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Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission

Report 3/56 – October 2017

Review of the *Public Interest Disclosures Act 1994*



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The motto of the coat of arms for the state of New South Wales is “Orta recens quam pura nites”. It is written in Latin and means “newly risen, how brightly you shine”.

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Membership

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|------------------------|--|
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| Members | Ms Eleni Petinos MP (until 29 March 2017) Mr Paul Lynch MP Dr Hugh McDermott MP The Hon Taylor Martin MLC (from 8 August 2017) The Hon Lou Amato MLC (from 6 April 2017 until 8 August 2017) The Hon Scott Farlow MLC (until 1 February 2017) The Hon Trevor Khan MLC The Hon Adam Searle MLC |
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Chair's foreword and summary

The *Public Interest Disclosures Act 1994* (the PID Act) is an important piece of legislation: it provides protection to public officials who raise issues of corruption, maladministration, waste of public money and government information contraventions in their workplace. Often, such practices would not come to light without insiders being willing to speak up. Therefore, we need to create a culture in which raising those issues is encouraged and supported to engender public trust in the public sector. The PID Act aims to achieve just that by providing reporting avenues for public officials, affording protections to reporters raising issues and creating an oversight framework for public interest disclosures.

The Committee was charged with reviewing the PID Act, including the effectiveness of the amendments introduced after the last review, conducted by the Committee on the Independent Commission Against Corruption in 2009. I would like to thank all the submission makers and witnesses who assisted us in this inquiry. We heard evidence that, on the whole, the public interest disclosures regime works well and the 2010 amendments achieved their aims.

Still, we heard that there are elements of the system that can be improved. Our recommendations focus on simplifying the disclosure process, improving remedies for detrimental action, refining reporting requirements, and providing clarification to the PID Act.

In examining the disclosure process, we found that there are gaps or technicalities in the legislation that could cause people who make disclosures to miss out on protections. We have therefore recommended that the PID Act be amended to protect reporters who make a disclosure to the wrong public authority, and that public sector agencies be required to nominate a sufficient number of employees to receive public interest disclosures.

We have also recommended that reporters can be deemed to be a public official for the purposes of the Act. This aims to afford protection to people who become aware of public sector wrongdoing but are not covered by the Act, for example, former public officials, subcontractors or public officials from other jurisdictions. We also concluded that the PID Act should protect disclosures to a wider range of people and bodies, such as the Privacy Commissioner or Ministers when the disclosure relates to their portfolios, and lower the threshold for external disclosures to the media or MPs.

We found that the protections around detrimental action resulting from a public interest disclosure should be enhanced. Firstly, the responsibilities of agencies need to be clarified. To this end, the PID Act should state that the head of a public authority must ensure that the authority establishes a procedure to assess the risk of detrimental action, and that the Ombudsman is notified when allegations of detrimental action are made, so that they can assist the authority in handling it. The PID Act should also state that reasonable management action is not detrimental action.

Secondly, reporters should be better supported if a case of detrimental action is taken to court. People who have made a public interest disclosure should be able to claim for any remedy, including exemplary damages, if they are found to have experienced detrimental action, and should not have to pay the costs of such proceedings. At the same time, the bar of proof for detrimental action should be lowered.

We have recommended amendments to the current reporting requirements for public authorities and the Ombudsman. These amendments aim to alleviate unnecessary administrative burdens on public authorities, and to increase the data available to the Ombudsman to allow for more detailed monitoring of the scheme. Thus, public authorities without staff should no longer be obliged to report on public interest disclosures, and all other public authorities should only report to the Ombudsman once a year instead of every six months. In these reports, agencies should be required to include additional information on public interest disclosures and to report on purported public interest disclosures.

We heard that the PID Act is written in complicated and technical language, which makes it difficult for potential reporters and public and investigating authorities to understand. In addition to minor clarifications, we have therefore recommended that the PID Act be redrafted in simpler language and with a clearer structure, while maintaining its substance. The redrafting should consider possible civil, employment and administrative remedies for detrimental action and the findings of the Whistling While They Work 2 research project, and other reviews of PID legislation around the country. This would make the PID Act more accessible and remove the technicalities and uncertainties that weaken the current legislation.

New South Wales has the oldest public interest disclosure scheme in the country, which is something we should be proud of. However, the legislation needs to be reviewed at regular intervals to ensure it fulfils its purpose. We believe that with the implementation of our proposed amendments, the NSW PID scheme would be improved.

In closing, I would like to thank my fellow Committee members for their collegiate work on this inquiry.

Lee Evans MP
Chair

Recommendations

- Recommendation 1 _____ 1
- That the *Public Interest Disclosures Act 1994* be amended to require public authorities to nominate in their internal reporting policies an adequate number of officers to receive public interest disclosures on behalf of the authority. Authorities should take into account the number of public officials they employ, and include at least one person in each major worksite.
- Recommendation 2 _____ 2
- That the *Public Interest Disclosures Act 1994* be amended to enable public interest disclosures to be made to a public authority's governing body or to the Minister responsible for an authority.
- Recommendation 3 _____ 2
- That section 15 of the *Public Interest Disclosures Act 1994* be extended to misdirected disclosures received by a public authority, if the public official who made the disclosure honestly believed that it was the appropriate public authority to deal with the matter.
- Recommendation 4 _____ 4
- That the *Public Interest Disclosures Act 1994* be amended to provide that conduct related to an agency within a cluster is taken for the purposes of the Act to relate to the principal department.
- Recommendation 5 _____ 6
- That the *Public Interest Disclosures Act 1994* be amended to omit section 26(1A), which requires a public official to refer a disclosure to the authority to which the disclosure relates, or to the relevant investigating authority.
- Recommendation 6 _____ 7
- That the *Public Interest Disclosures Act 1994* be amended to provide that public interest disclosures may be made orally or in writing, may be made anonymously, and that a reporter does not have to assert that the disclosure is made under the Public Interest Disclosures Act. Authorities should be required to record oral disclosures in writing as soon as practicable.
- Recommendation 7 _____ 8
- That the *Public Interest Disclosures Act 1994* be amended to enable disclosures concerning serious privacy contraventions to be made to the Privacy Commissioner. Contraventions would involve serious breaches of the *Privacy and Personal Information Protection Act 1998*, or *Health Records and Information Privacy Act 2002*, or *Data Sharing (Government Sector) Act 2015*, or *State Records Act 1998*.
- Recommendation 8 _____ 9
- That the *Public Interest Disclosures Act 1994* be amended to add the Privacy Commissioner as an investigating authority.
- Recommendation 9 _____ 9

That the *Public Interest Disclosures Act 1994* be amended to add the Privacy Commissioner to the membership of the Public Interest Disclosures Steering Committee.

Recommendation 10 _____ 10

That the *Public Interest Disclosures Act 1994* be amended to enable a person to be deemed to be a public official under the Act, to provide protection to those who report wrongdoing but do not fall within the definition of public official.

Recommendation 11 _____ 13

That section 19 of the *Public Interest Disclosures Act 1994* be amended to:

- Omit subsection (4) and provide instead that the public official must have an honest belief on reasonable grounds that they have information that shows or tends to show conduct covered by the Act (corrupt conduct, maladministration, serious and substantial waste, government information contravention, or local government pecuniary interest contravention).
- Omit subsection (5), which provides that the disclosure must be substantially true.

Recommendation 12 _____ 16

That the *Public Interest Disclosures Act 1994* be amended to provide that the authority or officer who receives and/or investigates a report should inform the person who made the report about:

- the report being received
- the referral of the report to another public or investigating authority
- the assessment of the report and whether it will be treated as a public interest disclosure
- if the public interest disclosure is investigated, the progress of the investigation at least once every 3 months
- the outcome of the investigation, including any action taken.

This requirement should not apply to anonymous disclosures or where the person who made the disclosure has requested not to be informed about action taken as a result of the disclosure.

Recommendation 13 _____ 17

That the *Public Interest Disclosures Act 1994* be amended to require public authorities to publish the authority's public interest disclosures policy on the authority's website.

Recommendation 14 _____ 18

That the *Public Interest Disclosures Act 1994* be amended to provide that public officials who make a disclosure in the course of their day-to-day functions, under a statutory or other legal obligation, or while assisting an investigation by a public authority, that otherwise meets the criteria set out in the legislation, are considered to have made a public interest disclosure, but only for the purpose of the protections of the Act.

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| Recommendation 15 | 20 |
| That the <i>Public Interest Disclosures Act 1994</i> be amended to provide that the head of a public authority is responsible for ensuring that the authority establishes procedures for assessing the risk of detrimental action against a reporter, and takes appropriate action when allegations of detrimental action are made. | |
| Recommendation 16 | 21 |
| That the <i>Public Interest Disclosures Act 1994</i> be amended to require public authorities to notify the Ombudsman when an allegation of detrimental action is made, or when detrimental action is identified, so that the Ombudsman can intervene and assist the authority with determining an appropriate response. | |
| Recommendation 17 | 21 |
| That the <i>Public Interest Disclosures Act 1994</i> be amended to include the resolution of disputes arising as a result of a public official making a public interest disclosure as part of the Ombudsman’s oversight functions. | |
| Recommendation 18 | 22 |
| That the <i>Public Interest Disclosures Act 1994</i> be amended to provide that a manager is not prevented from taking reasonable management action in relation to an employee who has made a public interest disclosure, if the action taken was reasonable and justifiable, carried out in a reasonable manner and was not taken on a belief or suspicion that the person has made a public interest disclosure. | |
| Recommendation 19 | 25 |
| That the <i>Public Interest Disclosures Act 1994</i> be amended to omit section 20A(3), and enable public officials to claim for any remedy, including exemplary damages, when seeking compensation for loss they have suffered as a result of detrimental action. | |
| Recommendation 20 | 26 |
| That Part 3 of the <i>Public Interest Disclosures Act 1994</i> be amended to provide that a court cannot order the applicant to pay costs incurred in any proceedings relating to compensation or injunction unless the proceedings were instituted vexatiously or without reasonable cause, or the applicant’s unreasonable act or omission caused the other party to incur the costs. | |
| Recommendation 21 | 26 |
| That section 20 of the <i>Public Interest Disclosures Act 1994</i> be amended to omit the words ‘substantially in reprisal’ and provide instead that a public official takes detrimental action against another person if the making of a public interest disclosure by that person was a contributing factor for the detrimental action. | |
| Recommendation 22 | 27 |
| That the <i>Public Interest Disclosures Act 1994</i> be amended to omit the term ‘reprisal’ from sections 20, 20A and 20B, and replace it with ‘detrimental action’. | |
| Recommendation 23 | 29 |

That a note be added to section 20B of the *Public Interest Disclosures Act 1994* to make it clear that a court may grant an injunction to issue an apology, restrain termination or mandate reinstatement.

Recommendation 24 _____ 31

That section 6CA of the *Public Interest Disclosures Act 1994* be amended to require public authorities to provide a report to the Ombudsman for each 12 month period (ending on 30 June in any year).

Recommendation 25 _____ 31

That section 31 of the *Public Interest Disclosures Act 1994* be repealed and replaced with a requirement on the Ombudsman to prepare and provide a report to Parliament based on information received from public authorities under section 6CA of the Act.

Recommendation 26 _____ 33

That the Public Interest Disclosures Regulation 2011 be amended to require public authorities to provide the following information to the Ombudsman about every public interest disclosure they receive:

- a. whether the public interest disclosure was made directly to or referred to the authority
- b. the type of conduct alleged
- c. what action was taken in response to the public interest disclosure
- d. whether the allegations were wholly or partly substantiated
- e. whether the public interest disclosure resulted in systemic or organisational changes or improvements
- f. when the public interest disclosure was received and finalised.

Recommendation 27 _____ 34

That the Public Interest Disclosures Regulation 2011 be amended to require public authorities to provide information to the Ombudsman about the number of purported public interest disclosures they receive, the number of public officials who made them, and the broad reasons why each purported public interest disclosure did not meet the criteria in the *Public Interest Disclosures Act 1994*.

Recommendation 28 _____ 35

That the *Public Interest Disclosures Act 1994* be amended to provide that the annual report of the Public Interest Disclosures Steering Committee's activities and any recommendations made to the Minister be included in the Ombudsman's annual report on its oversight of the Act.

Recommendation 29 _____ 37

That section 4 of the *Public Interest Disclosures Act 1994* be amended to include Local Aboriginal Land Councils in the definition of public authority.

Recommendation 30 _____ 37

That the definition of local government investigating authority at section 4 of the *Public Interest Disclosures Act 1994* be amended by omitting ‘Director General’ and replacing it with ‘the Departmental Chief Executive of the Office of Local Government’.

Recommendation 31 _____ 38

That the *Public Interest Disclosures Act 1994* be amended to provide that the obligations on public authorities under the Act do not extend to authorities without any staff.

Recommendation 32 _____ 38

That section 17 of the *Public Interest Disclosures Act 1994* be amended to clarify that a disclosure that principally involves ‘a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure’ is not protected under the Act.

Recommendation 33 _____ 39

That the *Public Interest Disclosures Act 1994* be amended to provide that disclosures based solely or substantially on an individual employment related grievance or other personal grievance, including a decision to take reasonable management action in relation to a reporter (other than a grievance about detrimental action), are not public interest disclosures.

Recommendation 34 _____ 40

That section 12D of the *Public Interest Disclosures Act 1994* be amended to provide that, to be protected under the Act, a disclosure to the Information Commissioner must show or tend to show a serious government information contravention.

Recommendation 35 _____ 42

That the *Public Interest Disclosures Act 1994* be amended to require public officials to use their best endeavours to assist an investigation under the Act.

Recommendation 36 _____ 43

That the *Public Interest Disclosures Act 1994* be amended to enable investigating authorities to share information for the purpose of fulfilling their responsibilities under the Act.

Recommendation 37 _____ 44

That the *Public Interest Disclosures Act 1994* be amended to provide for a review of the Act and the effectiveness of any amendments five years after the amendments commence.

Recommendation 38 _____ 44

That the *Public Interest Disclosures Act 1994* be redrafted to simplify its provisions and structure, while retaining its substance. The simplified Act should set out how and to whom a disclosure can be made, obligations on agencies, protections for disclosers and oversight of the public interest disclosure scheme by the Ombudsman.

Chapter One – The disclosure process

Nominating enough officers to receive public interest disclosures

Recommendation 1

That the *Public Interest Disclosures Act 1994* be amended to require public authorities to nominate in their internal reporting policies an adequate number of officers to receive public interest disclosures on behalf of the authority. Authorities should take into account the number of public officials they employ, and include at least one person in each major worksite.

- 1.1 The Committee is concerned that public authorities do not nominate enough people to receive public interest disclosures. The Ombudsman reported that ‘many public authorities limit the number of officers nominated to receive disclosures to staff in specialist units or very senior management’.¹ Reports about serious wrongdoing to officers not nominated to receive public interest disclosures are not considered to be public interest disclosures.
- 1.2 Public officials usually report wrongdoing to their direct supervisors or managers, who are in most cases not designated recipients under the *Public Interest Disclosures Act 1994* (the PID Act).² One remedy would be to amend the Act to include protection for disclosures made to managers and supervisors, as put forward by the Public Interest Disclosures Steering Committee (the PID Steering Committee)³ and supported by some stakeholders.⁴
- 1.3 The Ombudsman consulted with public authorities about this proposal but reported that they had concerns. Training such a large number of supervisors to identify and handle public interest disclosures would be impractical and costly and would also mean that relatively junior people could receive public interest disclosures.⁵
- 1.4 Instead, the Ombudsman recommended that the number of people designated to receive public interest disclosures be increased and include at least one person in each major worksite.⁶ This would ensure that there are sufficient reporting

¹ Submission 9, NSW Ombudsman, p8

² Submission 9, NSW Ombudsman, p7 and background paper, p32; PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, p5

³ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, recommendation 4, p5. The members of the PID Steering Committee are: the NSW Ombudsman (Chair), the Secretary of the Department of Premier and Cabinet, the Auditor General, the Chief Commissioner of the Law Enforcement Conduct Commission, the Chief Commissioner of the ICAC, the Chief Executive of the Office of Local Government, the Police Commissioner, the Information Commissioner, and the Public Service Commissioner.

⁴ Submission 2, NSW Council for Civil Liberties, recommendation 1, p4; Dr Martin Bibby, NSW Council for Civil Liberties, Transcript of evidence, 27 September 2016, p17; submission 7, Transparency International, p2

⁵ Submission 9, NSW Ombudsman, pp7, 9 and background paper, pp32-33

⁶ Submission 9, NSW Ombudsman, recommendation 1, p9; The PID Steering Committee made a similar recommendation in line with the *Commonwealth Public Interest Disclosure Act 2013*, s59(3), i.e. to require principal officers to ensure that the number of authorised officers in their agency is sufficient to ensure they are readily accessible: PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, recommendation 9, pp10-11

avenues for public officials who want to make a disclosure. The Committee agrees with and supports this recommendation.

Enabling disclosures to Ministers or an authority's governing body

Recommendation 2

That the *Public Interest Disclosures Act 1994* be amended to enable public interest disclosures to be made to a public authority's governing body or to the Minister responsible for an authority.

- 1.5 The Ombudsman referred to instances of public officials reporting wrongdoing to Ministers, when the disclosure relates to their portfolio.⁷ However, disclosures to members of Parliament are not protected under the PID Act unless the disclosure was previously made within an agency or to an investigating authority, and only if the reporter had reasonable grounds for believing the disclosure was substantially true, and if the disclosure was substantially true.⁸
- 1.6 The Committee considers that these provisions are too restrictive. Ministers are perceived to be responsible for public authorities within their portfolio and can be distinguished from a member of Parliament. Similarly, public officials may believe that an authority's governing body is responsible for overseeing the authority. Therefore, disclosures made to Ministers and governing bodies in the first instance should be considered an internal report and be protected under the PID Act. This would create an additional reporting avenue.
- 1.7 Under section 17(3) of the Queensland *Public Interest Disclosure Act 2010*, public officials can make disclosures to a Minister responsible for the administration of a department or to a member of a public sector entity's governing body.⁹
- 1.8 The Committee agrees with the Ombudsman's suggestion that the PID Act should contain a provision similar to the Queensland *Public Interest Disclosure Act 2010*.¹⁰

Protecting disclosures made to the wrong public authority

Recommendation 3

That section 15 of the *Public Interest Disclosures Act 1994* be extended to misdirected disclosures received by a public authority, if the public official who made the disclosure honestly believed that it was the appropriate public authority to deal with the matter.

- 1.9 The PID Act currently provides for 'misdirected disclosures'. A misdirected disclosure is a disclosure that would have been a public interest disclosure if it had been made to the correct public authority or investigating authority.¹¹

⁷ Submission 9, NSW Ombudsman, p33 (background paper)

⁸ *Public Interest Disclosures Act 1994*, s19

⁹ See discussion in submission 9, NSW Ombudsman, pp33-34 (background paper)

¹⁰ Submission 9, NSW Ombudsman, p34 (background paper)

¹¹ *Public Interest Disclosures Act 1994*, s15(2)

- 1.10 Some misdirected disclosures can still attract protection if:
- they were made to an investigating authority under the Act,¹²
 - the public official making the disclosure honestly believed that the authority was the appropriate investigating authority to deal with the matter, and
 - the investigating authority refers the disclosure to another investigating authority, public official or public authority for investigation or investigates the matter itself.¹³
- 1.11 However, this does not apply to public officials who make a disclosure to the wrong public authority.
- 1.12 In the NSW public sector it is not always clear which public authority is the correct authority to make a disclosure to. As the Ombudsman notes, the NSW public sector is now structured in 'clusters' of agencies under a principal department and it is not always obvious who an agency's 'principal officer' is or what is meant by 'public authority':
- The PID legislation was written for a time when the public sector was structured differently from now. The current state government structure of ten principal departments and their 'clusters' of agencies raises questions about what constitutes a 'public authority' and who is the 'principal officer' of the authority. ... While Schedule 1 of the *Government Sector Employment Act 2013* provides some guidance around separate and executive agencies, the position is not clear in relation to statutory authorities. Nor is it always clear whether the principal officer of an authority is the secretary of the principal department or the agency's own chief executive.¹⁴
- 1.13 The complexity of the public sector's structure and the provisions in the PID Act increase the likelihood that officers wishing to make a public interest disclosure may make it to the wrong agency and be left without protection, even if they honestly believed they were making their disclosure to the appropriate agency. When the disclosure is made anonymously, the agency cannot advise the officer to make the disclosure to the appropriate agency.¹⁵
- 1.14 The Committee on the Independent Commission Against Corruption (ICAC Committee) examined the issue of disclosures made to the wrong agency in its 2009 report entitled *Protection of public sector whistleblower employees*.¹⁶ While the report focused on disclosures made to the wrong investigating authority, the ICAC Committee recommended that, 'a disclosure by a public official be eligible for protection ... if the public official makes the disclosure in the honest belief

¹² As defined in the PID Act, s4, an investigating authority is the Auditor-General, the Independent Commission Against Corruption (ICAC), the Ombudsman, the Law Enforcement Conduct Commission (LECC), the LECC Inspector, the ICAC Inspector, the Director General of the Office of Local Government, the Information Commissioner.

¹³ *Public Interest Disclosures Act 1994*, s15(1)

¹⁴ Submission 9, NSW Ombudsman, p9; see also p7 and background paper, pp30-32

¹⁵ Submission 9, NSW Ombudsman, p30

¹⁶ Committee on the Independent Commission Against Corruption, *Protection of public sector whistleblower employees*, November 2009, pp134-137

that it is being made to an appropriate public authority or investigating authority concerned with such conduct'.¹⁷

- 1.15 The Committee agrees with the ICAC Committee's view that '[t]echnicalities, such as whether or not the disclosure has been made to a specific agency, should not prevent a disclosure from attracting protection'.¹⁸ Therefore, the Committee recommends that misdirected disclosures to public authorities also be eligible for protection as public interest disclosures.
- 1.16 This recommendation also addresses the Ombudsman's point that some public authorities that have a role in overseeing or investigating wrongdoing in other authorities are not defined as an investigating authority under the PID Act. For example:
- NSW Treasury can investigate wrongdoing by members of Audit and Risk Committees; and
 - the Health Care Complaints Commission investigates certain conduct by health professionals.¹⁹
- 1.17 These agencies may receive misdirected disclosures because public officials believe them to be the correct public authority to make a disclosure to, given their oversight roles.
- 1.18 If misdirected disclosures made to the wrong public authority were covered under the PID Act, agencies could refer such disclosures to the correct authority for investigation if appropriate.

Centralising disclosure handling within clusters

Recommendation 4

That the *Public Interest Disclosures Act 1994* be amended to provide that conduct related to an agency within a cluster is taken for the purposes of the Act to relate to the principal department.

- 1.19 The Committee further agrees with the Ombudsman and the PID Steering Committee that conduct related to a 'subsidiary agency' should be taken to relate to the 'parent agency', as it does in the Commonwealth public interest disclosures legislation.²⁰
- 1.20 As noted earlier, the structure of the NSW public service has changed through the introduction of clusters and principal departments. According to the Ombudsman, many principal departments have centralised the handling of public interest disclosures by developing internal reporting policies that apply to entities within their cluster. This approach can free up small entities within the cluster from administrative responsibilities and provide additional avenues for reporting,

¹⁷ Committee on the ICAC, *Protection of public sector whistleblower employees*, November 2009, p137

¹⁸ Committee on the ICAC, *Protection of public sector whistleblower employees*, November 2009, p137

¹⁹ Submission 9, NSW Ombudsman, p32 (background paper)

²⁰ Submission 9, NSW Ombudsman, background paper, p6; PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, recommendation 5, p5

if enough officers are nominated to receive public interest disclosures and staff in the related entities are aware that the central policy relates to them.²¹

- 1.21 As the Ombudsman noted, the definition of public authority currently includes authorities that do not employ any staff. This includes trust funds, small agencies and individual public officials, such as Crown Lands reserve trusts, community visitors to people in care or official visitors to correctional and mental health inpatient facilities.²² The Committee supports the centralisation of public interest disclosure handling and responsibilities to alleviate unnecessary administrative burdens on small agencies and individual officers constituting public agencies.
- 1.22 The Committee is concerned by the Ombudsman's report that centralised complaint handling can lead to misdirected disclosures. The Ombudsman provided the example of a principal department which had set up a central hotline for all officers within its clusters to report misconduct. If an employee of a subsidiary agency made a public interest disclosure about another staff member of the same agency through this hotline, it would be a misdirected disclosure because it was not made to the authority to which the reporter belonged or to which the wrongdoing related.²³
- 1.23 To allow for effective centralisation of public interest disclosure handling and to clarify the meaning of public authority, the Committee recommends that conduct related to an agency within a cluster is taken to relate to the principal department. This is in line with the Ombudsman's recommendation that public authorities should be considered part of other authorities for the purposes of meeting obligations under the Act, such as reporting requirements or establishing a public interest disclosures policy.²⁴
- 1.24 The Ombudsman referred to other NSW legislation which provides that agencies are to be regarded as part of other agencies for the purposes of the Act, for example, clause 6 of Schedule 4 of the *Government Information (Public Access) Act 2009* (GIPA Act), and section 4B of the *Privacy and Personal Information Protection Act 1998* (PPIP Act).²⁵
- 1.25 Any provision to take conduct related to a subsidiary agency as relating to the principal department will have to use terminology specific to New South Wales and should take into account the challenges identified by the PID Steering Committee:

... any such amendment to the NSW Act would need to consider the issue of state government clusters, that divisions of the public service are not legal entities with a parent/subsidiary relationship, Schedule 3 of the Government Information (Public Access) Regulation 2009 (NSW) that deems certain agencies parts of other agencies, and the changes being made by the Government Sector Employment Act 2013

²¹ Submission 9, NSW Ombudsman, p31 (background paper)

²² Submission 9, NSW Ombudsman, pp5-6 (background paper)

²³ Submission 9, NSW Ombudsman, pp30-31 (background paper); *Public Interest Disclosures Act 1994*, s8(1)(c)

²⁴ Submission 9, NSW Ombudsman, p6 (background paper)

²⁵ Submission 9, NSW Ombudsman, p6 (background paper)

(NSW). For these reasons, the terminology of any provision is likely to differ from that used in the Commonwealth Act.²⁶

Clarifying the referral of disclosures

Recommendation 5

That the *Public Interest Disclosures Act 1994* be amended to omit section 26(1A), which requires a public official to refer a disclosure to the authority to which the disclosure relates, or to the relevant investigating authority.

- 1.26 The Committee is of the opinion that the requirement for a public official to refer a public interest disclosure to the authority to which the disclosure relates should be repealed. It is inconsistent with other provisions in the PID Act and a referral may be inappropriate in some cases.
- 1.27 Mr Graeme Head, the Public Service Commissioner, submitted that it can be confusing and frustrating for public officials to be able to make public interest disclosures to the Public Service Commission (PSC) that do not relate to the PSC.²⁷ Mr Head was concerned that in these cases, his organisation could add no value to the process other than to refer the disclosure to the appropriate authority and that this would only cause delays in the process.
- 1.28 The Committee considers it appropriate for the PSC to receive disclosures that do not relate to the PSC, as this provides further avenues for public officials to make disclosures. Public officials may perceive the PSC to be an appropriate agency to receive reports of public sector wrongdoing. In addition, the exercise of communicating with people making disclosures can assist them, even if the only concrete action is to refer the disclosure to the appropriate authority.²⁸ This is why the Committee has recommended protecting disclosures made to the wrong public authority.
- 1.29 However, the Committee agrees with Mr Head that section 26(1A) of the PID Act should be repealed as it is inconsistent with other provisions. Under the section, when a public official receives a public interest disclosure that relates to another public authority, they must refer the disclosure to the authority concerned or to an investigating authority. Section 26(1) on the other hand states that public officials have the discretion to refer public interest disclosures.
- 1.30 As the Ombudsman noted, the obligation to refer may be inappropriate in some cases, for instance:
- in clusters, where there is one agency investigating all misconduct,
 - if an agency is so small that it would be inappropriate for the disclosure to be referred to that agency,

²⁶ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, p5

²⁷ Submission 1, Public Service Commission; Answers to questions on notice, Mr Graeme Head, Public Service Commissioner, p3

²⁸ Ms Carolyn Strange, General Counsel, Public Service Commission, Transcript of evidence, 27 September 2016, p3

- if the disclosure is received by an agency that has the authority to investigate but is not a designated investigating authority under the PID Act.²⁹

1.31 Section 26(1A) is further inconsistent with the move to centralise public interest disclosure handling, as discussed above. The Committee recommends that section 26(1A) be repealed.

Clarifying how a disclosure can be made

Recommendation 6

That the *Public Interest Disclosures Act 1994* be amended to provide that public interest disclosures may be made orally or in writing, may be made anonymously, and that a reporter does not have to assert that the disclosure is made under the *Public Interest Disclosures Act*. Authorities should be required to record oral disclosures in writing as soon as practicable.

1.32 The Committee supports the PID Steering Committee's recommendation that a provision be included in the PID Act to clarify how a public interest disclosure can be made.

1.33 The PID Act is silent on the ways in which a public interest disclosure can be made. According to the Ombudsman, this raises questions and creates misunderstanding in the administration of public interest disclosures. For example, enquiries from public authorities and complaints to investigating authorities show that it is a common misperception that reporters need to declare they are making a public interest disclosure.³⁰

1.34 In contrast, section 28 of the Commonwealth *Public Interest Disclosure Act 2013* clearly states that a public interest disclosure may be made orally or in writing, can be made anonymously, and the reporter does not have to assert that they are making a public interest disclosure.

1.35 The PID Steering Committee recommended in its review of the Commonwealth *Public Interest Disclosure Act 2013* that a similar provision be included in the NSW PID Act.³¹ According to the Ombudsman, audits show that public officials make anonymous and verbal disclosures. The Ombudsman's public interest disclosures policies state that wrongdoing can be disclosed verbally and it is the responsibility of the person receiving the report to put it in writing. Agencies have adopted these model policies and have not raised any difficulties with the Ombudsman. The Ombudsman also noted that accepting verbal disclosures is 'consistent with best practice in complaint handling, including for people with a disability who may have difficulties making a complaint in writing'.³²

1.36 On the other hand, the Ombudsman drew attention to possible problems with reports being made orally, such as:

²⁹ Answers to questions on notice, NSW Ombudsman, p4

³⁰ Submission 9, NSW Ombudsman, p35 (background paper)

³¹ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, recommendation 3, p4

³² Submission 9, NSW Ombudsman, pp35-36 (background paper)

- Difficulties in determining whether an oral disclosure is a public interest disclosure.
- Difficulties in managing confidentiality when an oral disclosure is made to a designated recipient in the presence of people who are not authorised to receive it.
- Potential misinterpretation / paraphrasing by the receiver.³³

- 1.37 The Commonwealth provision was criticised during the recent review of the Commonwealth *Public Interest Disclosure Act 2013*.³⁴ The Commonwealth Ombudsman's submission to the review noted that the lack of formal requirements can make it difficult for the receiver to recognise that a public interest disclosure has been made and that public interest disclosures could be made unintentionally, for example in the execution of a person's normal duties. Unintended public interest disclosures would still trigger the full range of administrative requirements, including mandatory notification and protective mechanisms.³⁵
- 1.38 Due to differences between the Commonwealth and the NSW public interest disclosures legislation, the Committee believes that it is less likely that such issues would arise in NSW. For example, the threshold of seriousness for public interest disclosures under the Commonwealth legislation is lower than in NSW and the range of disclosable conduct is wider.³⁶ In addition, the Commonwealth legislation allows disclosures to be made to a supervisor, and does not have specific provisions for public officials making disclosures in the course of their day-to-day duties.
- 1.39 The Committee therefore considers that a similar provision in NSW would not raise the same problems as it does in the Commonwealth. However, the Ombudsman and the PID Steering Committee should monitor the recommended provision's operation and report on any unintended consequences.

Enabling disclosures about serious privacy breaches

Recommendation 7

That the *Public Interest Disclosures Act 1994* be amended to enable disclosures concerning serious privacy contraventions to be made to the Privacy Commissioner. Contraventions would involve serious breaches of the *Privacy and Personal Information Protection Act 1998*, or *Health Records and Information Privacy Act 2002*, or *Data Sharing (Government Sector) Act 2015*, or *State Records Act 1998*.

³³ Submission 9, NSW Ombudsman, pp36-37 (background paper)

³⁴ Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, <https://www.dpmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf>, viewed 8 November 2016

³⁵ Review of the Commonwealth Public Interest Disclosure Act 2013, submission 15, Commonwealth Ombudsman, pp11, 21

³⁶ *Public Interest Disclosure Act 2013* (Cth), s29; compared to conduct outlined in *Public Interest Disclosures Act 1994* (NSW), ss4, 10-14

Recommendation 8

That the *Public Interest Disclosures Act 1994* be amended to add the Privacy Commissioner as an investigating authority.

Recommendation 9

That the *Public Interest Disclosures Act 1994* be amended to add the Privacy Commissioner to the membership of the Public Interest Disclosures Steering Committee.

- 1.40 The Committee is concerned that disclosures by public officials about serious breaches of privacy within their organisation are currently not protected by the PID Act. The Committee recommends that the Privacy Commissioner be included as an investigating authority under the Act.
- 1.41 The NSW Privacy Commissioner submitted that there is currently no provision for public officials 'who may become aware of systemic privacy breaches or practices involving the use of personal and health information as data, to make a public interest disclosure on adverse use of personal information under the PID Act'.³⁷
- 1.42 The Commissioner argued that there is a danger of private data becoming publicly accessible. The unprecedented accumulation of sensitive private data, including health records, by agencies creates the risk of breaches or unauthorised release, intentionally or by accident. Agencies have the responsibility to protect this data under the *Privacy and Personal Information Protection Act 1998* and the *Health Records and Information Privacy Act 2002*.³⁸
- 1.43 Further, the Commissioner noted that data sharing arrangements between government agencies may result in private data becoming vulnerable.³⁹ The *Data Sharing (Government Sector) Act 2015* aims to regulate, promote and facilitate data sharing between government agencies. Section 12 of the Data Sharing (Government Sector) Act provides that private and sensitive health data has to be treated in accordance with privacy legislation. Failure to take proper measures to protect private and health data when dealing with data under the *State Records Act 1998* can also lead to sensitive data breaches.
- 1.44 The Commissioner receives anonymous inquiries from people who are reluctant to disclose the agency where they work and details that might identify the agency, for fear of retribution. Therefore, the Office cannot take action or make a request for investigation to the relevant agency.⁴⁰
- 1.45 The inquiries received by the Commissioner cover:
- systemic issues that create privacy risks;
 - individual decisions of supervisors that are contrary to the privacy rights of other employees or the community;

³⁷ Submission 3, NSW Privacy Commissioner, p3

³⁸ Submission 3A, NSW Privacy Commissioner, pp2, 3-5

³⁹ Submission 3A, NSW Privacy Commissioner, p2

⁴⁰ Submission 3A, NSW Privacy Commissioner, p6

- privacy infringing behaviours that are not properly investigated or addressed; and
- unlawful misuse or disclosure of personal and health information by colleagues.⁴¹

- 1.46 While not all of these issues may reach the threshold of serious privacy contraventions, the Committee is concerned that public officials may not feel confident enough to report these issues, even anonymously. The Committee therefore considers it appropriate to include disclosures to the Privacy Commissioner under the public interest disclosures regime.
- 1.47 To enable such disclosures, the Privacy Commissioner should be included as an investigating authority under the PID Act. While the Information Commissioner is already designated as an investigating authority, the Information Commissioner is prohibited by legislation from acting as Privacy Commissioner.⁴²
- 1.48 The Ombudsman supported the inclusion of privacy-related contraventions in the PID Act, but cautioned that disclosures about privacy breaches should be required to meet a test of seriousness.⁴³ The Ombudsman noted that this would be consistent with the Privacy Commissioner's submission that current complaints mechanisms 'are not sufficient in identifying or remedying more systemic breaches of privacy that could give rise to a real risk of serious harm to affected individuals'.⁴⁴ It would also be consistent with the threshold for other disclosable wrongdoing under the Act.
- 1.49 The Committee also supports the inclusion of the Privacy Commissioner in the Public Interest Disclosures Steering Committee, to enable the Commissioner's input on the operation of the Act consistent with other investigating authorities.

Providing protection for people who are not public officials

Recommendation 10

That the *Public Interest Disclosures Act 1994* be amended to enable a person to be deemed to be a public official under the Act, to provide protection to those who report wrongdoing but do not fall within the definition of public official.

- 1.50 The Committee supports the concept that the PID Act should only protect disclosures made by public officials. In this regard, the Committee agrees with the Ombudsman's view that public officials are most in need of protection from reprisals and the protections provided by the PID Act would not assist members of the public:

Not only are insiders best placed to notice mismanagement or wrongdoing that may arise, they are also the most vulnerable from reprisal for raising their concerns. Members of the public do not appear to be reluctant to complain about the conduct of public officials or authorities out of concern of reprisals. Further, the offence and

⁴¹ Submission 3A, NSW Privacy Commissioner, p6

⁴² Dr Elizabeth Coombs, Privacy Commissioner, Transcript of hearing, 27 September 2016, p12

⁴³ Answers to questions on notice, NSW Ombudsman, p8

⁴⁴ Submission 3, NSW Privacy Commissioner, p3

disciplinary provisions under section 20 would not assist members of the public as there is no employment relationship that could be jeopardised.⁴⁵

- 1.51 The Committee is, however, concerned that the definition of public official contained in the PID Act may be too narrow to provide protection to all who should be entitled to it. The Committee therefore recommends that a reporter can be deemed a public official under the Act.
- 1.52 Currently, section 4A of the PID Act states that a public official is ‘an employee of or otherwise in the service of a public authority’, including without limitation:
- (i) a Public Service employee,
 - (ii) a member of Parliament, but not for the purposes of a disclosure made by the member,
 - (iii) a person employed by either or both of the President of the Legislative Council or the Speaker of the Legislative Assembly,
 - (iv) any other individual having public official functions or acting in a public official capacity whose conduct and activities may be investigated by an investigating authority,
 - (v) an individual in the service of the Crown, or
- (a1) a person employed under the *Members of Parliament Staff Act 2013*, or
- (b) an individual who is engaged by a public authority under a contract to provide services to or on behalf of the public authority, or
- (c) if a corporation is engaged by a public authority under a contract to provide services to or on behalf of the public authority, an employee or officer of the corporation who provides or is to provide the contracted services or any part of those services.
- 1.53 The Ombudsman stated that it can be difficult to determine whether some people fall within this definition.
- 1.54 For example, the Legal Aid Commission arranges for the services of private legal practitioners to be made available through panels (‘panel lawyers’). These services are arranged through a service provision agreement. The Ombudsman noted that if this agreement is a contract within the meaning of the PID Act, panel lawyers can be considered public officials for the purposes of the PID Act. However, the Legal Aid Commission has stated that the agreement is not a contract under the PID Act, as under the *Legal Aid Commission Act 1979*, the Commission cannot interfere with the relationship between lawyer and client, and a private lawyer performing legal work for an individual is not performing a public function.⁴⁶

⁴⁵ Submission 9, NSW Ombudsman, p23 (background paper)

⁴⁶ Submission 9, NSW Ombudsman, pp8-9 (background paper)

- 1.55 The current provision is also limiting in cases where public officials from NSW and other jurisdictions work together. For example, the Ombudsman related the case of a Commonwealth public official who made a report to a NSW public authority about one of their staff members. The public authority was concerned that the protections of the PID Act did not apply to the Commonwealth official, as there was a significant risk of reprisal in this case.⁴⁷
- 1.56 Similarly the Ombudsman pointed to a lack of clarity in terms of subcontractors who provide services to a contractor to a public authority. The PID Act includes contractors engaged by a public authority in the definition of public official, but subcontractors are not specified in the definition.⁴⁸
- 1.57 As the Ombudsman noted, subcontractors may not be considered to be public officials under the Act, yet ‘much like head contractors, [they] may engage in wrongdoing and equally are able to play an important role in reporting wrongdoing in the public interest’. Audits conducted by the Ombudsman have examined corruption allegations about staff employed by companies that were subcontracted to provide services to a contractor to a public authority.⁴⁹
- 1.58 It is clear that the current definition of public official is not adequate to cover such cases. The Committee is, however, reluctant to add further detail to the definition as it seems unlikely that any enumeration will ever capture every conceivable case. Inserting a ‘deeming provision’, similar to that in the Commonwealth *Public Interest Disclosure Act 2013*, would provide the necessary flexibility to afford protection to people who have information about wrongdoing but do not fit into the definitions of the current PID Act.
- 1.59 Section 70 of the Commonwealth *Public Interest Disclosure Act 2013* provides that an authorised officer may determine that the Act applies to a disclosure, as if the person making the disclosure had been a public official when obtaining the information, if:
- the officer believes, on reasonable grounds, that the person has information that concerns disclosable conduct; and
 - the person was not a public official when obtaining the information; and
 - the person has disclosed, or proposes to disclose, the information to the authorised officer.
- 1.60 The determination must be made in writing and can be made on request from the reporter or on the officer’s own initiative.
- 1.61 The Ombudsman advised that the proposal to insert a deeming provision in the NSW legislation was supported by public authorities.⁵⁰

⁴⁷ Submission 9, NSW Ombudsman, p24 (background paper)

⁴⁸ *Public Interest Disclosures Act 1994*, s4A

⁴⁹ Submission 9, NSW Ombudsman, p8 (background paper)

⁵⁰ Submission 9, NSW Ombudsman, p23 (background paper)

- 1.62 A deeming provision would allow former public officials to make disclosures under the PID Act in certain circumstances. The question of whether to allow former public officials to make public interest disclosures was discussed extensively before the Committee. The Committee agrees with the NSW Council for Civil Liberties, the Ombudsman, the PID Steering Committee and the Joint Media Organisations that former public officials could benefit from the protections afforded by the PID Act, for example in cases of ‘pre-emptive dismissal’.⁵¹
- 1.63 However, including former public officials as a group in the definition of public official under the PID Act could lead to problems, as it has in the Commonwealth. The Ombudsman’s submission highlighted the case of a former public official who via his blog encouraged public officials to inform him of wrongdoing so that he could make disclosures on their behalf. In other cases, former public officials purported to make public interest disclosures relating to information they obtained in a private capacity, for example as clients of Centrelink.⁵²
- 1.64 Further, the Ombudsman cautioned that including former public officials as a group could lead to problems in verifying whether the person making a disclosure really had been a public official, and could increase the number of public interest disclosures and therefore the associated workload of public authorities.⁵³ The Committee also heard an argument from the Information Commissioner that including former public officials could lead them to delay reporting and that current protections are sufficient.⁵⁴
- 1.65 The Committee considers that a deeming provision similar to the Commonwealth provision would circumvent these problems. It would allow the receiver to determine whether the PID Act should apply because the information relates to wrongdoing and the reporter would benefit from the protections of the Act.

Lowering the threshold for disclosures to an MP or journalist

Recommendation 11

That section 19 of the *Public Interest Disclosures Act 1994* be amended to:

- **Omit subsection (4) and provide instead that the public official must have an honest belief on reasonable grounds that they have information that shows or tends to show conduct covered by the Act (corrupt conduct, maladministration, serious and substantial waste, government information contravention, or local government pecuniary interest contravention).**
- **Omit subsection (5), which provides that the disclosure must be substantially true.**

⁵¹ Submission 2, NSW Council for Civil Liberties, p8; submission 8, Joint Media Organisations, p5; submission 9, NSW Ombudsman, pp24-25 (background paper); Mr Eugene Schofield-Georgeson and Dr Martin Bibby, NSW Council for Civil Liberties, Transcript of evidence, pp20-21; PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, recommendation 2, p4

⁵² Submission 9, NSW Ombudsman, p24 (background paper)

⁵³ Submission 9, NSW Ombudsman, p25 (background paper)

⁵⁴ Submission 4, Information and Privacy Commission, pp4-5; Ms Samara Dobbins, Acting Information Commissioner, Transcript of evidence, 27 September 2016, pp7-10

- 1.66 The Committee is of the opinion that the current threshold for external disclosures is too high. Disclosures to the media or members of Parliament are a valuable part of the public interest disclosure regime, particularly after all internal avenues have been exhausted. The requirement for an external disclosure to be substantially true, in addition to the reporter having reasonable grounds for believing it to be substantially true, may discourage external disclosures after internal processes have failed.
- 1.67 Disclosures to a member of Parliament or a journalist are currently protected under the PID Act if they satisfy several requirements. Firstly, the disclosure must previously have been made internally, and secondly, there must have been a failure to investigate, or the investigation must have taken longer than six months, or there were no recommendations to take any action after an investigation. In addition, the public official must have reasonable grounds for believing that the disclosure is substantially true, and the disclosure must be substantially true.⁵⁵
- 1.68 The Committee heard arguments that public interest disclosures should be able to be made to MPs or journalists in the first instance in certain circumstances. The NSW Council for Civil Liberties argued that external disclosures without a prior internal disclosure should be permitted when the reporter faces a significant risk of reprisal, for example because of a culture of workplace secrecy, the gravity of an accusation, or the high status of those against whom accusations are made.⁵⁶ The Joint Media Organisations recommended that external disclosures in the first instance should be protected 'when the disclosure is in the public interest in order to expedite appropriate action that is in the public interest'.⁵⁷ In addition, the Joint Media Organisations argued for the protection of such disclosures 'where the discloser reasonably believes that the disclosure through internal channels is likely to be futile or result in the whistleblower, or any other person, being victimised'.⁵⁸
- 1.69 In response to these arguments, the Ombudsman stated that while external disclosures 'are a vital integrity and accountability mechanism', public authorities should retain a primary role in dealing with matters relating to the conduct of their staff.⁵⁹ The Ombudsman argued that external disclosures in the first instance could undermine the application of secrecy and confidentiality provisions, lead to a higher risk of reprisals against the person making the disclosure and unreasonably damage the reputations of people against whom allegations are made. Finally, the Ombudsman pointed to the role of investigating authorities in the NSW public interest disclosures scheme, which provide an alternative reporting avenue for people fearing reprisals within their own organisation.⁶⁰

⁵⁵ *Public Interest Disclosures Act 1994*, s19

⁵⁶ Submission 2, NSW Council for Civil Liberties, p5

⁵⁷ Submission 8, Joint Media Organisations, p2

⁵⁸ Submission 8, Joint Media Organisations, p3

⁵⁹ Answers to questions on notice, NSW Ombudsman, p4

⁶⁰ Answers to questions on notice, NSW Ombudsman, pp4-5

- 1.70 The Committee agrees with the Ombudsman and supports the current approach which requires disclosures to be made to public authorities or an investigating authority in the first instance, before being made to the media or an MP.
- 1.71 The Committee is, however, concerned that external disclosures are only protected if the public official making the disclosure has reasonable grounds for believing that the disclosure is substantially true, and the disclosure is substantially true.⁶¹
- 1.72 These requirements are higher than those for disclosures to public authorities or investigating authorities, which can be based on the reporter's honest belief on reasonable grounds that they show or tend to show wrongdoing.⁶²
- 1.73 The Committee also notes that these requirements are the highest in any Australian jurisdiction, and that no other Australian jurisdiction has different standards for external disclosures and internal disclosures.⁶³
- 1.74 The requirements for external disclosures to be substantially true may prevent public officials from taking the risk and making an external disclosure if internal procedures fail.⁶⁴ Some inquiry participants argued that this threshold is too high, as articulated by Mr Eugene Schofield-Georgeson from the NSW Council for Civil Liberties:
- At the moment the standard for an external disclosure requires a test involving two limbs. The first of those limbs is that the whistleblower has an honest belief on reasonable grounds that the disclosure is substantially true. The second is that the discloser know that the disclosure is substantially true. That is quite a high test in order for a discloser to go public. I would suggest that it is a standard that the New South Wales police would often have difficulty satisfying, even with all the institutional backing that their job entails.⁶⁵
- 1.75 The Ombudsman generally supported the recommended alignment of the test for external disclosures with the requirements for internal disclosures.⁶⁶
- 1.76 The Committee notes the PID Steering Committee's concern that lowering the threshold for external reports could undermine or prejudice investigations.⁶⁷ However, in the Committee's opinion, the other requirements around external disclosures provide sufficient safeguards against this. In particular, the Committee notes that the disclosure must have been made internally and the authority must have decided not to investigate, not recommended any action after an investigation, not completed the investigation within six months, or failed to notify the person making the disclosure of whether there would be an investigation within six months. Recommendation 12 of this report will also

⁶¹ *Public Interest Disclosures Act 1994*, ss19(4)-(5)

⁶² See *Public Interest Disclosures Act 1994*, ss10-14

⁶³ Mr Schofield-Georgeson, Transcript of evidence, pp18-19; submission 2, NSW Council for Civil Liberties, p6

⁶⁴ See a similar argument in submission 8, Joint Media Organisations, pp4-5

⁶⁵ Mr Schofield-Georgeson, Transcript of evidence, p18

⁶⁶ Answers to questions on notice, NSW Ombudsman, p6

⁶⁷ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, p4

ensure that reporters are given information on the action taken as a result of their disclosure.

- 1.77 The Committee therefore recommends aligning the current threshold for external disclosures with the requirements for internal disclosures, which is that a public official must hold an honest belief on reasonable grounds that they have information that shows or tends to show conduct covered by the PID Act.

Keeping public officials informed about their disclosure

Recommendation 12

That the *Public Interest Disclosures Act 1994* be amended to provide that the authority or officer who receives and/or investigates a report should inform the person who made the report about:

- **the report being received**
- **the referral of the report to another public or investigating authority**
- **the assessment of the report and whether it will be treated as a public interest disclosure**
- **if the public interest disclosure is investigated, the progress of the investigation at least once every 3 months**
- **the outcome of the investigation, including any action taken.**

This requirement should not apply to anonymous disclosures or where the person who made the disclosure has requested not to be informed about action taken as a result of the disclosure.

- 1.78 Communication with reporters is important. This is reflected in the PID Act, which sets timeframes for when an authority is to contact a reporter:

- Section 6D(1A) provides that a person making a disclosure is to be provided with an acknowledgement of the receipt of the disclosure and a copy of the authority's public interest disclosures policy within 45 days.
- Section 27 states that a person making a disclosure must be notified of the action taken or proposed to be taken within six months by the investigating authority, public authority or officer to whom the disclosure was made or referred.

- 1.79 However, the Ombudsman noted that requiring a public authority to contact reporters may be inappropriate in some cases, for example if the reporter remained anonymous or could not be contacted, or when they do not wish to be further involved in the process.⁶⁸ The PID Act currently recognises that some

⁶⁸ Submission 9, NSW Ombudsman, p44 (background paper)

exceptions are warranted, for example when public officials make disclosures in performing their day-to-day functions or under a statutory or legal obligation.⁶⁹

- 1.80 The Committee agrees with the Ombudsman that the current provisions are too static. A principles-based approach would provide more flexibility to react to specific situations by replacing deadlines for contact with the requirement to contact reporters when key decisions are taken, where possible and appropriate. The Ombudsman suggested that such an approach ‘recognises that there are situations where acknowledging a PID [public interest disclosure] is undesirable and merely an administrative burden on public authorities’.⁷⁰
- 1.81 The Committee therefore recommends that a new provision be inserted in the PID Act. The provision should be modelled on the ACT’s *Public Interest Disclosure Act 2012* which sets out key points at which contact should be made, namely:
- when the disclosure is referred to another public sector entity (authority),
 - when a decision is made not to investigate or to end an investigation,
 - if a disclosure is investigated, a progress report every three months and a report of the final outcome of the investigation.⁷¹
- 1.82 It further specifies that no contact has to be made where the disclosure was made anonymously or where the reporter has asked in writing not to be kept informed.

Making public interest disclosure policies available online

Recommendation 13

That the *Public Interest Disclosures Act 1994* be amended to require public authorities to publish the authority’s public interest disclosures policy on the authority’s website.

- 1.83 The Committee supports an amendment to the PID Act to require authorities to publish their public interest disclosures policy on their public website.
- 1.84 The Ombudsman has identified that only a fifth of public authorities have a link to their internal reporting policy on their public website. While many display the policy on their intranet, contractors and other public officials cannot access it in this location. Also, many employees may not want to access the policy from their workplace for fear of discovery or reprisal.⁷²
- 1.85 To make the policies more widely accessible, the Committee recommends amending the PID Act to require public authorities to publish their reporting policies on their public website.

⁶⁹ *Public Interest Disclosures Act 1994*, s6D(4)

⁷⁰ Submission 9, NSW Ombudsman, p44 (background paper)

⁷¹ *Public Interest Disclosure Act 2012* (ACT), s23(1)

⁷² Submission 9, NSW Ombudsman, pp16-17 (background paper)

- 1.86 The Ombudsman cautioned that this may increase the number of people attempting to make a public interest disclosure without being entitled to do so,⁷³ but the Committee considers that the benefits of providing accessible public interest disclosures policies outweigh this risk.

Protecting officials who make a disclosure as part of their role

Recommendation 14

That the *Public Interest Disclosures Act 1994* be amended to provide that public officials who make a disclosure in the course of their day-to-day functions, under a statutory or other legal obligation, or while assisting an investigation by a public authority, that otherwise meets the criteria set out in the legislation, are considered to have made a public interest disclosure, but only for the purpose of the protections of the Act.

- 1.87 The Committee recommends that public officials who make a disclosure in the course of their day-to-day functions, under a statutory or other legal obligation, and witnesses assisting investigations should be afforded the protections of the PID Act, but that in these cases agencies should not be required to fulfil all the administrative requirements associated with receiving a public interest disclosure.
- 1.88 Some public officials such as internal auditors or investigators are required to report wrongdoing as part of their day-to-day duties. Technically, these reports can be classed as public interest disclosures, although, as the Ombudsman's submission noted, '[i]n the majority of these cases the benefit in assessing and counting these reports as PIDs [public interest disclosures] is not clear'.⁷⁴
- 1.89 The Committee agrees with the Ombudsman that the benefit from accepting these reports as public interest disclosures is to reporters who receive the protections of the PID Act when they experience reprisals on account of having reported wrongdoing.⁷⁵
- 1.90 Similarly, witnesses to investigations could be considered as having made a public interest disclosure, especially if disclosures can be made orally and without the reporter asserting that they are making a public interest disclosure, as discussed above under recommendation 6. The Committee agrees with the Ombudsman that these witnesses should also benefit from the protections of the PID Act.⁷⁶
- 1.91 Processing public interest disclosures creates an administrative burden on public authorities and investigating authorities. Inserting a provision that public officials who make a public interest disclosure in the course of their day-to-day functions and witnesses to investigations are to be afforded the protections of the PID Act without requiring authorities to fulfil the associated administrative requirements will provide the best outcome, as the Ombudsman noted:

⁷³ Submission 9, NSW Ombudsman, p17 (background paper)

⁷⁴ Submission 9, NSW Ombudsman, p18

⁷⁵ Submission 9, NSW Ombudsman, pp18-19 and background paper, p26

⁷⁶ Submission 9, NSW Ombudsman, p18

We believe the difficulties outlined above could be addressed by providing in the PID Act that public officials who make a disclosure in the course of their day-to-day functions or under a statutory or other legal obligation are considered to have made a PID, but only for the purpose of the protections of the Act.

This would mean a public authority's obligations under the Act do not apply in relation to these PIDs. That is, they would have no obligation to acknowledge the report within 45 days of receipt, notify the reporter of the action taken or proposed to be taken in relation to their report or count the PID in the statistical reports provided to the NSW Ombudsman. However if such a reporter suffers detrimental action following making their report they are entitled to the protections against reprisals and the other legal remedies provided in the PID Act.⁷⁷

⁷⁷ Submission 9, NSW Ombudsman, p19

Chapter Two – Detrimental action

Requiring agencies to conduct risk assessments

Recommendation 15

That the *Public Interest Disclosures Act 1994* be amended to provide that the head of a public authority is responsible for ensuring that the authority establishes procedures for assessing the risk of detrimental action against a reporter, and takes appropriate action when allegations of detrimental action are made.

2.1 The Committee recognises that the best way to protect a reporter against detrimental action is for the agency to act proactively. This recommendation aims to introduce certainty to the PID Act on the responsibility of an agency to protect a reporter. The Committee agrees with the NSW Ombudsman who submitted that agencies' obligations to prevent reprisal should be included in the PID Act:

... we believe there needs to be a stronger emphasis in the legislation on taking a proactive approach to reprisal. This would aim to make sure that disclosures are managed in a way that best prevents adverse consequences for the people who make them. While it may be implied, there is currently no specific obligation in the PID Act for public authorities to prevent reprisal or to protect a reporter.⁷⁸

2.2 The Ombudsman currently publishes guidance material which advises public authorities to:

- conduct an assessment of the risk of reprisals faced by an internal reporter and any related workplace conflict; and
- implement strategies to prevent or contain any identified risks.⁷⁹

2.3 However, audits conducted by the Ombudsman have found that public authorities typically do not undertake assessments regarding the risk of reprisal to a reporter. Where risk assessments are completed, they have often not identified any practical steps to lessen the risk of reprisal.⁸⁰

2.4 Similarly, when auditing agencies' handling of allegations of reprisal, the Ombudsman found that in each case a risk assessment was warranted. Such an assessment would have assisted the public authority in managing and preventing reprisals occurring. The Ombudsman also noted that it was common that confidentiality was not able to be maintained following the receipt of a public interest disclosure but a risk assessment process would identify and alleviate these problems.⁸¹

⁷⁸ Submission 9, NSW Ombudsman, p11

⁷⁹ Submission 9, NSW Ombudsman, p11

⁸⁰ Submission 9, NSW Ombudsman, p11

⁸¹ Submission 9, NSW Ombudsman, p11

- 2.5 Professor AJ Brown, Professor of Public Policy and Law at Griffith University, also told the Committee that, in many cases, difficulties and problems occurred because risk assessments had not been carried out:

The reality is most of the damage that is done, as far as we can ascertain ... most of the problems that befall people are simply the problems of being collateral damage to a process which has gone off the rails, often through no fault of any individual. It is simply a case of we realise we should have done something differently and we could have done something differently and the damage has occurred, or procedures simply were not followed, a risk assessment was not done and the damage has occurred.⁸²

- 2.6 When detrimental action is taken against someone who makes a public interest disclosure, it can be a lengthy and unpleasant experience for all parties to bring the matter to a satisfactory conclusion. If authorities have procedures in place for assessing the risk of detrimental action then this can be avoided. Set processes would make it easier for agencies to handle detrimental action and increase the confidence of staff. The Committee is of the view that in this case preventative action is preferable to action after the fact or procedures devised 'on the run'.
- 2.7 The head of an agency already has a number of responsibilities outlined in section 6E of the PID Act. The Committee considers that the recommended amendment will emphasise the importance of an agency acting proactively and improve protections for people who make public interest disclosures. As highlighted by the Ombudsman, it can be implied that agencies have these responsibilities. The Committee believes that it should be clearly provided for in the PID Act.

Enabling the Ombudsman to assist in cases of detrimental action

Recommendation 16

That the *Public Interest Disclosures Act 1994* be amended to require public authorities to notify the Ombudsman when an allegation of detrimental action is made, or when detrimental action is identified, so that the Ombudsman can intervene and assist the authority with determining an appropriate response.

Recommendation 17

That the *Public Interest Disclosures Act 1994* be amended to include the resolution of disputes arising as a result of a public official making a public interest disclosure as part of the Ombudsman's oversight functions.

- 2.8 An allegation or the identification of detrimental action following the making of a public interest disclosure can be difficult for agencies to properly deal with due to a lack of experience. The process can be high-risk and resource intensive. As such, it would be beneficial if agencies notified the Ombudsman who can provide assistance and expertise in such matters.

⁸² Professor AJ Brown, Professor of Public Policy and Law, Griffith University, Transcript of evidence, 27 September 2016, p29

- 2.9 The Ombudsman reported that agencies themselves would welcome such a change: 'There was widespread support for this suggestion at the practitioners' forums that we held as part of our consultation process for the review of the PID Act'.⁸³
- 2.10 An additional benefit of an agency notifying the Ombudsman when detrimental action is alleged or identified is that it will improve data collection. During audits, the Ombudsman found that public authorities had only identified 18 cases of alleged reprisal over a two year period from 1 January 2012. While this could indicate a general lack of reprisal action, the Ombudsman believes there were more cases but some were not properly identified or recorded.⁸⁴
- 2.11 Giving the Ombudsman oversight of the resolution of disputes arising as a result of a public official making a public interest disclosure would also improve the handling of such cases. The Ombudsman's expertise and experience would be of assistance to both the agency and the public official to facilitate the process. The Ombudsman told the Committee that a regulation making provision for this function has been drafted but it has not yet been introduced in Parliament.⁸⁵
- 2.12 The Committee considers that it would be simpler for such a function to be included alongside the Ombudsman's other oversight functions in section 6B of the PID Act. Throughout this review of the PID Act, the Committee has had the aim of simplifying processes and the legislation. Including this provision in the Act, rather than in an additional regulation, will help to achieve this aim.
- 2.13 The Committee recognises the expertise of the Ombudsman in this area. Since taking on oversight functions related to the PID Act, the Ombudsman's office has established a PID Unit which has gained practical experience in the handling of public interest disclosures and also gathered information and feedback from various agencies on their experiences with handling disclosures. The Ombudsman's office has the expertise to identify what is best practice in the handling of public interest disclosures. If the Ombudsman is notified about allegations of detrimental action, they will be able to use this practical knowledge to help agencies manage the situation in the most effective way.
- 2.14 Similarly, if the Ombudsman is given responsibility for the resolution of disputes, they will be able to quickly identify any potential problems and intervene to prevent them from escalating. This role will also help the Ombudsman conduct further research on the response of agencies and formulate best practice advice.

Making it clear that agencies can take reasonable management action

Recommendation 18

That the *Public Interest Disclosures Act 1994* be amended to provide that a manager is not prevented from taking reasonable management action in relation to an employee who has made a public interest disclosure, if the action taken was reasonable and justifiable, carried out in a reasonable manner and

⁸³ Submission 9, NSW Ombudsman, p12

⁸⁴ Submission 9, NSW Ombudsman, p12

⁸⁵ Submission 9, NSW Ombudsman p15 (background paper)

was not taken on a belief or suspicion that the person has made a public interest disclosure.

- 2.15 While protection from detrimental action is a key part of the public interest disclosures regime, this should not be confused with management action taken as a routine part of running a workplace.
- 2.16 Section 3 of the PID Act states that it is not meant to affect the proper administration and management of public authorities with respect to the salary, wages, conditions of employment or discipline of a public official as long as:
- detrimental action is not taken against a person in contravention of the PID Act, and
 - beneficial treatment is not given in order to influence a person to make, not make or withdraw a disclosure.
- 2.17 This means that reasonable management action, such as performance or disciplinary action, can still be taken in relation to a person who has made a public interest disclosure. However, the Ombudsman told the Committee that this is not well understood by agencies or reporters. Mr Chris Wheeler, Deputy Ombudsman, explained that agencies are reluctant to take management action that may be perceived as reprisal:
- ... we often find when we go out and do audits, when we are doing training or having forums, management indicate that they are reticent ... to take management action in circumstances where they believe that is appropriate because it will be alleged, they believe, that they are taking detrimental action in reprisal for a disclosure.⁸⁶
- 2.18 Similarly, the Ombudsman submitted that some reporters believed that making a public interest disclosure made them immune to management or disciplinary action. This has led to instances of people making pre-emptive public interest disclosures in an attempt to avoid management action being taken against them.⁸⁷ This can be particularly problematic given the fact that public interest disclosures are often made in situations with a history of workplace conflict.⁸⁸
- 2.19 The recommended amendment to the legislation will give further clarity to agencies and staff.
- 2.20 The Committee notes that there may be concerns about public authorities using such a provision to disguise detrimental action taken against a reporter. However, a public authority would still have to demonstrate that any action taken was reasonable and justifiable and was not taken as a result of someone making a public interest disclosure.
- 2.21 The Committee also agrees with the Ombudsman that the benefit of using the term 'reasonable management' action is that the notion is already well established, for example in the *Workers Compensation Act 1987* and the

⁸⁶ Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, Transcript of evidence, 27 September 2016, p35

⁸⁷ Submission 9, NSW Ombudsman, p13

⁸⁸ Submission 9, NSW Ombudsman, p38 (background paper)

Commonwealth *Fair Work Act 2009*. Professor John McMillan, Acting Ombudsman, highlighted that these terms have been well tested:

That is one of the advantages of using the phraseology "reasonable management" or "action taken in a reasonable manner" because it has been so well and truly tested in tribunals and courts that there is now very strong guidance on what constitutes reasonable management action and what is a reasonable manner of taking it.⁸⁹

- 2.22 Furthermore, the Ombudsman stated that they would be able to provide information in public interest disclosure publications on what actions would be considered reasonable management action.⁹⁰
- 2.23 The Committee also notes the Queensland *Public Interest Disclosure Act 2010*, which explicitly outlines what can be considered reasonable management action against someone who made a public interest disclosure, as long as the reasons for taking the action do not include the fact that the person made a disclosure. These actions include:
- a reasonable appraisal of the employee's work performance;
 - a reasonable requirement that the employee undertake counselling;
 - a reasonable suspension of the employee from the employment workplace;
 - a reasonable disciplinary action;
 - a reasonable action to transfer or deploy the employee;
 - a reasonable action to end the employee's employment by way of redundancy or retrenchment;
 - a reasonable action in relation to the above actions;
 - a reasonable action in relation to the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in relation to the employee's employment.⁹¹
- 2.24 The Committee considers that clarifying reasonable management action, where it is not carried out as a consequence of someone making a public interest disclosure, would be suitable in the NSW regime. The Queensland legislation could be considered in the drafting of the new provision. It could also assist the Ombudsman's office should they be required to draft guidance material.

⁸⁹ Professor John McMillan, Acting Ombudsman, NSW Ombudsman, Transcript of evidence, 27 September 2016, p35

⁹⁰ Submission 9, NSW Ombudsman, p14

⁹¹ *Public Interest Disclosure Act 2010* (Qld), s45

Allowing disclosers to claim for any remedy when seeking compensation

Recommendation 19

That the *Public Interest Disclosures Act 1994* be amended to omit section 20A(3), and enable public officials to claim for any remedy, including exemplary damages, when seeking compensation for loss they have suffered as a result of detrimental action.

- 2.25 Removing the restriction on what damages a public official can claim in compensation for loss they suffered as a result of detrimental action will deter people from taking detrimental action against another person because of a public interest disclosure.
- 2.26 Section 20A(1) of the PID Act states that when a person takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure, they are liable in damages for any loss that the other person suffers as a result of that detrimental action. The damages exclude exemplary or punitive damages or damages in the nature of aggravated damages.
- 2.27 The Committee heard that this limit has caused difficulties for people seeking legal representation in public interest disclosure cases. The NSW Council for Civil Liberties stated that: ‘such limitations on damages often prevent lawyers from acting in whistleblower cases, leading to insufficient legal specialisation in whistleblower protection law and a paucity of adequate legal representation in the area’.⁹²
- 2.28 The Ombudsman also supported an amendment to remove the limits on damages, highlighting the positive effect it could have on preventing instances of detrimental action. He noted that, ‘Given the nature of reprisal action, any remedies that may deter similar conduct in the future would be consistent with the objects of the PID Act’.⁹³
- 2.29 The Committee notes that a provision in the ACT *Public Interest Disclosure Act 2012* states that:
- 1 A person who takes detrimental action against someone else [because of a public interest disclosure] is liable in damages to anyone who suffers detriment as a result.
 - 2 Detrimental action is a tort and damages may be recovered in a proceeding in a court of competent jurisdiction.
 - 3 Any remedy that may be given by a court for a tort, including exemplary damages, may be given by a court in a proceeding under this section.⁹⁴

⁹² Submission 7, NSW Council for Civil Liberties, p7

⁹³ Answers to questions on notice, NSW Ombudsman, 11 October 2016

⁹⁴ *Public Interest Disclosure Act 2012* (ACT), s41

- 2.30 The ACT legislation is discussed elsewhere in this report and highlighted as best practice in this area. As such, the Committee considers that amending the NSW PID Act to include similar provisions will further improve the remedies available to people who suffer detrimental action.

Providing that disclosers won't pay costs, unless proceedings are vexatious

Recommendation 20

That Part 3 of the *Public Interest Disclosures Act 1994* be amended to provide that a court cannot order the applicant to pay costs incurred in any proceedings relating to compensation or injunction unless the proceedings were instituted vexatiously or without reasonable cause, or the applicant's unreasonable act or omission caused the other party to incur the costs.

- 2.31 The Committee considers that ensuring that a person making a public interest disclosure will not be liable for costs in proceedings relating to compensation or injunction, unless the proceedings were instituted vexatiously or without reasonable cause, will further encourage people to make disclosures.
- 2.32 The Ombudsman told the Committee that a common concern put forward by public officials during training sessions is that of incurring large costs as part of proceedings, should they suffer detrimental action after making a public interest disclosure. This has discouraged people from making disclosures.⁹⁵
- 2.33 The Committee notes that the Commonwealth *Public Interest Disclosure Act 2013* provides that a court cannot order the applicant to pay costs incurred in any proceedings relating to compensation, injunction or reinstatement unless the proceedings were instituted vexatiously or without reasonable cause, or the applicant's unreasonable act or omission caused the other party to incur the costs.⁹⁶
- 2.34 The Committee agrees with the PID Steering Committee⁹⁷ and the NSW Council for Civil Liberties⁹⁸ who recommended that this provision be included in the NSW legislation. The amendment will support the objective of the PID Act to encourage and facilitate the making of disclosures.

Lowering the threshold for detrimental action

Recommendation 21

That section 20 of the *Public Interest Disclosures Act 1994* be amended to omit the words 'substantially in reprisal' and provide instead that a public official takes detrimental action against another person if the making of a public interest disclosure by that person was a contributing factor for the detrimental action.

⁹⁵ Submission 9, NSW Ombudsman, p22 (background paper)

⁹⁶ *Public Interest Disclosure Act 2013* (Cth), s18

⁹⁷ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, p10

⁹⁸ Submission 7, NSW Council for Civil Liberties, p7

Recommendation 22

That the *Public Interest Disclosures Act 1994* be amended to omit the term ‘reprisal’ from sections 20, 20A and 20B, and replace it with ‘detrimental action’.

- 2.35 In order to better protect officials who make public interest disclosures, the Committee considers that taking detrimental action should be considered an offence, without the need to prove that it was substantially in reprisal for making a disclosure.
- 2.36 Section 20 of the PID Act provides that:
- A person who takes detrimental action against another person that is substantially in reprisal for the other person making a public interest disclosure is guilty of an offence.
- 2.37 Proceedings for an offence under s20 operate with a reverse onus of proof. This means that once it has been established that detrimental action was taken, the defendant has to prove that the detrimental action was not substantially in reprisal for the person making a public interest disclosure.
- 2.38 The reverse onus of proof was introduced following a recommendation of the then Committee on the Office of the Ombudsman and the PIC with the intention of making it easier for reporters to establish the offence of detrimental action.⁹⁹ There have been no successful prosecutions for breaches of s20 of the PID Act, nor for breaches of similar public interest disclosure legislation across Australia.¹⁰⁰
- 2.39 In a recent case brought under s20, *DPP v Murray Kear*, allegations against Mr Kear that he took detrimental action against a former employee by dismissing her from her position were dismissed.¹⁰¹
- 2.40 In this case, the parties were not in dispute as to whether detrimental action was taken. It was admitted that the dismissal of an employee was detrimental action within the meaning of s20(2) of the PID Act. However, it was found that the detrimental action was not substantially in reprisal for the making of a series of public interest disclosures.
- 2.41 According to the Ombudsman, the magistrate said that the term reprisal ‘denotes an act of revenge or retribution from an action of another’. He also stated that in relation to the term ‘substantially’, its ordinary meaning is ‘of a material nature; real or actual’ and that the term means that ‘it formed an important real and actual basis for the alleged reprisal’.¹⁰²

⁹⁹ Committee on the Office of the Ombudsman and the Police Integrity Commission, *Review of the Protected Disclosure Act 1994*, September 1996, p78

¹⁰⁰ Submission 9, NSW Ombudsman, p37 (background paper)

¹⁰¹ *DPP v Murray Kear*, unpublished decision, 16 March 2016

¹⁰² Submission 9, NSW Ombudsman, p38 (background paper)

2.42 In considering whether the detrimental action was substantially in reprisal for the making of a series of public interest disclosures, the magistrate noted that there was a toxic relationship between the employer and the employee. As such, there were ‘many factors behind the dismissal’ and ‘there was no element of revenge, pay-back or retaliation’.¹⁰³

2.43 This decision has the potential to make it more difficult to successfully prosecute a case under s20. The Ombudsman notes that it is difficult to prove that detrimental action was motivated by revenge:

The decision in *Kear* makes the accused’s motivation for taking the detrimental action a key element of the offence, and it may be similarly interpreted in future that the detrimental action must be motivated by malice or revenge. A reporter would face difficulty in demonstrating that such motivation exists.¹⁰⁴

2.44 It is particularly problematic as people who make public interest disclosures rarely do so in isolation and without other existing concerns. A reprisal audit by the Ombudsman found that in 79% of cases reviewed, there was a history of conflict in the workplace prior to the public interest disclosure and alleged reprisal.¹⁰⁵

2.45 To rectify this, the Committee received evidence that the threshold for taking detrimental action against someone making a public interest disclosure should be lowered from ‘substantially in reprisal’ to ‘a contributing reason’ or a ‘part of the reason’.¹⁰⁶ These terms are used in public interest disclosure legislation in the ACT¹⁰⁷ and the Commonwealth¹⁰⁸ respectively.

2.46 Professor AJ Brown argued that the best solution is to remove the term ‘reason’ entirely and allow the magistrate to decide whether the detrimental action can be attributed to the making of a public interest disclosure. He told the Committee that:

If there is criminal intent to harm somebody's interest as a result of making a public interest disclosure, then the test should simply be whether the fact that a public interest disclosure was made or may be made was a factor of any significance in the damaging action that was taken towards that person.

...

I actually think that the ideal threshold is not even to say a reason. A reason is the logical thing to do, but the language I prefer is "a factor of any significance" so that it comes back to the discretion of the magistrate to ask whether it was a factor of any significance at all.¹⁰⁹

¹⁰³ Submission 9, NSW Ombudsman, p38 (background paper)

¹⁰⁴ Submission 9, NSW Ombudsman, p39 (background paper)

¹⁰⁵ Submission 9, NSW Ombudsman, p38 (background paper)

¹⁰⁶ Submission 7, Transparency International, p2

¹⁰⁷ *Public Interest Disclosure Act 2012* (ACT), s40(3)

¹⁰⁸ *Public Interest Disclosure Act 2013* (Cth), s13(1c)

¹⁰⁹ Professor Brown, Transcript of evidence, 27 September 2016, p29

- 2.47 The Committee supports this approach and considers that the PID Act should be amended to provide for a threshold of ‘a contributing factor’ when considering whether detrimental action has been taken against someone making a public interest disclosure.
- 2.48 As consequential amendments, the word ‘reprisal’ should be replaced with ‘detrimental action’ in the heading of sections 20, 20A and 20B, and the term ‘substantially in reprisal’ should be removed from section 20A. This will remove the associated connotations of revenge or retribution.

Clarifying the orders courts can make when granting an injunction

Recommendation 23

That a note be added to section 20B of the *Public Interest Disclosures Act 1994* to make it clear that a court may grant an injunction to issue an apology, restrain termination or mandate reinstatement.

- 2.49 The Committee considers that clearly stating the actions that a court can take when granting an injunction will further support people who suffer detrimental action after making a public interest disclosure.
- 2.50 Section 20B of the PID Act provides that the Supreme Court may issue an injunction to prevent someone from taking detrimental action against a person who has made a public interest disclosure. This includes the court’s power to issue a mandatory injunction requiring an offending agency to reinstate a person who was terminated as reprisal action, as well as issuing an injunction to stop any such attempted termination.
- 2.51 In reviewing the Commonwealth public interest disclosure legislation, the PID Steering Committee considered the situation of a person suffering adverse treatment as a result of making a public interest disclosure. They found that, overall, the NSW PID Act contained provisions which ‘provide sufficient redress to reporters’ seeking relief from such treatment, including reinstatement.¹¹⁰
- 2.52 However, the PID Steering Committee noted that many people who had suffered detrimental action after making a public interest disclosure would also appreciate a formal apology. This would vindicate their actions and offer some form of closure, as well as helping to restore any potential damage to their reputation:
- ... where the taking of reprisal has damaged the reputation of a reporter (either generally or in the workplace), a suitable formal apology (either alone or in conjunction with other remedies) from the person found responsible for that action may well be of great value to the reporter as evidence of vindication and to assist in restoring the reporters’ reputation.¹¹¹
- 2.53 The Commonwealth *Public Interest Disclosure Act 2013* clearly specifies that the Federal Court can order an apology to someone who suffered detrimental action and order reinstatement of a person who was terminated in reprisal for a public

¹¹⁰ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, p9

¹¹¹ PID Steering Committee, *Review of the Commonwealth Public Interest Disclosure Legislation*, January 2014, p10

interest disclosure.¹¹² The Committee agrees with the PID Steering Committee's recommendation that a note should be added to section 20B of the PID Act to clarify what an injunction can be granted for.

- 2.54 Making it clear that an injunction can be granted to issue an apology will offer redress for people who suffer detrimental action after making a public interest disclosure. Making a disclosure can be a difficult process for someone to go through. The Committee agrees that this would vindicate the person who made a public interest disclosure and help build a culture where persons making disclosures are seen to be protected.

¹¹² *Public Interest Disclosure Act 2013* (Cth), ss15 and 16

Chapter Three – Reporting on disclosures and their outcomes

Reducing the reporting burden on agencies

Recommendation 24

That section 6CA of the *Public Interest Disclosures Act 1994* be amended to require public authorities to provide a report to the Ombudsman for each 12 month period (ending on 30 June in any year).

Recommendation 25

That section 31 of the *Public Interest Disclosures Act 1994* be repealed and replaced with a requirement on the Ombudsman to prepare and provide a report to Parliament based on information received from public authorities under section 6CA of the Act.

- 3.1 The Committee considers that the reporting requirements in the PID Act should be refined to reduce the burden on agencies and gather more detailed data on disclosures and their outcomes. The reporting requirements have been an important tool in the oversight of the public interest disclosure scheme. Agency reporting has allowed the Ombudsman to assess agency compliance with the PID Act. It has also enabled the Ombudsman and the PID Steering Committee to gauge the overall effectiveness of the PID Act, including the implementation and operation of the 2010 amendments. Since the 2010 amendments, agencies have developed and implemented public interest disclosures policies and the scheme has matured.
- 3.2 Public authorities are required to report on their compliance with the PID Act in six monthly reports to the Ombudsman and yearly in their annual reports, which are tabled in Parliament and provided to the Ombudsman. The six monthly and yearly reports include:
- statistics on the number of public officials who made a disclosure;
 - the total number of disclosures received, as well as disclosures broken down into categories of conduct;
 - the number of disclosures finalised;
 - whether the authority has a public interest disclosures policy; and
 - action taken by the head of the authority to meet their responsibilities under the PID Act.¹¹³

¹¹³ *Public Interest Disclosures Act 1994*, ss6CA, 31; Public Interest Disclosures Regulation 2011, cl4. Agencies are required to separate their data into disclosures made by public officials in performing their day to day roles; disclosures that are made under a statutory or other legal obligation; and all other disclosures.

- 3.3 The reporting requirements were a recommendation of the ICAC Committee and were implemented in the 2010 amendments to the Act. They sought to address a lack of data on the number of public interest disclosures and the way they were managed by agencies, as well as providing for transparent and centralised data collection and reporting. In discussing the need for agency reporting, the ICAC Committee noted that ‘the NSW Ombudsman may assess the usefulness of the information prescribed in the PDA [PID Act] to determine whether it is adequate and make recommendations for amendments to the PDA [PID Act] in his audit reports. The NSW Ombudsman could assess the adequacy of the categories of information and data in consultation with the Protected Disclosures Steering Committee’.¹¹⁴
- 3.4 Public authorities have expressed concern about the frequency of reporting, and supported a shift to annual reporting to the Ombudsman. According to the Ombudsman, six-monthly reporting can be particularly burdensome for small agencies that rarely receive public interest disclosures. Around 80% of public authorities do not report receiving public interest disclosures in any given period. The Committee agrees with the Ombudsman’s recommendation to reduce the frequency of public interest disclosure reporting by requiring agencies to report to the Ombudsman annually.¹¹⁵
- 3.5 The Ombudsman also proposed that agencies no longer be required to include information on public interest disclosures in their annual reports, and that this information should instead be published in the Ombudsman’s report on oversight of the PID Act. Fewer agencies are complying with the requirement to forward annual reports to the Ombudsman - in 2012–2013, 46 councils and 20 state government agencies forwarded their annual reports to the Ombudsman, and 22 councils and 11 state government agencies provided their annual reports in 2014–2015. The Ombudsman notes that, given that there are around 450 public authorities in NSW, a low proportion of agencies are fully complying with the reporting requirements at section 31 of the PID Act.¹¹⁶
- 3.6 The Committee agrees with the recommendation to include detailed information on disclosures received by agencies in the Ombudsman’s annual oversight report. As the Ombudsman observes, this would maintain Parliamentary oversight and increase the information available on public interest disclosures by including data for agencies that are exempt from annual reporting requirements:

Removing the annual reporting requirement for public authorities would remove duplicative reporting and reduce the administrative burden of the PID Act on public authorities. We realise, however, that it is important to ensure Parliamentary oversight of such information. This could be achieved by requiring the NSW Ombudsman to report annually to Parliament on the information provided by public authorities in their reports under section 6CA. Such an amendment would also ensure that information about PIDs dealt with by public authorities that are not

¹¹⁴ Committee on the ICAC, *Protection of public sector whistleblower employees*, November 2009, pp92-94

¹¹⁵ Submission 9, NSW Ombudsman, p17, p18 (background paper)

¹¹⁶ Submission 9, NSW Ombudsman, p19 (background paper)

required to produce an annual report, such as local Aboriginal land councils, is publicly available and tabled in Parliament.¹¹⁷

3.7 Another benefit of this proposed change is that it would reduce the additional reporting burden on local councils. To meet the differing reporting requirements in the *Local Government Act 1993* and the PID Act¹¹⁸ councils currently submit separate public interest disclosure annual reports to the Ombudsman and the Minister for Local Government. As the Office of Local Government notes, the inconsistency in reporting schedules under the Acts creates duplication and imposes an additional regulatory burden on local councils:

... The inconsistency in these reporting timeframes is creating unnecessary duplicate reporting for councils. The Independent Pricing and Regulatory Tribunal's recent draft report analysing the regulatory burden on local government also supported reform in this area noting that these reporting requirements impose an additional regulatory burden on councils that is of no value and is counter to the intention that the information be publicly available.¹¹⁹

3.8 The Office of Local Government and the Ombudsman both proposed that the Ombudsman's oversight annual report be used to make councils' public interest disclosures information publicly available, and that the need for councils to report separately to the Minister be removed from the PID Act.¹²⁰ The Committee agrees with this suggestion and is recommending that section 31 of the PID Act be repealed, with public interest disclosure information to be published in the Ombudsman's oversight report.

Improving the information agencies collect and report

Recommendation 26

That the Public Interest Disclosures Regulation 2011 be amended to require public authorities to provide the following information to the Ombudsman about every public interest disclosure they receive:

- a. whether the public interest disclosure was made directly to or referred to the authority**
- b. the type of conduct alleged**
- c. what action was taken in response to the public interest disclosure**
- d. whether the allegations were wholly or partly substantiated**

¹¹⁷ Submission 9, NSW Ombudsman, p17

¹¹⁸ Section 428 of the *Local Government Act* requires councils to submit an annual report to the Minister for Local Government within five months of the end of each financial year (30 November). This report includes councils' public interest disclosures information for the year. A copy must be provided to the Minister for Local Government and published on council websites. Section 31 of the *Public Interest Disclosures Act* requires councils to prepare their annual PID reports within four months of the end of each reporting year (30 October).

¹¹⁹ Submission 10, Office of Local Government, p2

¹²⁰ Submission 10, Office of Local Government, p3; Submission 9, NSW Ombudsman, pp17-18 & p19 (background paper)

- e. **whether the public interest disclosure resulted in systemic or organisational changes or improvements**
- f. **when the public interest disclosure was received and finalised.**

Recommendation 27

That the Public Interest Disclosures Regulation 2011 be amended to require public authorities to provide information to the Ombudsman about the number of purported public interest disclosures they receive, the number of public officials who made them, and the broad reasons why each purported public interest disclosure did not meet the criteria in the *Public Interest Disclosures Act 1994*.

- 3.9 The current reporting system has been in place for a number of years and it is timely to reconsider not only the frequency of reporting but also the type of information that should be gathered and reported by agencies.
- 3.10 Current reporting requirements have supported the introduction of the scheme and assisted the Ombudsman's oversight work. For instance, tracking the number of disclosures relative to the number of staff in a public authority allows the Ombudsman to identify authorities that receive high or low numbers of public interest disclosures and plan the office's audit program.¹²¹
- 3.11 In developing the reporting categories, the PID Steering Committee recommended a staged approach, to give agencies time to develop systems to support a reporting regime. It was envisaged that a second phase of reporting would support the collection of more detailed data. The Ombudsman supports a change to require agencies to gather more detailed information about the public interest disclosures they handle each year, including:
- whether the disclosure was made directly to the authority or referred;
 - the type of conduct alleged;
 - the action taken in response;
 - whether the allegations were wholly or partly substantiated;
 - any systemic or organisational changes that were taken in response; and
 - when the disclosure was received and finalised.¹²²
- 3.12 In feedback to the Ombudsman, public authorities supported a move to require them to collect and report further details about public interest disclosures they receive. This would fill a gap in information about the outcomes of public interest disclosures and ensure monitoring of the public interest disclosure scheme. According to the Ombudsman 'it is unknown how many PIDs are substantiated or

¹²¹ Submission 9, NSW Ombudsman, p18 (background paper)

¹²² Submission 9, NSW Ombudsman, pp15-16 (background paper)

result in improvements to organisations. Effective monitoring of the system depends on this type of information being available'.¹²³

- 3.13 The Committee agrees that more detailed reporting from agencies would provide useful information about public interest disclosures, particularly the outcomes of investigations and any changes that take place as a result. As the Ombudsman notes, this information 'would highlight the value of PIDs and demonstrate to potential reporters that their concerns will be taken seriously and appropriate action taken'.¹²⁴
- 3.14 The Ombudsman also recommended that data be collected about purported public interest disclosures. This refers to cases where a person claims they are making a public interest disclosure or requests protection under the PID Act, but their report does not meet the Act's criteria for protection.
- 3.15 Purported public interest disclosures can indicate a lack of understanding about the PID Act on the part of the person making the report, or the public authority that receives the report. The Ombudsman also notes that the handling of purported public interest disclosures can be resource intensive for agencies, and that the work involved is not reflected in the data that is currently collected, which only relates to actual public interest disclosures.¹²⁵
- 3.16 In order to address this issue, the Ombudsman recommended that agencies be required to collect and report information on the number of purported public interest disclosures they receive, the number of public officials who made the reports, and the reasons why the reports did not meet the criteria in the PID Act. Data on purported public interest disclosures would allow the Ombudsman to help authorities with managing reporters' expectations and develop targeted training and audit programs. It would also encourage agencies to keep adequate records on purported public interest disclosures, and improve their assessment of reports of wrongdoing. As the Ombudsman notes, better understanding of purported public interest disclosures may also help to dispel common misconceptions, for example, that reports of wrongdoing are automatically protected.¹²⁶
- 3.17 The Committee considers that the recommended changes to the information to be gathered and reported by agencies will improve public officials' and authorities' understanding of the PID Act. It will also provide better data on the effectiveness of agencies' handling of public interest disclosures and assist the Ombudsman to deliver focused training and audit programs.

Consolidating annual reporting

Recommendation 28

That the *Public Interest Disclosures Act 1994* be amended to provide that the annual report of the Public Interest Disclosures Steering Committee's activities

¹²³ Submission 9, NSW Ombudsman, pp17-18 (background paper)

¹²⁴ Submission 9, NSW Ombudsman, pp15-16 (background paper)

¹²⁵ Submission 9, NSW Ombudsman, pp16-17 (background paper)

¹²⁶ Submission 9, NSW Ombudsman, pp16-17 (background paper)

and any recommendations made to the Minister be included in the Ombudsman's annual report on its oversight of the Act.

- 3.18 Including the PID Steering Committee's activities in the Ombudsman's annual report on the PID Act would reduce duplication and make it easier to locate consolidated information on oversight of the PID Act.
- 3.19 Currently, the Ombudsman (as the PID Steering Committee's chairperson) prepares an annual report on the PID Steering Committee's activities and any recommendations for change that it has made to the Minister. The Ombudsman also prepares an annual report to Parliament on its oversight role and functions under the PID Act.¹²⁷ The Ombudsman's annual public interest disclosure oversight reports contain a summary of the PID Steering Committee's report and the two reports are cross-referenced. The Ombudsman submitted that inclusion of the PID Steering Committee's activities and recommendations in the Ombudsman's annual report on oversight of the PID Act would simplify the current reporting requirements and avoid duplication.¹²⁸
- 3.20 The Committee considers that a consolidated report would enable a simpler reporting regime, and improve efficiency by not requiring the Ombudsman's staff to produce two separate reports. It would also make it easier to access a full account of the activities undertaken to oversight the operation of the PID Act.
- 3.21 The Committee's recommendations to refine and consolidate annual reports on the oversight of the scheme and agency data about the handling of reports of wrongdoing will facilitate comprehensive and complete reports by the Ombudsman on the operation of the public interest disclosure scheme.

¹²⁷ *Public Interest Disclosures Act 1994*, ss 6A(6), 6B(3)

¹²⁸ Submission 9, NSW Ombudsman, p14 (background paper)

Chapter Four – Clarifying amendments and further review

Making it clear that Local Aboriginal Land Councils are a public authority

Recommendation 29

That section 4 of the *Public Interest Disclosures Act 1994* be amended to include Local Aboriginal Land Councils in the definition of public authority.

- 4.1 The NSW Ombudsman highlighted that while Local Aboriginal Land Councils¹²⁹ are public authorities under the *Aboriginal Land Rights Act 1983*, some Land Council Chief Executives have told the Ombudsman that they are not public authorities and are not subject to the reporting requirements of the PID Act.¹³⁰ The Committee agrees that including Local Aboriginal Land Councils in the definition of public authority would address these misconceptions and clarify the obligations on Aboriginal Land Council Chief Executives.

Updating the definition of local government investigating authority

Recommendation 30

That the definition of local government investigating authority at section 4 of the *Public Interest Disclosures Act 1994* be amended by omitting 'Director General' and replacing it with 'the Departmental Chief Executive of the Office of Local Government'.

- 4.2 The Office of Local Government drew the Committee's attention to the definition of local government investigating authority under the PID Act, noting that it is inconsistent with the Local Government Act. The PID Act refers to the Office's Director General, while under the *Local Government Act 1993* the head of the Office is defined as the Departmental Chief Executive.¹³¹
- 4.3 The Committee is recommending that the definition of local government investigating authority be updated to reflect the current terminology used in the Local Government Act, and prevent any confusion due to inconsistency between the two Acts.

¹²⁹ The 120 Local Aboriginal Land Councils in NSW are public authorities for the purposes of accountability legislation. The Aboriginal Land Rights Act provides that the Land Councils are public authorities under the Ombudsman Act, the ICAC Act and the GIPA Act. These investigating authorities therefore have powers to investigate or require information from Land Councils.

¹³⁰ Submission 9, NSW Ombudsman, pp6-7 (background paper)

¹³¹ Submission 10, Office of Local Government, p3

Exempting public authorities without staff

Recommendation 31

That the *Public Interest Disclosures Act 1994* be amended to provide that the obligations on public authorities under the Act do not extend to authorities without any staff.

- 4.4 The NSW Ombudsman drew the Committee's attention to a small number of public authorities without staff, such as trusts or superannuation funds, and Local Aboriginal Land Councils that are under administration. Although these authorities do not have any staff, they are still required to have a public interest disclosure policy and report to the Ombudsman.¹³²
- 4.5 The Committee agrees that requiring authorities that do not have any staff to comply with the PID Act is impractical and unnecessary. The Committee recommends that the PID Act be amended to exempt authorities without staff from the obligations set out in the Act.

Clarifying what is meant by questioning the merits of government policy

Recommendation 32

That section 17 of the *Public Interest Disclosures Act 1994* be amended to clarify that a disclosure that principally involves 'a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure' is not protected under the Act.

- 4.6 Disclosures that principally involve questioning the merits of government policy are not protected under the PID Act.¹³³ The Committee supports an amendment to clearly articulate what is meant by 'government policy'.
- 4.7 The NSW Council for Civil Liberties argued that the provision should be removed or narrowed. The Council cited the definition of 'government policy' contained in the ACT *Public Interest Disclosure Act 2012*, commenting that 'where disagreement with government policy is precluded from whistleblower protection, it is important that any exclusion from protection be stated as precisely and thereby, as transparently, as possible'.¹³⁴
- 4.8 The Ombudsman noted that disclosures that relate to government policy may be protected if they raise allegations of wrongdoing (such as maladministration or corruption) by a public authority. The Ombudsman advised that there did not appear to be a problem with this provision in practice: 'it is rare that a report is not treated as a PID because it is considered to primarily question the merits of government policy'.¹³⁵ Nonetheless the Ombudsman stated that it may be preferable to clarify this provision, consistent with the ACT's Public Interest Disclosure Act, which excludes disclosures that relate 'to a disagreement in

¹³² Submission 9, NSW Ombudsman, p18

¹³³ *Public Interest Disclosures Act 1994*, s17(1)

¹³⁴ Submission 2, NSW Council for Civil Liberties, pp8-9

¹³⁵ Answers to questions on notice, NSW Ombudsman, p7

relation to a policy about amounts, purposes or priorities of public expenditure'.¹³⁶

Excluding disclosures based on personal grievances

Recommendation 33

That the *Public Interest Disclosures Act 1994* be amended to provide that disclosures based solely or substantially on an individual employment related grievance or other personal grievance, including a decision to take reasonable management action in relation to a reporter (other than a grievance about detrimental action), are not public interest disclosures.

- 4.9 The PID Act should clearly state that disclosures based on individual grievances are not public interest disclosures. The purpose of the Act is to encourage reports of serious wrongdoing, not to provide an alternative avenue for personal or employment-related grievances. The Committee considers that individual grievances should be dealt with through standard workplace policies and processes. A clear statement excluding such matters will assist agencies and public officials by providing clarity and ensuring that workplace conflict is identified and managed as a grievance or disciplinary/performance issue, and not a public interest disclosure.
- 4.10 The Committee heard that a lack of clarity around reports relating to grievances can make it difficult for agencies to assess reports and manage the perceptions of reporters, which can escalate a matter and potentially result in claims of reprisal.¹³⁷
- 4.11 The Ombudsman receives 'consistent and strong feedback from public authorities that grievance matters should be specifically excluded under the PID Act as they are not disclosures in the public interest'.¹³⁸ The Deputy Ombudsman advised that it is common for staff with a private grievance to report the matter as a public interest disclosure:

... one of the issues that is raised regularly—I will not say always—whenever we have any forum and we are discussing with public interest disclosure practitioners is the incidence of people claiming to be making disclosures about matters that are basically a grievance. They are dressing up the grievance as being something more than that. Any objective assessment of the disclosure would indicate that it is not that, but we are finding that agencies are having difficulty making such an assessment.

... It is a significant issue—one of the most significant issues raised with us by practitioners. It is dealing with matters that arise in the context of an ongoing workplace conflict. A lot of disclosures are made in that context. Some fit the criteria of the Act quite clearly; others do not. They are often made as a strategic move in an ongoing conflict.¹³⁹

¹³⁶ Answers to questions on notice, NSW Ombudsman, p7

¹³⁷ Submission 9, NSW Ombudsman, p15

¹³⁸ Submission 9, NSW Ombudsman, pp29-30 (background paper)

¹³⁹ Mr Wheeler, Transcript of evidence, 27 September 2016, p35

- 4.12 An amendment to exclude personal grievances would assist agencies with assessing reports and clarifying to staff that some matters will not be treated as public interest disclosures. As the Ombudsman notes, it would also be consistent with the object of the PID Act to encourage disclosures that are in the public interest and make it clear that the legislation is not for resolving personal grievances.¹⁴⁰
- 4.13 The Ombudsman suggested that the Northern Territory's legislation strikes the right balance by excluding matters based 'solely or substantially' on an individual grievance. This would mean that disclosures that relate to individual grievances but which raise matters that are in the public interest are still eligible for protection, for example, allegations about systemic bullying or an agency's failure to address such conduct.¹⁴¹
- 4.14 The Committee notes that the Moss Review of the Commonwealth's *Public Interest Disclosure Act 2013* identified the need for that Act to focus on disclosures that relate to serious wrongdoing, and recommended the exclusion of personal grievances. The recommendation was in response to evidence from agencies indicating that 'the overwhelming majority of disclosures concerned issues like workplace bullying and harassment, forms of disrespect from colleagues or managers, or minor allegations of wrongdoing'. The review concluded that these matters were better resolved through 'performance management, merits review, or disciplinary conduct procedures'.¹⁴²

Limiting disclosures about government information breaches to serious wrongdoing

Recommendation 34

That section 12D of the *Public Interest Disclosures Act 1994* be amended to provide that, to be protected under the Act, a disclosure to the Information Commissioner must show or tend to show a serious government information contravention.

- 4.15 The PID Act is intended to enable the disclosure and investigation of serious wrongdoing, and the categories of conduct contained in the Act should have consistent thresholds. The Committee considers that the Act should be amended to make it clear that disclosures alleging government information contraventions should involve serious breaches of the *Government Information (Public Access) Act 2009* (GIPA Act).
- 4.16 Public officials can disclose information to the Information Commissioner that shows or tends to show that a public authority or public official has engaged in or proposes to engage in government information contravention, which is defined as 'conduct that constitutes a failure to exercise functions in accordance with any provision of the *Government Information (Public Access) Act 2009*'.¹⁴³

¹⁴⁰ Submission 9, NSW Ombudsman, p15

¹⁴¹ Submission 9, NSW Ombudsman, p15

¹⁴² Mr Philip Moss AM, *Review of the Commonwealth Public Interest Disclosure Act 2013*, July 2016, pp30-31

¹⁴³ *Public Interest Disclosures Act 1994*, ss4, 12D

- 4.17 The Information Commissioner noted that these provisions are different to the provisions for disclosures to other investigating authorities, in that they do not contain an element of seriousness. Disclosures to the Ombudsman must concern maladministration, and disclosures to the Auditor General must concern serious and substantial waste.¹⁴⁴
- 4.18 Requiring disclosures to the Information Commissioner to involve serious government information contraventions would ensure a similar threshold to those for disclosures about other types of conduct. The Information Commissioner stated that 'the injection of an additional threshold, such as the requirement that only 'serious' wrongdoings are disclosed may better articulate an alignment with the operation of analogous provisions under the PID Act'.¹⁴⁵
- 4.19 The Ombudsman argued that disclosures concerning government information contraventions and privacy breaches (as recommended in chapter 1) should include an element of seriousness. The Ombudsman gave the example of a public official who attempted to make disclosures about public authorities not making policies publicly available, and commented that 'while this may technically constitute a breach of the GIPA Act, we do not believe that such reports bring to light 'serious wrongdoing' in the public interest'.¹⁴⁶
- 4.20 The Committee agrees that disclosures about government information and privacy breaches should be required to meet the same threshold as other types of wrongdoing covered by the PID Act. Section 11(2) provides that conduct amounts to maladministration under the Act if it is of a serious nature. This provision could serve as a guide for a seriousness threshold in relation to government information and privacy breaches.
- 4.21 The Committee notes the Acting Information Commissioner's evidence that a seriousness threshold may have unintended consequences:
- The injection of an additional threshold consideration of seriousness may have the unintended effect of narrowing the Commissioner's functions under the GIIC Act [*Government Information (Information Commissioner) Act 2009*] and, in particular, limit the complaints to government information contraventions meaning that only complaints that meet the test of seriousness will be captured and may not allow the Information Commissioner to consider complaints about conduct relating to the inaction of agencies.¹⁴⁷
- 4.22 The Committee considers that a carefully worded provision that clearly limits the seriousness test to the PID Act should not impact on the Information Commissioner's functions under the *Government Information (Information Commissioner) Act 2009*. The Information Commissioner could be consulted to ensure that the provisions are drafted appropriately, so as not to affect the

¹⁴⁴ *Public Interest Disclosures Act 1994*, ss10, 11. Section 11(2) states that for the purposes of the Act, conduct is of a kind that amounts to maladministration if it involves action or inaction of a serious nature that is: (a) contrary to law, or (b) unreasonable, unjust, oppressive or improperly discriminatory, or (c) based wholly or partly on improper motives.

¹⁴⁵ Submission 4, Information Commissioner, p4

¹⁴⁶ Answers to questions on notice, NSW Ombudsman, p8

¹⁴⁷ Ms Dobbins, Transcript of evidence, 27 September 2016, p7

Commissioner's functions under the Government Information (Information Commissioner) Act. The Committee notes that the Ombudsman's jurisdiction in relation to maladministration does not appear to have been limited by s11(2) of the PID Act.

Requiring public officials to assist investigations

Recommendation 35

That the *Public Interest Disclosures Act 1994* be amended to require public officials to use their best endeavours to assist an investigation under the Act.

- 4.23 The Committee considers that the obligation on public authorities' staff to assist with public interest disclosure investigations should be included in the PID Act. A clear statement in the Act that staff should endeavour to assist investigations would enable agencies to conduct timely investigations into allegations of wrongdoing. It would also add weight to the Ombudsman's model reporting policy, which states that staff are obliged to co-operate with public interest disclosure investigations.
- 4.24 Public officials who make disclosures must not give false or misleading information or attempt to mislead the authority or official they make a disclosure to.¹⁴⁸ The Ombudsman has reported instances of reporters withholding information, delaying investigations and breaching confidentiality. These cases prompted the Ombudsman to include in its model internal reporting policy the obligation on agency staff to provide information, maintain confidentiality and co-operate with investigations.¹⁴⁹
- 4.25 However the Ombudsman noted that including the obligations of staff in the PID Act 'may assist public authorities to conduct investigations efficiently and resolve issues around reporters and other staff failing to maintain confidentiality as well as other conduct issues'.¹⁵⁰
- 4.26 The Ombudsman observed that the Commonwealth's Public Interest Disclosure Act requires public officials to use their 'best endeavours to assist' an investigation under the Act. However it was noted that some investigating authorities under the NSW PID Act have powers to compel, and placing a legislative requirement on reporters and other staff may result in people involved in the reporting process incriminating themselves.¹⁵¹
- 4.27 The Commonwealth Public Interest Disclosure Act establishes the Commonwealth Ombudsman and Inspector-General of Security and Intelligence as investigative authorities. These bodies have significant powers to obtain information when conducting investigations, similar to the powers of some NSW investigating authorities. The Commonwealth Public Interest Disclosures Act includes a provision that protects witnesses from civil and criminal liability if they

¹⁴⁸ *Public Interest Disclosures Act 1994*, s28

¹⁴⁹ Submission 9, NSW Ombudsman, p49 (background paper)

¹⁵⁰ Submission 9, NSW Ombudsman, p49 (background paper)

¹⁵¹ Submission 9, NSW Ombudsman, p49 (background paper)

give information to a person who is conducting a public interest disclosure investigation.¹⁵²

- 4.28 The Committee acknowledges the Ombudsman’s concerns about public officials potentially incriminating themselves, if they are required to assist an investigation conducted by an investigating authority with coercive powers. In order to address this issue, the PID Steering Committee should monitor the practical operation of the recommended provision (should it be implemented), and consider whether there is a need for the PID Act to protect witnesses who are assisting public interest disclosure investigations from self-incrimination. While some investigating authorities’ operating legislation contains protections against self-incrimination,¹⁵³ the provisions can differ depending on the authorities’ powers. It may be more practical for such protections to be contained in the PID Act.

Allowing investigating authorities to share information

Recommendation 36

That the *Public Interest Disclosures Act 1994* be amended to enable investigating authorities to share information for the purpose of fulfilling their responsibilities under the Act.

- 4.29 The Committee considers that information sharing between investigating authorities should be provided for in the PID Act. The current provisions that authorities rely on to share information are intended to assist the authorities to perform functions under their operating legislation, and may not be wide enough to allow information sharing for the purposes of the PID Act. For instance, the Ombudsman Act allows for information sharing in the context of complaint handling by relevant agencies. However, the list of agencies the Ombudsman can share information with under the Ombudsman Act does not include all of the agencies that are investigating authorities under the PID Act. The Committee is therefore recommending an amendment to ensure that investigating authorities can share information to perform their roles under the PID Act.
- 4.30 While the legislation of investigating authorities enables limited information sharing, there was support for a provision that allows the authorities to share information in performing their functions under the PID Act. The Acting Information Commissioner told the Committee that there would be ‘a benefit to improved legislative capacity for information sharing’.¹⁵⁴ The Information Commissioner and the Ombudsman have entered into a memorandum of understanding to facilitate the exchange of information. The Committee

¹⁵² *Public Interest Disclosure Act 2013* (Cth), s57: (1) A person is not subject to any criminal or civil liability because the person (voluntarily or otherwise) gives information, produces a document or answers a question if:

(a) the person does so when requested to do so by a person conducting a disclosure investigation; and
(b) the information, document or answer is relevant to the investigation. ...

(3) This section does not apply to proceedings for a breach of a designated publication restriction. ...

(4) To avoid doubt, if the information, document or answer relates to the person’s own conduct, this section does not affect his or her liability for the conduct.

¹⁵³ See for example *Independent Commission Against Corruption Act 1988*, ss26, 37, 50

¹⁵⁴ Ms Dobbins, Transcript of evidence, 27 September 2016, p6; Submission 4, Information Commissioner, p3

considers that, rather than relying on ad hoc arrangements, it would be more practical for the PID Act to clearly state that investigating authorities are permitted to share information.

- 4.31 The Ombudsman gave examples of cases where a provision to allow information sharing would assist investigating authorities, including instances where more than one investigating authority wishes to share information to jointly undertake concurrent enquiries or investigations. The Ombudsman observed that secrecy provisions and privacy concerns could limit the information that can currently be shared by investigating authorities, and stated that legislative change ‘may put this beyond doubt and legitimise the sharing of information’.¹⁵⁵

Reviewing any new amendments

Recommendation 37

That the *Public Interest Disclosures Act 1994* be amended to provide for a review of the Act and the effectiveness of any amendments five years after the amendments commence.

- 4.32 The terms of reference for the Committee’s review include consideration of the need for further review of the PID Act. The Committee agrees with inquiry participants who submitted that regular reviews are important as they provide ongoing opportunities to assess how the legislation is operating.¹⁵⁶
- 4.33 The NSW Ombudsman reflected that legislative changes can take some time to implement, and supported a review of the Act five years after any future amendments commence. This timeframe would also enable the review to consider the results of the Whistling While They Work 2 research project - a three year study of internal reporting of wrongdoing in the public, private and not for profit sectors, led by Griffith University’s Professor AJ Brown.¹⁵⁷
- 4.34 The Committee considers that five years after any amendments commence would be an appropriate time to review the operation of the PID Act.

Simplifying the Act

Recommendation 38

That the *Public Interest Disclosures Act 1994* be redrafted to simplify its provisions and structure, while retaining its substance. The simplified Act should set out how and to whom a disclosure can be made, obligations on agencies, protections for disclosers and oversight of the public interest disclosure scheme by the Ombudsman.

- 4.35 The Committee’s recommendations have aimed to clarify and simplify the PID Act and make the scheme more effective. During the review it became evident that

¹⁵⁵ Answers to questions on notice, NSW Ombudsman, pp8-9

¹⁵⁶ Ms Margaret Crawford, Auditor General, Audit Office of NSW, Transcript of evidence, 27 September 2016, p22; Submission 7, Transparency International Australia, p2; Submission 9, NSW Ombudsman, p50 (background paper)

¹⁵⁷ Submission 9, NSW Ombudsman, p50; Griffith University, Whistling While They Work, About the project, http://www.whistlingwhiletheywork.edu.au/?page_id=11, viewed 28 October 2016

the legislation could be further improved through a more logical structure and simpler, Plain English drafting.

- 4.36 A number of inquiry participants commented on the complexity of the PID Act¹⁵⁸ and stated that the Act would benefit from being redrafted.¹⁵⁹ The Ombudsman told the Committee that in spite of his expertise in public interest disclosure legislation, he found the PID Act difficult to interpret:

... I had quite a lot of familiarity with whistleblower and public interest disclosure legislation before coming to this role. I also played a strong role in advocating for the development of the Commonwealth scheme and that function being given to the Office of the Commonwealth Ombudsman, which I headed. When I first came to the New South Wales Office of the Ombudsman, I found this Act hard to understand.¹⁶⁰

- 4.37 The complexity of the PID Act can make it hard for public officials and public authorities to understand the disclosure process. Through its oversight work, the Ombudsman's office has become aware that public officials and authorities often misinterpret the legislation. This can result in officials complaining to the wrong authority, and authorities not understanding that a complaint is a public interest disclosure.¹⁶¹

- 4.38 Changes to the PID Act over time have improved the protections available to public officials, however they have also made the legislation more difficult to interpret. The Ombudsman notes that the parts of the Act that deal with making a disclosure are contained in 12 sections: 'this can result in undue complexity, which increases the risk of errors of interpretation and process for public authorities, and places unnecessary hurdles in the way of potential reporters'.¹⁶²

- 4.39 The PID Act's language and structure were identified as elements that could be improved to make the legislation more accessible. The Act could be structured to first set out the types of conduct that can be the subject of a disclosure and then list the possible recipients for a disclosure.¹⁶³

- 4.40 The Ombudsman also noted that the PID Act could be updated to reflect changes in the public sector and advances in communication. The distinction between separate public authorities has blurred and government services are increasingly contracted out to private and non-government service providers. Technology has led to a growing preference for public officials to make disclosures through a hotline service or an online form.¹⁶⁴

- 4.41 A redraft could also improve the protections in the PID Act. Professor AJ Brown emphasised that a redraft should focus on developing civil, employment and

¹⁵⁸ Submission 7, Transparency International Australia, p1; Professor McMillan, Transcript of evidence, 27 September 2016, pp32-33

¹⁵⁹ Answers to questions on notice, Professor AJ Brown, p1; Answers to questions on notice, NSW Ombudsman, p1

¹⁶⁰ Professor McMillan, Transcript of evidence, 27 September 2016, pp32-33

¹⁶¹ Professor McMillan, Transcript of evidence, 27 September 2016, pp32-33

¹⁶² Answers to questions on notice, NSW Ombudsman, p1

¹⁶³ Answers to questions on notice, NSW Ombudsman, p1

¹⁶⁴ Answers to questions on notice, NSW Ombudsman, p1

administrative remedies that are separate to the existing criminal remedies.¹⁶⁵ The Ombudsman argued that the Act should emphasise agencies' obligations to prevent detrimental action, rather than focusing on legal protections if a reprisal occurs.¹⁶⁶

- 4.42 In the years since the NSW PID Act was last reviewed, there have been changes to public interest disclosure legislation in other states and territories. The Committee heard that while the structure of the Commonwealth Public Interest Disclosure Act is better than the NSW PID Act, Commonwealth agencies have had problems implementing it. The PID Steering Committee stated that the provisions for the assessment and allocation of disclosures are 'overly lengthy and prescriptive, may create confusion for authorities and officials handling disclosures, and encourage lengthy legal challenges if there is a failure to comply'.¹⁶⁷ The Moss Review of the Commonwealth Public Interest Disclosure Act also highlighted difficulties with the implementation of the legislation.¹⁶⁸
- 4.43 Professor AJ Brown stated that although the Commonwealth Act has positive elements that could be adopted, it is 'very cumbersome and complex as a piece of legislation'.¹⁶⁹ According to Professor Brown, the Australian Capital Territory's Public Interest Disclosure Act is 'the simplest and best drafted Act of this kind in Australia', with a better structure than the Commonwealth legislation. While the ACT Act's remedies and compensation provisions could be improved, it would be 'a better place to start'.¹⁷⁰
- 4.44 With regard to the timing of a redraft, the Ombudsman suggested that a review of the NSW Act consider the results of reviews of the Commonwealth and Queensland legislation. The findings of the Whistling While They Work 2 research project would also provide useful input in determining which parts of the PID Act could be improved.¹⁷¹

¹⁶⁵ Answers to questions on notice, Professor AJ Brown, p1

¹⁶⁶ Answers to questions on notice, NSW Ombudsman, p1

¹⁶⁷ Answers to questions on notice, NSW Ombudsman, pp2-3

¹⁶⁸ Mr Philip Moss AM, *Review of the Commonwealth Public Interest Disclosure Act 2013*, July 2016, pp18-19

¹⁶⁹ Answers to questions on notice, Professor AJ Brown, p1

¹⁷⁰ Answers to questions on notice, Professor AJ Brown, p1

¹⁷¹ Answers to questions on notice, NSW Ombudsman, pp2-3

Appendix One – Terms of reference

- 1 That the Committee conduct the statutory review of the *Public Interest Disclosures Act 1994* (the Act).
- 2 In its review, the Committee is to inquire into and report on:
 - (a) the effectiveness of the amendments made by the *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010*, in particular the amendments providing for the role of the PID Steering Committee and the Ombudsman;
 - (b) whether the structures in place to support the operation of the public interest disclosures scheme remain appropriate; and
 - (c) the need for further review of the Act.
- 3 In conducting its inquiry, the Committee is to consider the Public Interest Disclosures Steering Committee's Review of the Commonwealth Public Interest Disclosure Legislation dated January 2014.

Appendix Two – Conduct of the inquiry

Parliament referred the *Review of the Public Interest Disclosures Act 1994* to the Committee on 1 and 2 June 2016.

Submissions

The Committee called for submissions by issuing a media release and writing to key stakeholders, inviting them to make a submission. Submissions closed on 1 August 2016.

The inquiry received submissions from ten stakeholders, including individual submissions from the member agencies of the Public Interest Disclosures Steering Committee and agencies processing public interest disclosures as well as organisations concerned with promoting transparency in the public sector, such as the NSW Council of Civil Liberties, Transparency International Australia and Joint Media Organisations.

A full list of submissions makers can be found at Appendix Three. The published submissions are available on the Committee's website.

Public hearing

On 27 September 2016, the Committee held a public hearing at Parliament House. Witnesses included the Acting Ombudsman, the Acting Public Service Commissioner, the Acting Information Commissioner, the Privacy Commissioner and the Auditor-General as well as Professor AJ Brown of Griffith University. A full list of witnesses is reproduced at Appendix Four.

The transcript of evidence taken at the hearing can be found on the Committee's website.

Appendix Three – Submissions

| | |
|----|--|
| 1 | Public Service Commission |
| 2 | NSW Council for Civil Liberties |
| 3 | Office of the Privacy Commissioner NSW |
| 3a | Office of the Privacy Commissioner NSW |
| 4 | Information and Privacy Commission |
| 4a | Information and Privacy Commission |
| 5 | <i>Confidential</i> |
| 6 | Audit Office NSW |
| 7 | Transparency International Australia |
| 8 | Joint Media Organisations |
| 9 | New South Wales Ombudsman |
| 10 | Office of Local Government |

Appendix Four – Witnesses

Tuesday 27 September 2016, Jubilee Room, Parliament House

| Witness | Organisation |
|--|--|
| Mr Phil Minns Acting Public Service Commissioner | Public Service Commission |
| Ms Carolyn Strange General Counsel | |
| Ms Samara Dobbins Acting Information Commissioner | Information and Privacy Commission |
| Ms Roxane Marcelle-Shaw Director, Investigation and Reporting | |
| Dr Elizabeth Coombs Privacy Commissioner | Office of the Privacy Commissioner |
| Mr Nick Yetzotis Acting Senior Advisor | |
| Mr Eugene Schofield-Georgeson Executive Member | NSW Council for Civil Liberties |
| Dr Martin Bibby Executive Member | |
| Mr Barry Underwood Executive Officer | Audit Office of NSW |
| Ms Margaret Crawford Auditor-General | |
| Dr A J Brown Professor of Public Policy and Law | Centre for Governance & Public Policy, Griffith University |
| Professor John McMillan Acting NSW Ombudsman | New South Wales Ombudsman |
| Mr Chris Wheeler Deputy Ombudsman | |

Appendix Five – Minutes

MINUTES OF MEETING No 9

1.31pm, Wednesday 24 February 2016

Room 1136

Members present

Mr Evans, Mr Farlow, Mr Khan, Dr McDermott, Mr Searle, Ms Petinos

Apologies

Mr Lynch

Officers in attendance

Jason Arditi, Dora Oravec, Leon Last, Tanja Zech

1. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded Mr Farlow: That the minutes of 30 November 2015 be confirmed.

2. Correspondence

The Committee noted correspondence received from:

- ***
- The Premier, dated 18 January 2016, advising of his intention to refer a review of the Public Interest Disclosures Act to the Committee

3. ***

4. ***

5. Next meeting

The Committee adjourned at 1.39pm until Monday 29 February at 9.45am.

MINUTES OF MEETING No 14

10.43am, Tuesday 17 May 2016

Room 814/815

Members present

Mr Evans, Mr Farlow, Mr Khan, Dr McDermott, Mr Searle, Ms Petinos

Apologies

My Lynch

Officers in attendance

Jason Arditi, Dora Oravec, Leon Last, Tanja Zech

1. ***

2. Deliberative meeting

2.1 ***

2.2 Confirmation of minutes

Resolved, on the motion of Mr Farlow, seconded Mr Khan: That the minutes of the meetings of 21 March 2016 and 12 May 2016 be confirmed.

2.3 ***

2.4 Review of Public Interest Disclosures Act

Resolved on the motion of Ms Petinos, seconded Mr Khan: That the Committee writes to the Premier seeking his advice on the timeframe for the referral to the Committee of a review of the Public Interest Disclosures Act.

2.5 ***

3. ***

4. Next meeting

The Committee adjourned at 12.21pm until a date to be determined.

MINUTES OF MEETING No 15

10.04am, Monday 20 June 2016

Room 1043

Members present

Mr Evans, Mr Farlow, Mr Khan, Mr Lynch, Mr Searle

Apologies

Dr McDermott, Ms Petinos

Officers in attendance

Jason Ardit, Leon Last, Tanja Zech

1. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded Mr Farlow: That the minutes of the meeting of 17 May 2016 be confirmed.

2. Correspondence

The Committee noted the following correspondence:

Sent

The Premier, dated 18 May, seeking advice on the timing of the referral to the Committee of the Review of the Public Interest Disclosures Act.

3. Statutory review of the *Public Interest Disclosures Act 1994*

Resolved on the motion of Mr Farlow, seconded by Mr Khan: That the Committee adopt the draft terms of reference and write to the list of stakeholders to request submissions.

Mr Searle undertook to provide a list of additional stakeholders in writing to committee staff.

Resolved on the motion of Mr Searle, seconded by Mr Farlow: That the Chair issue a media release announcing the inquiry.

4. ***

5. ***

6. Next meeting

The Committee adjourned at 10.39am until a date and time to be determined.

MINUTES OF MEETING No 17

1.44pm, Thursday 11 August 2016

Room 1254

Members present

Mr Evans, Mr Farlow, Mr Khan, Mr Lynch, Dr McDermott, Ms Petinos

Apologies

Mr Searle

Officers in attendance

Jason Arditi, Leon Last, Tanja Zech, Dora Oravec

7. Confirmation of minutes

Resolved, on the motion of Mr Khan, seconded Ms Petinos: That the minutes of the meeting of 23 June 2016 be confirmed.

1. ***

2. Review of the *Public Interest Disclosures Act 1994*

2.1 Correspondence

The Committee noted the following correspondence received:

- The Ombudsman, dated 29 June 2016, offering assistance with the review
- The Inspector of the Crime Commission, dated 19 July, advising that he will not be making a submission to the review.

2.2 Consideration of submissions

Resolved on the motion of Mr Lynch, seconded by Ms Petinos: That the Committee authorise the publication of submissions 1 to 4 and 6 to 9 and that the submissions be placed on the Committee's website.

Resolved on the motion of Ms Petinos, seconded Dr McDermott: That submission 5 remain confidential.

2.3 Hearing arrangements

The Committee noted the list of proposed witnesses and discussed possible dates for the public hearing.

Committee staff undertook to contact members' offices to canvass their availability for possible hearing dates in September.

3. ***

4. Next meeting

The Committee adjourned at 1.58pm until a date and time to be determined.

MINUTES OF MEETING No 18

3.51pm, Thursday 8 September 2016
Room 1254

Members present

Room 1254: Mr Evans, Mr Khan, Mr Searle
Via teleconference: Mr Farlow, Dr McDermott, Ms Petinos

Apologies

Mr Lynch

Officers in attendance

Jason Arditi, Leon Last, Tanja Zech, Dora Oravec

1. Confirmation of minutes

Resolved on the motion of Mr Khan, seconded by Mr Searle: That the minutes of the meeting of 11 August 2016 be confirmed.

2. ***

3. Review of the *Public Interest Disclosures Act 1994*

Consideration of submission

Resolved on the motion of Mr Khan: That the Committee authorises the publication of submission 10 and that the submission be placed on the Committee's website.

Discussion ensued.

4. ***

5. Next meeting

The Committee adjourned at 4.51pm until a date and time to be determined.

MINUTES OF MEETING No 19

9.48am, Tuesday 27 September 2016
Jubilee Room

Members present

Mr Evans, Mr Farlow, Mr Khan, Dr McDermott, Mr Searle, Ms Petinos, Mr Lynch

Officers in attendance

Jason Arditi, Dora Oravec, Leon Last, Tanja Zech

1. Deliberative meeting

1.1 Confirmation of minutes

Resolved, on the motion of Mr Farlow, seconded Mr Searle: That the minutes of 8 September 2016 be confirmed.

1.2 ***

1.3 Media orders

Resolved on the motion of Mr Farlow, seconded Mr Khan: That the Committee authorises the audio-visual recording, photography and broadcasting of the public hearing on 27 September 2016, in accordance with the Legislative Assembly's guidelines for the coverage of proceedings for parliamentary committees administered by the Legislative Assembly.

1.4 Answers to questions taken on notice

Resolved, on the motion of Mr Khan, that witnesses be requested to return answers to questions taken on notice and supplementary questions within 10 days of the date on which the questions are forwarded to the witnesses.

1.5 ***

2. Public hearing – Review of the *Public Interest Disclosures Act 1994*

Witnesses and the public were admitted. The Chair opened the public hearing at 10.01am and after welcoming the witnesses made a short opening statement.

Mr Phil Minns, Acting Public Service Commissioner and Ms Carolyn Strange, General Counsel, Public Service Commission, were sworn and examined.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Ms Samara Dobbins, Acting Information Commissioner, Information and Privacy Commission, was sworn and examined.

Ms Roxanne Marcelle-Shaw, Director, Investigation and Reporting, Information and Privacy Commission, was affirmed and examined.

Ms Dobbins made a brief opening statement.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

The Committee took a short adjournment at 10.48am and resumed the public hearing at 11.15am.

Dr Elizabeth Coombs, Privacy Commissioner, Office of the Privacy Commissioner, was sworn and examined.

Mr Nick Yetzotis, Acting Senior Advisor, Office of the Privacy Commissioner, was affirmed and examined.

The Privacy Commissioner made a brief opening statement.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Mr Eugene Schofield-Georgeson, Executive Member and Dr Martin Bibby, Executive Member, NSW Council for Civil Liberties, were affirmed and examined.

Dr Bibby and Mr Schofield-Georgeson made brief opening statements.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

Ms Margaret Crawford, Auditor-General, Audit Office, was sworn and examined.

Mr Barry Underwood, Executive Officer, Audit Office, was affirmed and examined.

The Auditor-General made a brief opening statement.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

The Committee adjourned at 12.44am and the public hearing resumed at 1.48pm.

Dr AJ Brown, Professor of Public Policy and Law, Griffith University, was affirmed and examined.

Dr Brown made a brief opening statement.

The Committee commenced questioning the witness. Evidence concluded and the witness withdrew.

Professor John McMillan, Acting Ombudsman and Mr Chris Wheeler, Deputy Ombudsman, NSW Ombudsman, were affirmed and examined.

The Acting Ombudsman made a brief opening statement.

The Committee commenced questioning the witnesses. Evidence concluded and the witnesses withdrew.

The public hearing concluded at 2.54pm.

3. Post-hearing deliberative meeting

3.1 Publication orders

The Committee commenced a deliberative meeting at 2.56pm.

Resolved, on the motion of Mr Farlow, seconded Mr Khan: That the corrected transcript of public evidence given today be authorised for publication and uploaded on the Committee's website.

3.2 Correspondence received

The Committee considered correspondence received from the Privacy Commissioner, dated 19 September 2016, providing further information concerning her submission to the review of the *Public Interest Disclosures Act 1994*.

Resolved, on the motion of Mr Khan, seconded Mr Lynch, that the Committee authorise publication of the correspondence from the Privacy Commissioner, dated 19 September 2016, providing further information concerning her submission to the review of the *Public Interest Disclosures Act 1994* as a supplementary submission, and that the correspondence be uploaded to the Committee's webpage.

4. Next meeting

The Committee adjourned at 3.01pm until a date to be determined.

MINUTES OF MEETING No 20

12:01pm, Friday 20 January 2017

Room 1254

Members present

Mr Evans, Mr Farlow, Mr Lynch, Ms Petinos
via teleconference: Dr McDermott, Mr Khan, Mr Searle

Officers in attendance

Jason Arditi, Dora Oravec, Leon Last, Tanja Zech

1. *****2. Confirmation of minutes**

Resolved, on the motion of Mr Lynch, seconded by Mr Farlow: That the minutes of the meeting of 27 September 2016 be confirmed.

3. *****4. Review of the Public Interest Disclosures Act 1994****4.1 Supplementary submission**

Resolved, on the motion of Ms Petinos, seconded by Mr Farlow: That submission 4a be authorised for publication and uploaded to the Committee's website.

4.2 Answers to questions taken on notice and supplementary questions

The Committee noted the receipt of the following:

- Answers to supplementary questions from Professor AJ Brown, received 30 September 2016
- Answers to questions on notice from the Audit Office, dated 10 October 2016
- Answers to questions on notice from the Public Service Commission, dated 10 October 2016
- Answers to question on notice and supplementary questions from the NSW Ombudsman, dated 11 October 2016.

Resolved, on the motion of Ms Petinos, seconded by Mr Lynch: That answers to questions taken on notice and supplementary questions from Professor AJ Brown, the Audit Office, the Public Service Commission, and the NSW Ombudsman be authorised for publication and uploaded to the Committee's website.

5. Next meeting

The committee adjourned at 12.24pm until a date to be determined.

MINUTES OF MEETING No 24

10.00am, Friday 12 May 2017

Macquarie Room

Members present

Mr Evans (Chair), Mr Lynch, Mr Bromhead, Dr McDermott, Mr Khan, Mr Searle, Mr Amato

Officers in attendance

Jason Arditi, Dora Oravec, Leon Last, Derya Sekmen, Chris Herbert

1. Deliberative meeting**1.1 Committee membership**

The Chair advised the Committee of the change in membership, as recorded in the Votes and Proceedings of Thursday 6 April 2017, entry 21, where Mr Amato was appointed to the Committee in place of Mr Farlow, who was discharged.

1.2 Election of Deputy Chair

There being a consequential vacancy in the office of Deputy Chair of the Committee, in accordance with Standing Order 282, the Chair called for nominations for the office of Deputy Chair.

Resolved, on the motion of Mr Evans, seconded Mr Khan: That Mr Bromhead be elected Deputy Chair.

1.3 Confirmation of minutes

Resolved, on the motion of Mr Khan: That the minutes of the meeting of 6 April 2017 be confirmed.

1.4 ***

1.5 Review of the Public Interest Disclosures Act 1994 - consideration of Chair's draft report

The Committee discussed the review of the Public Interest Disclosures Act and agreed to consider the Chair's draft report at a later date.

1.6 ***

1.7 ***

2. ***

3. ***

4. ***

The committee adjourned at 2.41pm until a date to be determined.

MINUTES OF MEETING No 25

1.32pm, Thursday 1 June 2017

Macquarie Room

Members present

Mr Evans (Chair), Mr Lynch, Mr Bromhead, Dr McDermott, Mr Khan, Mr Searle, Mr Amato

Officers in attendance

Jason Arditi, Dora Oravecz, Leon Last, Derya Sekmen, Chris Herbert

1. ***

2. ***

3. ***

3.1 ***

3.2 General business

The Committee agreed to defer consideration of the Chair's draft report on the review of the PID Act until August 2017.

4. Next meeting

The committee adjourned at 2.05pm until a date to be determined.

MINUTES OF MEETING No 29

1.36pm, Thursday 19 October 2017

Room 1254

Members present

Mr Evans (Chair), Mr Bromhead, Mr Khan, Mr Martin

Apologies

Dr McDermott, Mr Searle, Mr Lynch

Officers in attendance

Jason Ardit, Dora Oravec, Leon Last, Stephanie Mulvey, Chris Herbert, Derya Sekmen.

1. Confirmation of minutes

Resolved, on the motion of Mr Bromhead, seconded Mr Martin: That the minutes of the meeting of 14 September 2017 be confirmed.

2. ***

3. ***

4. Review of the Public Interest Disclosures Act 1994 – consideration of Chair’s draft report

Resolved, on the motion of Mr Martin, seconded Mr Bromhead:

1. That the draft report be the report of the Committee, and that it be signed by the Chair and presented to the House.
2. That the Chair and committee staff be permitted to correct stylistic, typographical and grammatical errors.
3. That, once tabled, the report be posted on the Committee’s website.

5. Next meeting

The meeting adjourned at 1.39pm until a date to be determined.