

**Submission
No 4**

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

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Mr Lee Evans, MP
Chair
Committee on the Ombudsman, the Police Integrity Commission and
the Crime Commission
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By email: ombopic@parliament.nsw.gov.au

Dear Mr Evans

Review of the *Public Interest Disclosures Act 1994*

The opportunity to make a submission on the Committee's review of the *Public Interest Disclosure Act 1994* (the PID Act) is appreciated.

Background

The current review being undertaken by the Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission provides a valuable opportunity to examine this important legislative regime.

As Information Commissioner I am a member of the Public Interest Disclosures Steering Committee. The establishment of this Committee and its regular meeting program provides a robust and comprehensive forum for consideration of operational and systemic issues.

The object of the PID Act can be summarised as establishing a system to:

encourage and facilitate the disclosure, in the public interest, of corrupt conduct, maladministration, serious and substantial waste, government information contravention and local government pecuniary interest contravention in the public sector by:

- (a) enhancing and augmenting established procedures for making disclosure of those matters*
- (b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures,*
- (c) providing for those disclosures to be properly investigated and dealt with.*

The PID Act identifies under section 8 that a public official may receive protections under the Act if a disclosure is made either to the principal officer of a public authority or to a number of identified investigating authorities who may receive disclosures about the specialist areas outlined in the PID Act.

The NSW Information Commissioner is defined as an investigating authority under section 4(1) of the PID Act. The Information Commissioner is also a principal officer of a public authority for the purposes of the PID Act, as the Chief Executive Officer of the Information and Privacy Commission (IPC) in accordance with the arrangements established by the *Privacy and Government Information Legislation Amendment Bill 2010*. The 2010 Explanatory Note to the Bill (www.parliament.nsw.gov.au/bills/DBAssets/bills/ExplanatoryNotes) confirms these arrangements.

Public officials may make public interest disclosures to the Information Commissioner under section 8 of the PID Act. Further, the Information Commissioner has specific responsibilities in relation to public interest disclosures made about government information contraventions in terms of section 12D of the PID Act.

In the last year, the Information Commissioner identified an opportunity to provide guidance and greater clarity for reporters about the conduct to be reported to the Information Commissioner under the PID Act. This arose following an:

- examination of what other investigating authorities published to assist persons making public interest disclosures to their agency; and
- analysis of the issues arising in complaints and disclosures made to the Information Commissioner in the past few years, in particular concerning the offence provisions of the *Government Information (Public Access) Act 2009* (GIPA Act).

Following a period of consultation and feedback, the IPC published guidance materials in May 2016 regarding public interest disclosures. This included three public facing resources (available on the IPC website at <http://www.ipc.nsw.gov.au/resources-public-interest-disclosures>) to enhance transparency and understanding around the process and procedures the Information Commissioner applies in considering complaints made under the PID Act.

These resources provide greater clarity to potential reporters about the conduct captured under the PID Act and that may be reported to the Information Commissioner.

Additionally the IPC published a fact sheet in June 2016 explaining the operation of the offence provisions under the GIPA Act. This fact sheet provided further information to potential reporters on the circumstances and evidence that may enliven consideration of the offence provisions and the IPC's role and procedures in dealing with allegations that offences have been committed.

Submission

This submission addresses four issues:

1. Greater legislative recognition of the role of individual complaints in identifying and informing consideration of systemic issues.
2. Retention of the specialist expertise of investigating agencies and the requirement that a disclosure to an investigating agency is to be made pursuant to the operating legislation of the investigating agency
3. A proposed change to the definition of 'government information contravention' and inclusion of a test of seriousness for disclosures about government information contraventions
4. Expansion of the scope of the PID Act to allow for disclosures by former public officials and members of the public

Issue 1 – Greater legislative recognition of the role of individual complaints in identifying and informing consideration of systemic issues

Often individual disclosures, although highlighting specific conduct, inform and identify systemic matters.

This useful intelligence can enable investigating agencies to pinpoint areas of reform, and opportunities for collaboration either with other investigating agencies or with other specialist regulators, such as State Records NSW or the Office of Local Government, to provide guidance and tools leading to improved public administration and the delivery of services to citizens.

Encouraging public officials to report wrongdoings including matters that may be systemic in nature and not limiting wrongdoings to individual instances of conduct will ensure this intelligence is recognised, captured and acted upon.

The operative legislation of investigating agencies includes the capacity to share information in limited circumstances. The Information Commissioner and the NSW Ombudsman have a memorandum of understanding about the exchange of information. The current review of the PID Act also provides an opportunity to recognise the value of a more coordinated approach to prioritising the work of integrity/investigating agencies.

Issue 2 – Retention of the specialist expertise of investigating agencies and extant legislative arrangements

The Information Commissioner supports the current approach enshrined in the PID Act that recognises specialist expertise available within the investigating authorities. This is highlighted, for example, in matters where a disclosure is made to the Information Commissioner about a government information contravention and in particular 'Information Act' offences.

The extant legislative nexus between the PID Act and the legislation pertaining to investigating authorities also promotes appropriate integration and cogency. For example section 12D requires that a disclosure about a government information contravention must be made in accordance with the *Government Information (Information Commissioner) Act 2009* (GIIC Act). Section 89(4) of the GIPA Act provides appropriate limitations on the matters that can be considered as a complaint under the GIIC Act by the Information Commissioner and ensures that the external review right regime set out in the GIPA Act is retained and distinguished from complaint handling and investigations by the Information Commissioner.

Conduct of an agency that constitutes a reviewable decision of the agency cannot be the subject of a complaint to the Information Commissioner under section 17 of the GIPA Act.

The retention of specialist expertise also enables regulatory programs to be calibrated to proportionately address issues and initiate proactive interventions including appropriate use of regulatory tools such as assistance and guidance to agencies. As identified the IPC has published a fact sheet on the GIPA Act offence provisions. The development of this fact sheet arose directly from the analysis and consideration of disclosures made to the Information Commissioner and the application of the expertise of the IPC. Dissemination of expert advice such as this facilitates understanding and appropriate application of the legislative provisions.

Issue 3 – A proposed change to the definition of “government information contravention” (section 4 & section 12D(b) PID Act) and inclusion of a test of seriousness for disclosures about government information contraventions

Section 4 and section 12D of the PID Act do not inject a test of ‘seriousness’ in respect of government information contraventions.

This approach is distinguishable from the provisions for disclosures to the Ombudsman or the Auditor General. However section 3 and section 8(1) of the PID Act assist when applying a purposive approach to interpretation and therefore informs the Information Commissioner’s assessment necessitated by section 12D of the PID Act. 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. However an amendment, if proposed, would warrant an appreciation of any unforeseen narrowing effect upon the exercise of the Commissioner’s functions under the GIIC Act.

In this regard section 17 of the GIIC Act in terms of ‘Information Act’ may provide guidance. Section 17 of the GIIC Act provides:

Any person may complain to the Commissioner about the conduct (including action or inaction) of an agency in the exercise of functions under an Information Act, including conduct that is alleged by the person to constitute a contravention of an Information Act.

Note. A decision of an agency that is reviewable under the GIPA Act cannot be the subject of a complaint to the Commissioner (even if the person is out of time to apply for review of the decision). See section 89 (4) of the GIPA Act.

This amendment would lead address the extant definitional inconsistency between the PID Act (section 4) and GIIC Act.

Issue 4 Expansion of the scope of the PID Act to allow for disclosures by former public officials and members of the public

The PID Act currently provides for disclosures by public officials. There has been discussion in PID practitioner forums about expanding the scope of the PID Act to provide for disclosures by members of the public or former public officials.

The PID Act sets out a system to encourage public officials to report wrongdoings to the appropriate authorities and promotes associated protections. The PID Act also provides that the disclosures are properly investigated and dealt with by reference to the operating legislation of the investigating agencies.

If the scope of the legislation was extended to former public officials to report wrongdoings occurring in the past it may present challenges to the complaint assessment process, evidence gathering and investigation of the disclosure. Public officials are encouraged under the PID Act to report wrongdoings, not to delay reporting until they are former public officials.

Agencies have complaint mechanisms for receiving and considering complaints made to them by citizens. Complaints can be made to the Information Commissioner in terms of section 17 of the GIIC Act. There is no requirement that the complaint be made by a public official. The complaints may be made by citizens about the

conduct, both actions and inactions of agencies in the exercise of functions under an Information Act.

The IPC's recently released Regulatory Framework ([IPC Regulatory Framework](#)) addresses issues of proportionality and provides the public and agencies with a clear statement of jurisdiction and regulatory approach. The IPC's Regulatory Framework is being trialled in the delivery of information access regulatory services to guide the IPC to prioritise and target resources to those areas which pose higher risks to the achievement of regulatory objectives and informs application of regulatory tools available to the Information Commissioner in the context of public interest disclosures.

I trust that these comments are of assistance to the Committee. Please do not hesitate to contact me in respect of any further assistance that could be provided.

Yours sincerely

[signed]

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CEO, NSW IPC,
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1 August 2016