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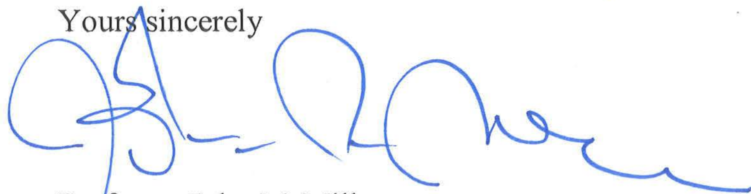
By email: ombopic@parliament.nsw.gov.au

Dear Mr Evans

Review of the Public Interest Disclosures Act 1994 (PID Act)

Please find attached answers to your question on notice and additional questions further to the public hearings for the above inquiry held on 27 September 2016.

Yours sincerely



Professor John McMillan
Acting Ombudsman

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Committee on the Ombudsman, Police Integrity Commission and the Crime Commission

Review of the *Public Interest Disclosures Act 1994* (PID Act)

Response to additional questions on notice

1. **The Committee has heard evidence that the Public Interest Disclosures Act can be difficult to interpret and would benefit from redrafting.**
    a. **In your view, is there a need for the Act to be redrafted?**
    b. **If so, which parts of the Act are most in need of redrafting?**

We agree with the Committee's suggestion that the PID Act would benefit from being redrafted in Plain English, and given a more logical structure.

Since the PID Act's commencement in 1995, various amendments have progressively strengthened the protections available to public officials who report serious wrongdoing.[1] These ad hoc and incremental changes, however, have also made the legislation more difficult to navigate, particularly for public officials who wish to report wrongdoing.

For example, 12 sections of the PID Act[2] provide for the making of disclosures to public authorities and investigating authorities. As noted on pages 34-35 of the background paper, 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. This could be simplified by redrafting the Act to first set out the conduct that can be the subject of a disclosure and then list the possible recipients.

Any redraft also needs to consider the current public sector landscape, the problems of which we note on pages 30-32 of our background paper. Not only is the distinction between separate public authorities blurring; so is the line between the public, private and not-for-profit sectors as the move towards contracting out government services continues. Further, the PID Act has not evolved in line with technological advancements and how these have affected the way we communicate. In particular, we note what appears to be a growing preference of many reporters to disclose via hotlines (including via telephone, email or an online form).

As noted in our submission to the Committee, a major weakness in the current Act is its focus on legal protections in the event that reprisal occurs, rather than on proactive prevention and management of such conduct by public authorities. This gap should ideally be redressed in the context of other obligations that the legislation places on public authorities and principal officers.[3]

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[1] NSW Ombudsman, *Oversight of the Public Interest Disclosures Act 1994 annual report 2014-2015*, p.6.
[2] Sections 8, 9A, 10, 11, 12, 12A, 12B, 12C, 12D, 12E, 13 and 14.
[3] Pages 41-45 of our background paper to the Committee.

2. Would it be preferable to redraft the NSW Act to mirror the Commonwealth Act?

One of the greatest strengths of the *Public Interest Disclosures Act 2013* (Cth) (Commonwealth Act) is how it sets out the major elements of the legislation, that is:

- the protections afforded to disclosers
- what constitutes a public interest disclosure
- the handling of disclosures, including notice to the discloser at various points.

In drawing on the best aspects of the state and territory public interest disclosure (PID) schemes, the Commonwealth legislation has adopted many elements of good practice. Indeed, in their 2014 review the PID Steering Committee (SC) made nine recommendations to improve the NSW Act based on the Commonwealth model. In our background paper, we also identify provisions that may strengthen the NSW Act, such as:

- Disclosures meeting either an objective/subjective threshold test (i.e. that the reporter 'believes on reasonable grounds that the information tends to show') or purely an objective test (i.e. the information 'tends to show') (page 10).
- Providing that a court cannot order the reporter to pay costs incurred in any proceedings relating to compensation on 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 (page 22).
- Allowing for a person to be deemed a public official for the purposes of making a PID (page 23).
- Extending the definition of a public official to former public officials (page 24).
- Clarifying that disclosures can be made orally or in writing, anonymously and without the discloser asserting that they are making a PID (page 35).
- Removing the term 'substantially' in relation to when detrimental action constitutes the criminal office of reprisal (page 39).
- Requiring public authorities to designate an adequate number of officers as being responsible for receiving PIDs on behalf of the authority (page 41).
- Requiring the principal officer of an agency to establish procedures for assessing the risk of reprisal against reporters and taking reasonable steps to protect public officials belonging to the agency from detriment or threats of detriment relating to PIDs (page 45).
- Placing obligations on public officials to use their 'best endeavours to assist' an investigation under the Act (page 49).

However we also draw the Committee's attention to the drawbacks identified by the PID SC while reviewing the Commonwealth Act. One example is the detailed provisions in the Commonwealth Act dealing with the assessment and allocation of disclosures. As stated, "The Steering Committee believes that in many respects this section of the legislation is 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."[4]

Rather than adding further complexity, our background paper notes the need to simplify the NSW PID Act by removing the technical barriers that run counter to the object of the Act to encourage and facilitate disclosures of public interest wrongdoing and provide broad protection to those who make them. As noted on pages 41-42 of the background paper:

[4] PID Steering Committee 2014, *Review of the Commonwealth public interest disclosure legislation*, p.6.

The SC has supported adopting a principles-based approach when considering any requirements on public authorities when a PID is made. This would place greater emphasis in the legislation on what authorities should proactively be doing when a report is made, while allowing flexibility in how this is done.

The SC is mindful of avoiding the detailed and prescriptive approach taken in other jurisdictions that can result in overly lengthy and unworkable legislation. PID legislation should not place unnecessary burdens on authorities, and any amendments should be practical and able to be implemented.

Through our close collaboration with the Commonwealth Ombudsman's office and involvement in the consultation process for the review of the Commonwealth Act by Mr Phillip Moss[5], we are aware that Commonwealth agencies have experienced operational difficulties in implementing the Act. These have included, for example:

- A PID may allege any conduct that could, if proved, give reasonable grounds for disciplinary action against a public official. This has the effect of capturing personal employment related grievances, allegations of bullying and harassment, and relatively minor code of conduct breaches which have no larger 'public interest' content.
- The prohibitive effect of the stringent confidentiality requirements, including the fact that revealing the identity of the reporter may constitute a criminal offence.
- The interaction of the requirements to investigate under the PID Act and other legislation, such as a code of conduct investigation under the *Public Service Act 1999* (Cth) or a fraud investigation under the *Public Governance, Performance and Accountability Rule 2014* (Cth).
- The short timeframes for investigations (i.e. 90 days unless an extension is granted by the Ombudsman).
- Unintended consequences, such as reporters unintentionally making disclosures to supervisors, technical disclosures made in the ordinary course of business or public officials disclosing information obtained in an 'unofficial' capacity.[6]

We therefore believe that it would be advantageous to await the findings of the Moss review, as well as the review of the Queensland Act currently being undertaken by the Queensland Ombudsman, before decisions are made about the preferred legislative model in NSW. Results from the Whistling While They Work 2 project, to be made available over the coming two years, may also identify areas of improvement.

In the interim we believe that there are a number of smaller reforms to the PID Act that could significantly enhance its operation. Those matters are discussed in our submission.

[5] https://www.dpmc.gov.au/government/legislation-review/statutory-review-public-interest-disclosure-act-2013.

[6] The submission of the Commonwealth Ombudsman to the Moss review discusses many of these issues: https://www.dpmc.gov.au/sites/default/files/pid-submissions/submission-office-of-the-commonwealth-ombudsman.pdf.

Response to question taken on notice

1. Have you formed a view on whether proposals for change made to the Committee in other submissions should be considered?

Whether the PID Act should be amended so that it is no longer possible for a non-PSC PID to be made to the Public Service Commissioner.[7]

We believe it is important that public officials who perceive the Public Service Commissioner as an appropriate authority to which to make a disclosure are able to do so, while receiving the protections of the PID Act.

The Public Service Commissioner's submission raises the problems arising from subsection 26(1A) whereby, if a PID is made to public authority A but relates to public authority B, public authority A must refer the PID to public authority B or the relevant investigating authority.

A preferable option may be to delete subsection 26(1A). There are many situations where it would not be appropriate for the public authority who receives a PID to refer it to the public authority to which it relates. For example:

- Transport for NSW (TfNSW) receives reports of misconduct from staff of agencies within their cluster about conduct within the agency. The arrangements within this cluster are such that these matters are investigated by TfNSW. There would be little value in TfNSW being required to refer the PID to the cluster agency, who would then refer it back to TfNSW to investigate.
- The NSW Aboriginal Land Council or the Registrar of the Aboriginal Land Rights Act may receive disclosures of misconduct from staff or members of LALCs about conduct within the LALC. Given the size and capacity of LALCs, in many circumstances it would be inappropriate for the PID to be referred to the LALC for investigation or other action.
- Other public authorities that have functions to investigate.[8]

Whether PIDs should be able to be made to MPs or journalists in the first instance if:

- ***the reporter is at significant risk of detrimental action***[9]
- ***the disclosure is in the public interest***[10]
- ***internal disclosure is likely to be futile.***[11]

There is no doubt that disclosures to journalists and MPs are a vital integrity and accountability mechanism. They are an important safeguard when disclosures to official channels fail to address or rectify serious problems. Statutory recognition of journalists and MPs as avenues for disclosure is also an incentive for public authorities to effectively and appropriately deal with concerns that are raised internally rather than ignore them.

However, the PID scheme should not undermine the important and primary role that public authorities have in dealing with matters relating to the conduct of their staff. Nor should it

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[7] Submission no. 1, Public Service Commissioner.
[8] See page 32 of our background paper.
[9] Submission no. 2, NSW Council for Civil Liberties.
[10] Submission no. 8, Joint Media Organisations.
[11] Submission no. 8, Joint Media Organisations.

unreasonably weaken the appropriate application of secrecy and confidentiality provisions that ordinarily apply to public officials.

We therefore believe that the PID Act should require public officials to first make their disclosure to either a public authority or investigating authority. Where there is an institutional failure to address the wrongdoing, reporters are still able to use the media or MPs as a second port of call and should not face detriment for doing so.

An important balance needs to be struck in ensuring that the reputations of people against whom allegations are made are not unjustly tarnished and ongoing investigations by public or investigating authorities are not prejudiced. Public officials may seek to disclose confidential information to the media for motives that are not in the public interest, including gaining a personal or political advantage. As noted by Deputy Ombudsman Chris Wheeler in his evidence before the Committee:

> *One of the problems that exists if people can just go straight to the media is that people choose the time they go and they choose precisely what they are providing. Then the media comes to the agency or the watchdog body and they ask for a comment. That body basically is either precluded by secrecy, confidentiality, privacy, procedural fairness, and operational reasons from being able to answer. As soon as you say "No comment", that is the story. Depending on when somebody makes a disclosure – and what they say – can have a huge impact that is beyond what the impact should have been.*[12]

One of the great strengths of the NSW PID scheme is that public officials are able to make a disclosure to a number of investigating authorities at any time, particularly if they do not feel comfortable or safe raising an issue internally within a public authority, or believe the authority will fail to take action in response. The strengths of such watchdog bodies are their independence, impartiality and objectivity.

We further note that there is always a risk that detrimental action may be taken in reprisal against a reporter and that making the disclosure to an MP or journalist will, in many cases, merely exacerbate that risk. Public authorities and investigating authorities are in a better position to take action to prevent reprisal from occurring. It is unclear in what circumstances a public official would be at greater risk of facing detrimental action in reprisal for making a disclosure to an investigating authority than for making it to the media or an MP.

Whether PIDs should be able to be made to MPs or journalists if the reporter reasonably believes the investigation is inadequate.[13]

We are generally supportive of this recommendation.

Currently, section 19(3)(c) of the PID Act, which provides for disclosures to an MP or journalist if the disclosure has been investigated but no action was recommended in respect of the matter, would generally extend to where an investigation has been inadequate.

Practically speaking, we note that reporters will often have little information on which to assess the adequacy of an investigation. Based on our experience, if reporters disagree with an

[12] Public hearings, 27 September 2016, p.37.
[13] Submission no. 2, NSW Council for Civil Liberties; submission no. 8, Joint Media Organisations.

outcome, they will often assume that it was not properly investigated. This is where our office plays an important role. We would suggest that reporters first make a complaint to our office if they believe that the investigation into their disclosure by a public authority has been inadequate. Experienced officers are then able to independently review the investigation and provide advice to reporters and public authorities about the outcomes of these enquiries.

Whether PIDs should be able to be made to MPs or journalists 'within a reasonable period'. [14]

As the Joint Media Organisations themselves note in their submission, if such a requirement was included in the PID Act, it should be accompanied by examples of what would be considered a reasonable period. Our view is that the current six month waiting period provided for in section 19 of the PID Act provides certainty to both public officials and public authorities about when it is appropriate to make an external disclosure. This is particularly important for public officials who may face serious consequences for doing so.

Whether the threshold test for making PIDs to MPs or journalists should be the same as internal disclosures (i.e. 'honest belief on reasonable grounds that shows or tends to show'). [15]

We are generally supportive of this recommendation. We draw the Committee's attention, however, to the view of the PID SC in their review of the Commonwealth Act that lowering the threshold for disclosures to MPs or journalists has the potential to undermine and prejudice open or proposed investigations.[16]

Whether courts should be barred from ordering a reporter plaintiff to pay costs incurred by the other party to litigation, except in cases brought vexatiously or without reasonable cause. [17]

We support such an amendment. The PID SC's recommended in their review of the Commonwealth legislation that the PID Act provide that a court cannot order the reporter 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.

As noted on page 22 of our background paper, such a provision would go some way towards addressing the concerns raised by participants at training sessions conducted by our office that, as a reporter who has suffered detriment, they would be responsible for their own legal costs, and that this would discourage them from making a PID.

Allowing reporters to claim for any remedies (rather than only actual damages) when seeking compensation. [18]

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[14] Submission no. 8, Joint Media Organisations.

[15] Submission no. 2, NSW Council for Civil Liberties; submission no. 8, Joint Media Organisations.

[16] PID Steering Committee 2014, *Review of the Commonwealth public interest disclosure legislation*, p.4.

[17] Submission no. 2, NSW Council for Civil Liberties.

[18] Submission no. 2, NSW Council for Civil Liberties.

We support such an amendment. 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.

Removing or substantially narrowing the exception that PIDs cannot primarily question the merits of government policy. [19]

We note that this provision does not exclude disclosures being made about wrongdoing that may lead to changes in government policy. In our view, the conduct described in the examples provided in the submission from the NSW Council for Civil Liberties – namely, live baiting and illegal drug use in the greyhound racing industry and police corruption and abuses of power – would indeed be considered wrongdoing rather than simply questioning the merits of government policy.

The example referred to in our office's guideline notes that a decision by government to close a particular school because it had unfair impact on a vulnerable group of children in itself would likely fall outside the coverage of the PID Act. However, our guidance goes on to note:

> *...if the report was that a relevant public authority wilfully refused to consider the likely impact of that decision on the vulnerable group of children, the PID Act could apply and the public official who made the report might be able to seek the protections of the PID Act.* [20]

We are also unsure if this provision presents a problem in practice. Based on our experience in dealing with PID complaints and auditing their handling by public authorities, it is rare that a report is not treated as a PID because it is considered to primarily question the merits of government policy.

Saying that, except in relation to local government, the PID Act does not define 'government policy'. It may be that the wording in the *Public Interest Disclosure Act 2012* (ACT) (excluding disclosures which relate 'to a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure') is preferable for its clarity.

Whether former public officials should be able to make PIDs. [21]

Pages 24-25 of our background paper relate to this issue. We are aware of situations in which former public officials have sought to make PIDs. However, we also note the unintended consequences in the Commonwealth relating to former public officials. Instead of specifically including all former public officials in the definition of a public official, those who which to report serious wrongdoing and who fear reprisal could be afforded protection through the introduction of a deeming provision in the NSW PID Act.

If former public officials are brought into the PID scheme, our view is that the subject of their disclosure should relate to matters they became aware of because of their former capacity as a public official. This is line with the recommendation made by the PID SC in their review of the Commonwealth Act.

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[19] Submission no. 2, NSW Council for Civil Liberties.

[20] NSW Ombudsman, 2011, *Guideline B3: What's not a public interest disclosure.*

[21] Submission no. 2, NSW Council for Civil Liberties; submission no. 4, Information and Privacy Commission; submission no. 8, Joint Media Organisations.

Whether PIDs should be able to be made to the Privacy Commissioner alleging contraventions of privacy legislation.[22]

We are supportive of the PID Act categories of conduct being extended to contraventions of an agency in the exercise of functions under the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*. We believe that disclosures alleging such conduct should be able to be made internally within public authorities, in addition to the Privacy Commissioner being a recipient, consistent with the other categories of conduct in the PID Act.

Consideration could also be given to injecting an element of 'seriousness' in the definition of this category of conduct. In a similar way, government information contravention is defined in section 4 of the PID Act to mean "conduct that constitutes a failure to exercise functions in accordance with any provision of the Government Information (Public Access) Act 2009". We are aware that a public official has sought to make PIDs about public authorities failing to make policies publicly available. 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.

Disclosures alleging maladministration must be of 'a serious nature'. In our view, this proviso could extend to disclosures alleging government information or privacy contraventions. We believe this is consistent with the Privacy Commissioner's submission that current complaints mechanisms are not sufficient to identify "more systemic breaches of privacy that could give rise to a real risk of serious harm to affected individuals" and that there is currently no option for individuals working within the NSW public sector to disclose "systemic privacy breaches or practices".

Whether there is a need to amend the PID Act to allow greater information sharing between investigating authorities.[23]

This is an issue that has been discussed at PID SC meetings. Any sharing of information that extends beyond deciding whether to refer a matter under the PID Act may not be possible under the current legislative provisions due to privacy concerns or the statutory secrecy requirements an investigating authority may operate under. While the PID SC was supportive of greater information sharing between investigating authorities, it was unclear whether an amendment to the PID Act was needed to allow this.

Nevertheless, a provision to enable investigating authorities to share information for the purpose of fulfilling their responsibilities under the PID Act may put this beyond doubt and legitimise the sharing of information in the following situations:

- When a complaint is assessed as not meeting the criteria outlined in the PID Act and is therefore not a PID.
- When more than one investigating authority wishes to share information before deciding what form their investigation or other action will take or its scope (i.e. in the situation where a reporter has made multiple PIDs which make allegations of corrupt conduct, maladministration and serious and substantial waste).

[22] Submission no. 3, Office of the Privacy Commissioner New South Wales.
[23] Submission no. 4, Information and Privacy Commission.

- When more than one investigating authority wishes to share information for the purposes of jointly undertaking concurrent enquiries or investigation (i.e. a decision has already been made not to refer).
- To fulfil other functions under the PID Act, such as those of our office in relation to resolving disputes, monitoring and auditing, or reporting on its implementation.

Whether members of the public should be able to make PIDs.[24]

As discussed on page 23 of our background paper, the PID Act is premised on providing protection to public officials who have insider information about wrongdoing and are most vulnerable to reprisal given their employment relation.

Despite this, we would support including a provision whereby a person can be deemed a public official for the purpose of making a PID.[25] This would provide a safeguard in situations whereby a person is in special need of protection but does not technically fit the definition of a public official under the Act.

Whether section 20 of the PID Act should be amended based on the tests in the ACT or Commonwealth models ('a contributing reason' 'is the reason, or part of the reason' for the act).[26]

We support such an amendment. In line with the views expressed by Transparency International Australia, pages 37-39 of our background paper set out the difficulties faced in the operation of section 20. In particular, we also draw attention to the use of the term 'substantially' and the Commonwealth and ACT legislation as alternative models.

Whether MPs should be able to make PIDs.[27]

Given that the PID Act largely defines detrimental action in relation to an employment relationship, it is unclear to us in what circumstances MPs would be at risk of reprisal. We also note the ability of MPs to raise matters under parliamentary privilege, as well as to make a complaint to the relevant investigating authority about any wrongdoing of which they are aware.

Whether 'pseudonymous' disclosures be expressly permitted under the PID Act.[28]

We support amending the PID Act to clarify that disclosures can be made anonymously. As noted on pages 35-36 of our background paper, this is consistent with the advice we currently provide to public officials and public authorities.

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[24] Submission no. 4, Information and Privacy Commission.
[25] See section 70 of the Commonwealth Act.
[26] Submission no. 7, Transparency International Australia.
[27] Submission no. 8, Joint Media Organisations.
[28] Submission no. 8, Joint Media Organisations.