to commence an investigation, they may conduct the investigation as they see fit however, they must be independent and unbiased in the matter and/or ensure they do not have an actual or perceived conflict of interest. The CEO may appoint an employee or external provider to investigate the disclosure, however the CEO will ensure that the investigator is suitably trained and/or qualified to perform the investigation.

The CEO may, for the purposes of the investigation, obtain information from persons involved. The CEO must ensure that any evidence to prove a fact is made on the balance of probabilities. The CEO, in conducting an investigation, must comply with:

- the Public Interest Disclosure Standard 2013
- the Agency Guide to the Public Interest Disclosure Act 2013

Interviewing witnesses

The investigator must ensure that, if a person is interviewed as part of the investigation, that the person is informed of:

- the identity and function of each person conducting the interview
- the process of conducting an investigation
- the authority of the investigator under the PID Act to conduct an investigation
- the protections provided to the person by section 57 of the PID Act
- the person's duty:
 - to use their best endeavours to assist the investigator (subject to the privilege against incriminating themselves or exposing themselves to a penalty)
 - not to take or threaten to take reprisal action against the discloser
 - not to disclose the identity of the person who made the disclosure

At the end of any interview the interviewee must be given an opportunity to make a final statement or comment, the investigator must include this in the record of the interview.

Where the investigator is aware of the discloser's identity and considers that it is necessary to reveal the discloser's identity to a witness, the investigator must consult with the discloser, where practicable, before proceeding.

Procedural fairness

Procedural fairness does not mean that a person must be told about any allegations made about them as soon as the disclosure is received, or an investigation is commenced. There may be good reasons to carry out an investigation before interviewing a person involved.

Procedural fairness may also require that the discloser's identity be revealed to the person who is the subject of the disclosure.

Where the investigator, in preparing the report, proposes to make a finding of fact or express an opinion, that is adverse to the discloser, the investigator must give the person a copy of the evidence and give the person a reasonable opportunity to comment on it.

3.6.10. REPORTS OF INVESTIGATIONS

In preparing a report the investigator must comply with the PID Act, the Public Interest Disclosure Standard 2013 and these procedures including the investigation and report must be finalised within 90 days of the disclosure being allocated. The report of an investigation must set out:

- the matters considered in the course of the investigation
- the duration of the investigation
- the investigator's findings (if any)
- the action (if any) that has been, is being or is recommended to be taken
- any claims made about, and any evidence of, detrimental action taken against the discloser, and ACIAR's response to those claims and that evidence

and, where relevant, a report must:

- identify whether there have been one or more instances of disclosable conduct
- identify any regulations, rules, administrative requirements or similar matters to which the disclosable conduct (if any) relates
- explain the steps taken to gather evidence
- set out a summary of the evidence
- set out any recommendations made based on that evidence

When the investigator has completed the report and has been given the discloser's contact details, the investigator must provide a copy of the report to the discloser and advise them:

- that the report has been completed
- whether the report was completed within the time limit provided for by the PID Act

The investigator may delete from the copy of the report given to the discloser any material that is likely to enable the identification of the discloser or another person for which the inclusion would result in the copy being a document:

- that is exempt for the purposes of Part IV of the *Freedom of Information Act 1982*
- having, or being required to have, a national security or other protective security classification
- containing intelligence information

3.6.11. INTERACTION WITH BREACHES OF THE CODE OF CONDUCT

Breaches of the APS Code of Conduct (the Code) occur when an APS employee (or former employee) behaves in a way that does not align with the APS Values. Disclosable conduct in the PID Act may contain material that alleges a breach of the Code. When a disclosure alleges a breach of the Code, the CEO will manage the disclosure under the terms of the PID Act in the first instance.

The CEO may conduct a preliminary investigation in accordance with the Code procedures and simultaneously investigate the disclosure under the terms of the PID Act. The CEO will then, decide whether it is appropriate to further investigate the matter as a suspected breach of the Code. Where this option is chosen, the investigator will need to exercise great care to ensure that they meet all their obligations under the PID Act and the Code procedures.

A PID investigation report may include a recommendation to proceed with a Code investigation. The discloser's protections in accordance with the PID Act will continue to apply where an investigation under the Code procedures arises from a PID disclosure.

3.6.12. CONFIDENTIALITY

The investigation of the disclosure should be conducted in as confidential a manner as is possible, any interviews conducted should be conducted in private. In particular, the identity of both the discloser and any persons described in the disclosable conduct should not be revealed except where necessary for the effective investigation (including because of the need to afford procedural fairness).

In accordance with the PID Act, it is an offence to disclose the identity of an individual who makes a disclosure or information that is obtained in the course of conducting a disclosure without the consent of the discloser.

3.6.13. RECORD-KEEPING

Where an Authorised Officer is required to keep a record, the record may be kept in hard copy or electronically or in both. A copy of all forms required to be sent under these procedures must also be kept. All records must be marked as 'Sensitive Personal' and hard copies stored in the appropriate storage container. Any email messages sent by Authorised Officers or delegates must be clearly marked 'to be read by named addressee only'.

Access to these records must be restricted to the Authorised Officers, delegates (including investigators) or other employees in ACIAR who require access in order to perform some function under the PID Act or for the purposes of another law of the Commonwealth.

The *Archives Act 1983*, *Privacy Act 1988* and the Administrative Functions Disposal Authority apply to records made under these procedures.

3.6.14. MONITORING AND EVALUATION

The Authorised Officer must provide a regular report to the CEO specifying the number of disclosures received and the nature of the disclosable conduct for each disclosure. The report must also include any disclosures that have been allocated to the Agency by another Agency's Authorised Officer.

The CEO will collate the Agency's report and provide it to the Commonwealth Ombudsman at the end of the financial year or as requested by the Commonwealth Ombudsman.

3.6.15. THE PROCESS

