

**Submission
No 1**

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

Organisation: Public Service Commission
Name: Mr Graeme Head
Position: Commissioner
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Ref: A3373796

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

I am writing in response to the invitation to make a submission to the review of the *Public Interest Disclosures Act 2014* ('the PID Act') by the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission.

I appreciate the opportunity to make this submission. It concerns the operation of the PID Act in relation to a disclosure that concerns one public authority¹ but is made to a second public authority which is not an investigatory authority. This is particularly relevant to the Public Service Commission ('PSC'), which is a public authority but not an investigatory authority.

Legislation does not confer a complaint-handling function on either the PSC or the Public Service Commissioner. However, complaints are frequently made to the PSC and the Commissioner about other public authorities. The complaints generally concern the management or the conduct of the staff of the authorities. In many cases the complainants are public officials.

The PSC's policy when it receives a complaint is to assess whether the complaint is a public interest disclosure ('PID') before deciding what steps to take in response to the complaint. If the assessment is that the complaint is or seems to be a PID the PSC treats the complaint in the way that the PID Act requires a PID to be treated.

The PSC understands that the PID Act enables a PID to be made to the Public Service Commissioner even if the disclosure does not relate to the PSC. This understanding is based on advice to the Ombudsman by the Solicitor General, Michael Sexton SC, which was made available to the PSC.

However, if a PID that does not relate to the PSC (a 'non-PSC PID') is made to the Public Service Commissioner the action that the Commissioner can take in relation to it under the PID Act appears to be very limited.

¹ Where this submission uses expressions that are used in the PID Act those expressions are intended to have the meaning that they have in the PID Act.

Section 26 (1) of the PID Act states:

A public official may refer any disclosure concerning an allegation of corrupt conduct, maladministration, serious and substantial waste or government information contravention made to the public official under Part 2 [of the PID Act] to an investigating authority or to another public official or a public authority considered by the public official to be appropriate in the circumstances, for investigation or other action.

Read in isolation section 26 (1) would appear to give the Public Service Commissioner (if the Commissioner is a 'public official' in this context) a *discretion* to refer a non-PSC PID 'to an investigating authority or to another public official or a public authority considered by the [the Commissioner] to be appropriate in the circumstances, for investigation or other action'.

However, section 26 (1A) states:

If the public official to whom the disclosure referred to in subsection (1) was made does not belong to the public authority or investigating authority to which the disclosure relates, the public official must refer the disclosure to the principal officer of, or officer who constitutes, the authority concerned, or to an investigating authority, for investigation or other action.

Subsection (1A) was inserted into section 26 by Schedule 1.22 [4] to the *Statute Law (Miscellaneous Provisions) Act (No 2) 2002* and commenced on 29 November 2002. In the Bill for that Act the explanatory note relating to that amendment states:

Item [4] of the proposed amendments inserts a new subsection in section 26 of the Act so as to require a public official to whom a disclosure under Part 2 (Protected disclosures) of the Act is made in respect of another public authority to refer the disclosure to the principal officer of (or officer who constitutes) the public authority to which the disclosure relates.

Assuming that the Public Service Commissioner is a 'public official' in the context of section 26, it seems that if the Commissioner receives a non-PSC PID the Commissioner is obliged by section 26 (1A) to refer it 'to either the public authority to which the disclosure relates or to an investigating authority'.

The subject of a non-PSC PID will always be one that could appropriately be the subject of a PID to an investigatory authority or the authority to which the disclosure relates (except in some circumstances²) or one of the other potential recipients of a PID listed in section 8 of the PID Act. If the PID alleges a matter that the Public Service Commissioner suspects on reasonable grounds concerns or may concern corrupt conduct the Commissioner will be required to report the matter to the Independent Commission Against Corruption in any event.

No useful purpose seems to be served by the PID Act enabling a non-PSC PID to be made to the Public Service Commissioner if the Act obliges the Commissioner to refer the PID 'to either the public authority to which the disclosure relates or to an investigating authority'. Having the PID go to the Commissioner delays the PID being considered by an appropriate authority. It also has the potential to make the PID process more confusing

² If a PID concerns the principal officer of the authority to which the PID relates it would not be appropriate for the PID to be made to the principal officer. However, the authority's PID procedures may provide the PID to be made to another officer of the authority.

for the person making the PID than it needs to be and to add to the stress of what, for many 'whistle blowers', will already be a stressful situation.

For these reasons it would preferable for the PID Act to be amended so that it is no longer possible for a non-PSC PID to be made to the Public Service Commissioner.

If the Act were amended in this way there would still be scope under section 26 for a non-PSC PID to be referred to the Public Service Commissioner for investigation or other action in appropriate cases. If the PID were made to the Independent Commission Against Corruption there would also be the potential under the *Independent Commission Against Corruption Act 1988* for appropriate aspects of the PID to be referred to the Public Service Commissioner.

I trust that this submission will be of assistance to your Committee. I would be happy to discuss any aspect of it with the Committee.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graeme Head', with the date '29.7.16' written below it.

Graeme Head

Public Service Commissioner