

Mr Lee Evans  
Chair  
Committee on the Ombudsman, the Police Integrity Commission  
and the Crime Commission  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Mr Evans

### **Review of the Public Interest Disclosures Act 2014**

I am writing in response to a question taken on notice by the then acting Public Service Commissioner, Phil Minns, on 27 September 2016 when appearing before your Committee in connection with its review into the *Public Interest Disclosure Act 1994*.

The question sought the Public Service Commission's 'view about the adequacy of the public service's handling of PIDs, and what role [I see] for the commission in assisting agencies to develop benchmark structures and processes so that they better handle disclosures under the legislation'. I thought it would be helpful to provide the following information by way of context before I address this question.

Under the *Government Sector Employment Act 2013* (GSE Act) the Public Service Commissioner has one function that specifically concerns PIDs. Section 83A of the GSE Act enables the Commissioner to direct or recommend the reinstatement of a Public Service executive whose employment the Commissioner is satisfied was terminated substantially in reprisal for the executive making a PID. This function has only existed since 1 July 2016. To date I have not been made aware of the termination of any executive's employment to which section 83A might apply.

The Public Service Commissioner has some general functions under the GSE Act that are of potential relevance to PIDs, namely: promoting and maintaining the government sector's legislated ethical framework comprising the core values of integrity, trust, service and accountability and a number of underlying principles (see sections 7 and 8); and leading the strategic development and management of the government sector workforce in relation to its compliance with ethical practices (see section 11).

In relation to these general functions, however, the Public Service Commission's focus has generally been on building awareness and implementation of the ethical framework and ethical practices in general, rather than on specific practices. I consider that this approach is consistent with the general functions of the Public Service Commissioner and is appropriate having regard to the legislated responsibility that other authorities have for specific matters. The handling of PIDs is a case in point as the *Public Interest Disclosures Act 1994* (PID Act) gives the Ombudsman the function of overseeing the operation of that Act, including monitoring public authorities' compliance with it.

I will turn now to the question on notice and, in particular, to the adequacy of the sector's handling of PIDs.

I have direct knowledge of how a small number of particular PIDs appear to have been handled and as a member of the PID Steering Committee I have indirect access to some information about PID-handling across the sector. I consider that this is too limited a basis on which to attempt to form conclusions about how the broader government sector is handling PIDs. However, the results of the two-yearly People Matter Employee Survey (PMES) that the PSC administers give some indication of how the sector's employees perceive their agencies' handling of reports of wrongdoing (although not specifically their handling of PIDs).

The PMES was first run in 2012 and is open to all the sector's workforce of around 400,000. It asks employees about their experiences of their own work and of working with their team, managers and the organisation. One of the propositions to which employees are asked to respond is 'I am confident that I would be protected from reprisal for reporting misconduct/wrongdoing'. In the 2016 PMES, 49.1% of participants strongly agreed or agreed with this proposition, 28.4% neither agreed nor disagreed with it and 22.5% either strongly disagreed or disagreed with it. It is not possible to draw any conclusions on trends based on the three surveys to date because the 2016 survey response scale is different from the scale used in the previous two surveys. Over time, however, the survey should provide data that will assist agencies in their review, development and implementation of PID-related policy and practices.

The second aspect of the question on notice concerned the PSC's role in improving agencies' handling of PIDs.

I consider that the PSC has a role to play in this area. The PSC's work to strengthen the ethical 'health' of the sector helps to foster an environment in which the value of PIDs is recognised and reporters are afforded the protection to which they are entitled. However, I think it is important that in playing this role the PSC's activities complement rather than duplicate or detract or distract in any way from the extensive work of the Ombudsman in relation to PIDs (for example, the Ombudsman's PID practitioner forums and extensive PID-specific resources to assist public officials who may wish to make PIDs as well as agencies that may receive them).

An example of such complementary work is the PSC's publication of *Behaving Ethically: A guide for NSW government sector employees*, a copy of which is enclosed. This guide is intended to be the key central source of legislation, policy and practical resources to assist government sector agencies to develop ethical cultures, leadership and workplace practices, and to assist employees to demonstrate ethical conduct. The guide includes information about PIDs: a summary of the PID framework and Section 4.2 (How to reporting wrongdoing), which describes what a PID is, how to make one, what should happen once a PID has been made and the statutory protection of those who make a PID.

The PSC held around 35 events promoting awareness of the Behaving Ethically guide in metropolitan and major regional centres around the state in 2014 and 2015. Over 4,000 people attended these events. The guide is also prominent on the PSC's website. There is a dedicated 'Behaving Ethically' page on which visitors to the website can download a PDF of the guide or view it on line. On that page there is a link directly to the section on how to report wrongdoing. Links to these pages are below:

<http://www.psc.nsw.gov.au/workplace-culture---diversity/workplace-culture/behaving-ethically>

<http://www.psc.nsw.gov.au/workplace-culture---diversity/workplace-culture/behaving-ethically/behaving-ethically/section-4--other-resources/4-2-how-to-report-serious-wrongdoing/4-2-how-to-report-serious-wrongdoing>

To date, the 'Behaving Ethically' web pages have been accessed by over 22,270 users. The Behaving Ethically guide includes a Code of Ethics and Conduct for NSW government sector employees. Your Committee may be interested to know that in April 2015 I used the Public Service Commissioner's direction power under section 13 of the GSE Act to direct the heads of government sector to implement the Code and to require employees to comply with it. The PSC is in the process of assessing what agencies have done to comply with the direction.

The PMES, to which I have already referred, is another example of how the PSC can support in a complementary way the PID-specific work of the Ombudsman's Office. In addition to the proposition to which I refer above about protection from reprisal, the PMES asks several other relevant questions, including whether:

- Employees have read their agency's code of conduct, reported wrongdoing at work and have confidence in how their agency resolves grievances
- People in workgroups are honest, open and transparent in their dealings
- Managers talk to employees about how the sector's values apply to their work
- Employees feel that senior managers model the values of their organisation.

Since 2014 the PSC has also been administering an annual agency survey that, over time, should provide more data that will help the PSC and agencies identify where progress is being made in implementation of the ethical framework and areas that require more attention. The survey asks agencies, among other things, whether they are taking action to address issues arising from their PMES results and whether their leaders adopt approaches that encourage alignment with the government sector's core values. The data complements the PMES data, helping to providing a more complete picture of the health of the sector's culture and practices.

In addition to responding to the question on notice, I would like briefly to clarify the submission that I made to the Committee given comments that some Committee members made in relation to it on 27 September.

The submission was not made out of concern for the PSC's convenience. (The volume of PIDs made to the PSC about other agencies is not such as to cause a challenge.) Rather, the essential concern of the submission was that for the person making the PID the process is potentially more complex and lengthy as a result of enabling a PID about one authority to made to a second, non-investigating authority regardless of whether the second authority is an appropriate authority to receive the PID. Adding to the complexity of navigating the PID process is the apparently inconsistent approach taken by section 15 of the Act. In the context of that section, a disclosure is not a PID if 'it is not made to the appropriate investigating authority or public authority'. If the disclosure 'would have been a public interest disclosure had it been made to the appropriate investigating authority or public authority' the disclosure is a 'misdirected disclosure' that becomes a PID in certain circumstances. However, section 15 applies only to disclosures made to investigating authorities and I should note that the PID Act does not appear to define what an 'appropriate' investigating authority or public authority is for the purposes of the section.

I hope that the information in this letter assists the Committee in its inquiry. Please do not hesitate to contact me if you would like to discuss any aspect of it.

Yours sincerely



10.10.2016

Graeme Head  
**Public Service Commissioner**

encl.