Submission No 9

REVIEW OF THE PUBLIC INTEREST DISCLOSURES ACT 1994

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Date Received: 9 August 2016

Review of the *Public Interest Disclosures Act 1994*

Submission of the NSW Ombudsman

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Introduction

The Ombudsman's office welcomes the opportunity to provide a submission to the Joint Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (JPC) on their review of the *Public Interest Disclosures Act 1994* (PID Act). This submission complements the background paper provided to the JPC on the issues and options that have arisen in relation to the Act.

The public interest reporting of serious wrongdoing by public officials is important at many levels. The object is not just to identify and rectify specific instances of wrongdoing. The object is also to identify systemic organisational issues and cultures, and ensure efficient and effective governmental structures, policies, procedures and practices into the future.

This submission draws on the Ombudsman's office experience in oversighting the PID Act since 2011. We firstly describe our work over this period, in promoting awareness and understanding of the legislation; providing advice and guidance on implementing the Act; monitoring and reviewing its implementation; and handling public interest disclosures (PIDs) and related complaints.

In Part 2 of this submission we set out five key issues that we believe would benefit from legislative reform. Our focus is on addressing the major challenges faced by public officials who wish to report wrongdoing and by public authorities in implementing the PID Act. In making these recommendations, our aim has been to identify necessary, practicable and sensible reforms that are likely to enjoy wide support across the NSW public sector and the community. The reforms we propose are as follows:

1. Section 6E(1)(d) of the PID Act be amended to require that the internal reporting policy of a public authority designates an adequate number of officers as being responsible for receiving PIDs on behalf of the authority. This should take into account the number of public officials belonging to the authority and include at least one person in each major worksite.

2. Section 15 of the PID Act 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.

3. Section 6E of the PID Act be expanded to provide that the head of a public authority is responsible for ensuring that the public authority takes reasonable steps to prevent reprisal action against a reporter and takes appropriate action to address any such reprisal action should it occur.

4. The PID Act require public authorities to notify the Ombudsman when an allegation of reprisal action is made or reprisal action is identified, so that the Ombudsman is able to intervene early and provide assistance to the public authority in determining an appropriate response.

5. The PID Act state that a manager is not prevented from taking reasonable management action in relation to an employee who has made a PID if the action taken was reasonable and justifiable, carried out in a reasonable manner and was not taken on a belief or suspicion that person has made a PID.

6. The conduct covered by the PID Act should specifically exclude matters based solely or substantially on an individual employment related grievance or other personal grievance, including any decision to take reasonable management action in relation to a reporter (other than a grievance about an act of reprisal).

7. To ensure more useful information about PID matters is available, the Public Interest Disclosures Regulation 2011 (PID Regulation) require public authorities to provide certain information to the Ombudsman in relation to every PID received, including:
    - whether the PID was made directly to or referred to the public authority
    - the categories of conduct alleged
    - what action was taken in response to the PID
    - whether the allegations were wholly or partially substantiated
    - whether the PID resulted in systemic or organisational changes or improvements
    - when the PID was received and finalised.

8. The PID Regulation be amended to require public authorities to provide information to the Ombudsman under section 6CA about the number of purported PIDs received, the number of public officials who made them and the broad reasons why each purported PID does not meet the criteria in the PID Act.

9. Section 6CA of the PID Act be amended to only require public authorities to provide a report to the Ombudsman for a 12 month period (ending on 30 June in any year).

10. Section 31 of the PID Act be repealed and replaced with a requirement on the Ombudsman to prepare and provide a report to Parliament based on the information received from public authorities under section 6CA.

11. The PID Act provide that any obligations on public authorities under that Act do not extend to authorities without any staff.

12. The PID Act 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 PID, but only for the purpose of the protections of the Act.

Part 1: The role of the Ombudsman's office

As per section 6B, the NSW Ombudsman's functions in connection with the operation of the PID Act are:

- to promote public awareness and understanding of the PID Act and to promote the object of the Act
- to provide information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to the PID Act
- to issue guidelines and other publications for the assistance of public authorities and investigating authorities in connection with their functions under the PID Act and public officials about the protections afforded under the Act
- to audit, monitor and provide reports to Parliament on the exercise of functions under the PID Act and compliance with the Act by public authorities
- to provide reports and recommendations to the Minister about proposals for legislative and administrative changes to further the object of the PID Act.

The Ombudsman's office established a specialist PID Unit responsible for performing these functions under the Act and providing support to public authorities and public officials. Appendix 1 of the background paper provides a summary of the work of the PID Unit over the five year period 1 July 2011 to 30 June 2016. Our four annual reports on the oversight of the PID Act provide further detail, as well as examining the implementation of the legislation across the public sector.[1]

Upon commencing our oversight role, our primary aim was to raise awareness and promote understanding of the PID Act. We did this by:

- hosting consultation forums with relevant stakeholders, including union representatives, and a breakfast event for chief executive officers
- developing general awareness and management PID training sessions[2]
- developing four e-Learning modules to raise awareness[3]
- releasing a range of guidance materials to assist public authorities and public officials, including:
  - model internal reporting policies, that public authorities could easily adopt[4]
  - 23 guidelines for public authorities on various aspects of managing PIDs[5]
  - nine fact sheets to provide advice on specific topics for particular audiences[6]
  - a promotional poster[7] and postcard for use by public authorities to raise awareness
  - seven templates to assist public authorities with the practical implementation of the PID system[8]
- communicating with PID practitioners and other interested stakeholders via our PID e-News[9]

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[1] Available at: http://www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/public-interest-disclosures.
[2] To date, 7,161 public officials have attended 273 general awareness training sessions and 3,372 public officials have attended 232 management training sessions, with over 98% of participants rating the training positively.
[3] Available at: http://www.ombo.nsw.gov.au/what-we-do/our-work/public-interest-disclosures/public-interest-disclosures-e-learning.
[4] Available at: http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures/model-internal-reporting-policy-local-government-public-interest-disclosures.
[5] Available at: http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures.
[6] Available at: http://www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/public-interest-disclosures.
[7] Available at: http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0019/6643/PID-internal-reporting-A3-Poster.pdf.
[8] Available at: http://www.ombo.nsw.gov.au/news-and-publications/publications/guidelines/public-interest-disclosures/ensuring-your-internal-reporting-policy-is-best-practice-checklist-public-interest-disclosures.

- delivering presentations and hosting information stands at conferences to give participants the opportunity to raise PID-related queries.

We have since moved from establishing frameworks, ground rules and procedures alongside public authorities, to working with them to implement their systems. Our focus is now on the practical application of the PID Act, working through operational difficulties faced by authorities and using examples of good practice to find better ways of achieving the public interest objectives of the legislation.

One way we have done this has been to build relationships with PID practitioners in public authorities. Not only are they increasingly willing to contact the NSW Ombudsman for advice on how to handle matters, but to discuss issues that they find challenging, particularly at PID forums.[10] Close collaboration with public authorities and understanding of the challenges in handling PIDs has resulted in all authorities we audited accepting the majority of recommendations we made.

We have engaged with other stakeholders by:

- meeting regularly with other PID Act investigating authorities to share information and assist with a consistent and coordinated approach in handling PIDs
- providing secretariat support to the PID Steering Committee (SC)
- supporting the PID oversight network, comprising agencies with similar oversight roles to ours across Australian jurisdictions
- working with the Commonwealth and Queensland Ombudsman's offices to set up the Whistling Wiki, a collaborative space for PID practitioners and researchers to share relevant information, resources and research
- partnering with certain academics and other integrity organisations in *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*, an Australian Research Council funded Linkage Project led by Griffith University and the world's largest research project into whistleblowing to date.

Our audit program has given us practical insight into the experiences of public authorities in dealing with internal reports of wrongdoing. The program has comprised audits of the exercise of functions under the PID Act by 22 public authorities,[11] a compliance audit of recommendations[12] and two sector-wide audits.[13] The audits have identified a number of areas of good practice — including a high standard of investigations, templates and other documentation developed by some authorities, and some examples of effective strategies implemented to protect reporters. They have also identified areas where public authorities can improve how they handle internal reports, such as:

- Record-keeping — key interactions (such as meetings with reporters), outcome advice and assessments of whether a report is a PID are commonly not documented.

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[9] Most recently, the issue 31 was distributed to 1,037 subscribers. The latest issues are available at: http://www.ombo.nsw.gov.au/news-and-publications/publications/newsletters/pid-e-news.

[10] Since commencing our oversight role, we have provided advice to public officials and public authorities in response 1,083 enquiries, and hosted 10 PID Practitioner Forums for PID practitioners to network, share information and gain a greater understanding of the process and obligations involved.

[11] This involved reviewing 682 files (243 PIDs and 439 internal reports) and led to us making 159 recommendations.

[12] This confirmed that 94% of the recommendations made were accepted: see pp.14–15 of the *Oversight of the PID Act annual report 2014–2015*.

[13] We conducted an electronic survey of public authorities in 2013 and an examination of the handling of allegations of reprisal in 2015.

- Risk management — strategies are not often developed as part of a risk assessment to manage the risk of reprisal when confidentiality cannot be maintained.
- Assessments of reports — reports made to supervisors and managers not being identified as possible PIDs, meaning the reporter will be unable to rely on the protections of the PID Act.

We continue to receive PID-related complaints.[14] This has included formal investigations into five PIDs since commencing our oversight role. We make enquires with public authorities about their PID assessment processes, whether they assessed the risk of reprisal and took action to mitigate any identified risks, their communication with the reporter, and their investigation of the allegations made. We have also monitored two public authorities' compliance with the PID Act, by requiring them to notify us of all PIDs/purported PIDs received over a certain period.

One of the strengths of the PID Act oversight responsibilities being vested in a single unit in the one investigating authority is that intelligence gained through performing a particular function can assist with the performance of others. This ensures that limited resources are employed where they are likely to have the greatest impact. For example:

- Information on PID-related complaints received by our office and PIDs reviewed as part of the audit program provide a useful insight into areas where public authorities can improve their handling of PIDs. Along with the enquiries and requests from public authorities, this has led to issues being flagged for legislative amendment, the development of new resources and the revision of existing publications.
- The selection of public authorities to be audited can be based on a number of sources of information, such as complaints received, the information contained in public authorities' six-monthly reports, and intelligence received while delivering training.
- Where public authorities indicate in the six-monthly reports that they do not have an internal reporting policy or have undertaken staff awareness, we can follow-up with an offer to conduct training, provide resources or otherwise assist. For example, in response to the initial low compliance with the reporting requirements by local Aboriginal land councils, we developed strategies to engage with these public authorities, such as by contacting them by phone, releasing targeted publications and conducting training at regional forums.
- Individual complaints relating to be PIDs that are declined may raise concerns that are better dealt with by auditing the public authority's systems.
- We identified a large discrepancy between the number of PIDs reported by public authorities and the number of staff who said they made a formal complaint about wrongdoing in the Public Service Commission's People Matter Survey.[15] This led to a focus in the audit program about whether public authorities are appropriately assessing internal reports of wrongdoing as PIDs and the development of an assessment template to assist public authorities.

[14] Over the five-year period 2011–2016, this included 121 PIDs, 72 purported PIDs (where the complainant claimed they were making a PID but we assessed the complaint as not meeting the criteria set out in the PID Act) and 25 complaints about the handling of PIDs by public authorities.
[15] See p.23 of the *Oversight of the PID Act annual report 2011–2012*.

Part 2: Key issues and recommendations

This part of the submission discusses five key issues that have arisen in the implementation of the PID Act that we believe would benefit from legislative reform:

1. removing barriers around who can receive a report
2. proactive prevention and management in relation to reprisals rather than relying on legal protections after the fact
3. managing the perceptions of reporters
4. requiring more useful information to evaluate how the system is working
5. protecting certain public officials who report serious wrongdoing while removing administrative burdens for public authorities.

Removing barriers around who can receive a report

One of the pitfalls for public officials wanting to make a disclosure is the possibility of not making it to the right person. Under the PID Act, protections will only apply if certain conditions are met, one being that the report is made to one of the people specifically authorised by the Act to receive them (such as the principal officer of a public authority, another officer of the authority nominated to receive them or a specified investigating authority). Another condition is that, if a PID is made to an officer in a public authority, the officer must be in the authority to which the reporter belongs or to which the wrongdoing relates.

These PID Act provisions relating to who can receive a PID can be narrow and complex, and create barriers to the legislation achieving its objective of encouraging and facilitating disclosures of public interest wrongdoing and providing broad protection to those who make them.

Our background paper notes that our audits of public authorities have confirmed that most reports of wrongdoing within organisations are made to supervisors and managers. If a manager then forwards this information on, the protections of the PID Act would not apply to the staff member who had originally reported the wrongdoing, but to the manager who brought the matter to the attention of an officer nominated to receive disclosures.

In their review of the Commonwealth legislation, the SC recommended all supervisors be able to receive PIDs. The SC noted that all levels of management should have the knowledge and capacity to identify PIDs (particularly given the focus in the NSW legislation on serious conduct) and to take appropriate action in response. We believe such an approach would best support the objects of the PID Act.

Nevertheless, public authorities we have spoken to are hesitant to support such an amendment. We are cognisant of the practical difficulties public authorities would face in ensuring that such a large number of supervisors and managers are trained to identify PIDs on an ongoing basis. Any amendment would therefore need to be accompanied by an increase in resources to our office so we could properly assist public authorities and meet the anticipated increased demand for face-to-face training of public officials.

Few officers nominated to receive PIDs in public authorities

Section 14(2) of the PID Act provides that a disclosure to a public authority must be "in accordance with any procedure established by the authority concerned for the reporting of allegations...". Our office has interpreted this to mean that only particular officers or positions that are nominated in a public authority's policy can receive disclosures in accordance with the PID Act. Our guidance material refers to such officers as 'nominated disclosures officers'.

The addition of s.6E in the PID Act in 2011 saw responsibility placed on the head of a public authority to ensure that their PID policy "designates at least one officer of the public authority (who may be the principal officer) as being responsible for receiving public interest disclosures on behalf of the authority".[16]

Our guidance to public authorities states:

> *The optimal number of nominated disclosures officers within an authority will depend on factors such as:*
>
> - *the size and structure of the authority*
> - *the geographic distribution of work locations*
> - *the volume and type of PIDs received.*
>
> *Decentralised or dispersed authorities may find it useful to have disclosures officers in the regions or divisions, while smaller authorities may need to nominate only a few officers. The aim is to provide staff with reporting options both within and removed from the workplace, since research shows that the majority of staff report wrongdoing within their immediate workplace.*[17]

Our background paper notes that many public authorities limit the number of officers nominated to receive disclosures to staff in specialist units or very senior management. This has the effect of limiting whether reports of serious wrongdoing made by staff are considered PIDs. For example:

- As mentioned earlier, managers who forward information reported to them by staff may be afforded the protections of the PID Act rather than the staff member who initially reported the wrongdoing.
- While we advise nominated officers to contact such reporters directly to ensure they are able to receive the protections of the PID Act, they are unable to do so in cases of anonymous reports. The reporter may also not wish to discuss their concerns with a more senior officer who they do not know or trust.
- Some PID coordinators in public authorities have raised concerns that managers are receiving reports and acting on them locally, rather than escalating them to a nominated officer or coordinator. This may be because they are unaware the reports could be PIDs or because they believe the report will reflect badly on themselves. As one PID coordinator stated: "We don't know what we don't know."

Many state government principal departments have also sought to centralise the handling of PIDs and, in doing so, have developed an internal reporting policy that applies to numerous entities within their cluster. This can be a sensible approach, particularly when the entities are small, such as boards and committees. It also provides staff of such entities with an additional independent reporting avenue to the principal department.

One of the drawbacks to such an approach is that the number of officers nominated to receive disclosures is often limited, for example to the head of the related entity. It is questionable too whether staff of the related entities are aware the policy applies to them. This has the impact of limiting the number of reports of wrongdoing by staff of related entities that receive the protections of the PID Act.

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[16] Section 6E(d).
[17] *Guideline B4: Reporting pathways*, p.2.

Subsequently, one of the most common recommendations made in our audits of public authorities is to increase the number of nominated officers to include those staff who routinely receive such reports or are most likely to. These recommendations also consider the accessibility of such officers, particularly if the authority has staff in various locations.

The problem of only having a limited number of staff who can receive disclosures could be addressed by allowing PIDs to be made to supervisors and managers, as per the recommendation made by the SC in their review of the Commonwealth *Public Interest Disclosure Act 2013*. However, during consultation public authorities have expressed concerns that such an approach would lead to relatively junior officers who supervise at least one other officer receiving PIDs.

We believe a preferable approach would be to require public authorities to nominate a sufficient number of officers to receive PIDs, given the number of public officials in their authority and the geographic locations across which they are spread. This would allow public authorities to consider their own context, while providing a legislative basis for ensuring there are enough nominated officers to be accessible to staff.

Section 59(3)(b) of the Commonwealth legislation provides a relevant example. It places an obligation on principal officers:

> *to ensure that the number of authorised officers of the agency is sufficient to ensure that they are readily accessible by public officials who belong to the agency...*

Given the propensity for staff to report wrongdoing to someone whom they know, we believe any such obligation should specify that at least one person in each major worksite should be able to receive disclosures. This would mean, for example, that there is a person in each school, correctional facility or council depot to whom staff can report.

Recommendation 1: Section 6E(1)(d) of the PID Act be amended to require that the internal reporting policy of a public authority designates an adequate number of officers as being responsible for receiving PIDs on behalf of the authority. This should take into account the number of public officials belonging to the authority and include at least one person in each major worksite.

Misdirected PIDs to public authorities

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. These clusters bring together a group of entities to allow similar and complementary government services to be coordinated more effectively within broad policy areas. 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.

Reporters are unlikely to be aware of these complexities. The consequence is that staff may unintentionally miss out on the protections of the PID Act if they make a disclosure to the wrong public authority or person. For example:

- One principal department we audited had a hotline for reports of misconduct by officers of all agencies within its cluster. A report by a staff member of an agency

about another staff member of that agency made to the hotline could therefore not be considered a PID as it was not made to the authority to which the reporter belonged or to which the wrongdoing related. In many cases these reports were made anonymously, so the principal department could not contact the reporter to advise them to make the report directly to the relevant agency in order to receive the protections provided by the PID Act.

- Staff from separate public authorities who work together in the one location or who perform functions for another public authority may come across wrongdoing by staff of another public authority. In the transition to Service NSW, it was unclear whether Roads and Maritime Service (RMS) employees were considered public officials of RMS or Service NSW. Further, Service NSW is entering into an arrangement with local government staff in regional locations to act as agents for Service NSW on a fee for service basis.

There are also many public authorities with a role in oversighting or dealing with wrongdoing in other public authorities that are not specified investigating authorities under the PID Act. For example:

- in relation to wrongdoing within local Aboriginal land councils (LALCs), the Office of the Registrar of the *Aboriginal Land Rights Act 1983* (who has a role in investigating misconduct by board members) and the state NSW Aboriginal Land Council
- principal departments where their cluster agencies are clearly separate public authorities, such as the Ministry of Health in relation to wrongdoing within local health districts
- NSW Treasury in relation to wrongdoing by members of Audit and Risk Committees
- the Health Care Complaints Commission in relation to certain conduct by health professionals
- the NSW Electoral Commission in relation to its role in enforcing provisions of the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* and the *Lobbying of Government Officials Act 2011*.

Section 15 of the PID Act provides for 'misdirected disclosures' to an investigating authority; that is, it is a PID if the public official honestly believed they were making the disclosure to the appropriate investigating authority even if they were not. We believe this provision should be extended to public authorities. This would mean that a public official can still receive the protections of the PID Act if they honestly believed their disclosure was made to the appropriate public authority to deal with the matter.

This approach was recommended by the Committee on the Independent Commission Against Corruption in their 2009 review of the legislation, but was not implemented by government. We agree with the Committee's view that: "Technicalities, such as whether or not the disclosure has been made to a specific agency, should not prevent a disclosure from attracting protection."[18]

Recommendation 2: Section 15 of the PID Act 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.

[18] Committee on the Independent Commission Against Corruption 2009, *Protection of public sector whistleblower employees*, p.137.

Proactive prevention and management in relation to reprisals

As our background paper notes, the recent failed prosecution of Mr Kear under the PID Act highlighted a common element in many PID related matters brought to our attention, namely, a pre-existing conflict situation in the workplace.[19] In such circumstances it can be particularly difficult to identify whether the motivation for action taken to the detriment of a reporter was the pre-existing conflict or was in reprisal for the making of a PID. This was also the sixth unsuccessful prosecution in NSW under the then *Protected Disclosures Act 1994*, PID Act or *Police Act 1990*; most of the earlier matters failed largely on technical grounds.

Given the evidentiary difficulties facing any prosecution, and the lack of any successful claims for compensation under 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.

Drawing on the best practice approach recommended by the *Whistling While They Work* research, our guidance material advises public authorities to undertake a two-step process:

- conduct an assessment of the risk of reprisals faced by an internal reporter and any related workplace conflict[20]
- implement strategies to prevent or contain any identified risks.[21]

Despite this, our complaint handling and audit work has identified that public authorities typically fail to undertake risk assessments regarding the risk of reprisal to a reporter. In cases where authorities have conducted such an assessment, doing so often has not identified any tangible risk to the reporter or identified any practical steps to mitigate the risk of reprisal.

Additionally, in our audit of the handling of allegations of reprisal, only one public authority completed a risk assessment following the receipt of the PID. In each case that was reviewed as part of the audit, a risk assessment was warranted and would have assisted the public authority in managing and preventing reprisals occurring. In the majority of the cases reviewed, confidentiality was not able to be maintained following the receipt of the PID or during the course of the investigation, and a risk assessment would have been helpful in identifying risks to the reporter.

We believe that the responsibilities on the head of a public authority under section 6E of the PID Act should be expanded to include ensuring that the public authority takes reasonable steps to prevent reprisals occurring and takes appropriate action to address reprisal action should it occur. This would focus the attention of public authorities on the need to assess risk as a key step in preventing and minimising reprisals. In doing so, such an amendment would support the implementation of the Act by requiring practical and proactive protection, enabling it to better achieve its objective.

Such a provision would also be consistent with similar requirements in other jurisdictions:

- In the Commonwealth PID Act, section 59(1)(a) requires the principal officer of an agency to establish procedures for assessing the risk of reprisal against reporters who make PIDs. In addition section 59(3)(a) requires the principal officer to take reasonable

[19] *DPP v Murray Kear*, unpublished decision, 16 March 2016.
[20] See *Guideline C4: Managing risk of reprisals and conflict*.
[21] See *Guideline D4: Preventing and containing reprisals and conflict*.

steps to protect public officials belonging to the agency from detriment or threats of detriment relating to PIDs.

- In Victoria, section 58(5) of the *Protected Disclosures Act* requires authorities to establish procedures for the protection of persons from detrimental action.
- In Queensland, section 28(1) of the *Public Interest Disclosure Act 2010* requires the chief executive officer of a public sector entity to establish reasonable procedures to ensure public officers are offered protection from reprisal.

Recommendation 3: Section 6E of the PID Act be expanded to provide that the head of a public authority is responsible for ensuring that the public authority takes reasonable steps to prevent reprisal action against a reporter and takes appropriate action to address any such reprisal action should it occur.

Obligation to notify the Ombudsman of reprisal action

In response to our audit of the handling of allegations of reprisal across the NSW public sector, public authorities only identified 18 cases of alleged reprisal over a two year period from 1 January 2012. This may be because few instances of reprisal occurred, however, it is likely that more cases occurred but were not identified or recorded appropriately.

A key indicator of whether the PID system in NSW is working effectively is whether or not staff who report wrongdoing suffer as a result of doing so. We believe it is therefore important to collect information about how many allegations of reprisal are made, whether such action was taken against a person who made a PID, who purported to make a PID or who was mistakenly believed to have made a PID.

These matters are the most high-risk and resource intensive for public authorities to deal with. If the NSW Ombudsman was notified of any allegations of reprisal as soon as such allegations were made or reprisal action identified, we would be able to provide timely advice and assistance to the public authority. This is particularly important given the lack of experience within public authorities for dealing with such allegations. 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.

We also note that, based on the information provided by public authorities in our reprisal audit, almost all of the reporters who alleged reprisal internally at some point complained to our office. Early intervention in these complex matters may lead to better outcomes for both the reporter and the public authority.

Recommendation 4: The PID Act require public authorities to notify the Ombudsman when an allegation of reprisal action is made or reprisal action is identified, so that the Ombudsman is able to intervene early and provide assistance to the public authority in determining an appropriate response.

Managing the perceptions of reporters

One of the most difficult challenges public authorities face is managing the perceptions of reporters, particularly where there is already high conflict in a workplace. This work can be time consuming and may not always result in a common understanding of PID processes, particularly where a person's perception of events is strong and enduring.

Reasonable management action

Section 3 of the PID Act states that the Act 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.

One implication of this object is that an individual who has made a PID can still be subjected to reasonable management action, such as performance or disciplinary action. As noted in the background paper, however, we are aware of some uncertainty among public authorities across the sector in taking such action. We have seen authorities hesitant to take reasonable management action against a reporter in circumstances where this would be appropriate, due to the concern that any actions may be perceived as reprisal. This misunderstanding of the PID Act is an issue which requires some consideration.

We have received strong feedback through enquiries, complaints and consultation with public authorities that the PID Act should specifically provide that reasonable management action may be taken against a person who has made a PID. Some reporters perceive the making of a PID to mean that they are then immune from performance management or disciplinary action. There have been instances where staff appear to have made a pre-emptive PID in an attempt to avoid any management action being taken against them. Providing clarity around this issue would reinforce the object of the PID Act and help to address any perception that the legislation provides immunity from reasonable management action for inappropriate conduct.

Feedback to this office indicates that public authorities would appreciate a clear legislative provision which would be of assistance in their decision-making and communication with reporters about conduct issues when they arise and, importantly, when responding to allegations of reprisal following reasonable management action in the context of a PID. Reasonable management action may also need to be taken in circumstances in which reporters or other people involved in the reporting process have breached their obligations, including maintaining confidentiality, cooperating with an investigation or other fact finding process, and using methods to gather evidence in breach of policy.

The Queensland PID legislation states that a manager is not prevented from taking reasonable management action in relation to an employee who has made a PID if the reasons for taking the action do not include the fact that the person has made the PID. The legislation also lists conduct which in this context may be considered reasonable management action including:

- 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.[22]

Inserting a similar provision in the PID Act with regard to taking reasonable management action would emphasise that reporters are only protected from detrimental action taken substantially in reprisal for the making of a PID.

The Commonwealth Fair Work legislation states in the context of bullying that a person is not being 'bullied at work' if they are subjected to reasonable management action 'carried out in a reasonable manner'.[23] The explanatory memorandum to that section states that the provision was included in order to balance the need for managers to be able to manage staff against the definition of bullying.[24] While it should be a given that it is appropriate to take reasonable management action in response to poor performance or misconduct, the provision was included in the bullying context to put this beyond doubt.

In a recent decision of the Fair Work Commission, the Commissioner referred to the explanatory memorandum as above and interpreted the intention of the Legislature to capture 'everyday actions' of management.[25] This seems to recognise that actions of managers and management decisions can be taken on a daily basis to direct and control the way work is carried out and are not limited to serious or high impact decisions. A similar provision in the PID Act would have scope to support agencies in this capacity also.

There may be some concern about public authorities using such a provision to disguise conduct which would constitute reprisal. Importantly, any public authority would still be required (as they are now) to be able to demonstrate that any action taken was reasonable and justifiable and was not taken on a belief or suspicion that the person has made a PID.

Under the Fair Work legislation any reasonable management action must be 'carried out in a reasonable manner'. This provides for an additional set of considerations when taking any action to firstly determine whether action is reasonable and appropriate and secondly, how to/whether it can be, or was carried out in a reasonable manner.

The Ombudsman responds to complaints and enquiries about these matters and frequently provides feedback to public authorities through these channels or via our audit program. Any legislative changes would be supported by expansion of our PID publications to assist in guiding public authorities on the kinds of actions which may constitute reasonable management action.

Recommendation 5: The PID Act state that a manager is not prevented from taking reasonable management action in relation to an employee who has made a PID if the action taken was reasonable and justifiable, carried out in a reasonable manner and was not taken on a belief or suspicion that person has made a PID.

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[22] Section 45, *Public Interest Disclosures Act 2010* (Qld).
[23] Section 789FD, *Fair Work Act 2009* (Cth).
[24] The provision appeared in Schedule 3 to the Fair Work Amendment Bill 2013. The explanatory memorandum states that the amendments in the Schedule were part of the Government's response to the House of Representatives Standing Committee on Education and Employment Inquiry report *Workplace bullying: We just want it to stop*.
[25] SB [2014] FWC 2104 at [48].

Grievances

Managing the perceptions of reporters is particularly important where a person has made a purported PID that is more appropriately categorised as a grievance or a matter personally affecting the person that would be dealt with more appropriately in another way.

We have seen many cases where public authorities have encountered issues responding to purported PIDs that were in fact grievances. In some instances this was a result of authorities not adequately explaining to staff that their purported PID was actually a grievance at the outset, which later resulted in claims of reprisal to the authority and/or externally to our office, adding complexity and requiring additional resources. Recently our feedback to authorities in these cases has focused on the importance of explaining when a purported PID is not a PID, as well as being aware of and responding to the perceptions of staff raising those concerns.[26]

PID matters can also involve personal, employment and workplace grievances and so it can be difficult to distinguish wrongdoing which can be the subject of a PID. Specifically excluding personal grievances from conduct which can be the subject of a PID may support public authorities in making assessments and explaining to staff why certain matters will not be treated as a PID. This approach may also strengthen the object of the PID Act to facilitate disclosures in the public interest and assist with the fundamental understanding that the purpose of the legislation is not to resolve personal grievances.

The approach taken in the Northern Territory PID Act is an example of the preferred approach in the background paper where certain matters are excluded where they are based solely or substantially on "an employment related grievance (other than a grievance about an act of reprisal) or other personal grievance".[27]

Any legislative amendment in the PID Act would need to achieve a balance between excluding conduct which is not in the public interest while ensuring that reporters are not deterred from raising public interest related concerns. We recommend that the PID Act exclude matters based solely or substantially on an *individual* employment related grievance or other personal grievance to ensure that certain allegations would remain able to be captured as PIDs. Currently allegations about systemic bullying or an agency failure to address claims of such conduct would, depending on the circumstances, attract the legal protections of the PID Act, and we believe this continues to be appropriate and in the public interest.

Recommendation 6: The conduct covered by the PID Act should specifically exclude matters based solely or substantially on an individual employment related grievance or other personal grievance, including any decision to take reasonable management action in relation to a reporter (other than a grievance about an act of reprisal).

Requiring more useful information to evaluate how the system is working

Information about how the PID system is operating in NSW is vital to ensure the objects of the legislation are being achieved in practice.

As outlined in our background paper, a staged approach to the introduction of the reporting requirements was recommended by the SC. We believe it is timely to move towards requiring more detailed information in relation to PIDs dealt with by public authorities.

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[26] See pp.6–15 of the *Oversight of the PID Act annual report 2013–2014*.
[27] Section 10(2), *Public Interest Disclosure Act 2008* (NT).

It is particularly important that information is collected about the outcome of any action taken in response to a PID, including whether the allegations were substantiated or the disclosure led to any organisational improvements or changes. We believe this would highlight the value of PIDs and demonstrate to potential reporters that their concerns will be taken seriously and appropriate action taken. The feedback from public authorities also supported a move to capture additional information, particularly in relation to the outcomes of PIDs.

Recommendation 7: To ensure more useful information about PID matters is available, the PID Regulation require public authorities to provide certain information to the Ombudsman in relation to every PID received, including:

- **whether the PID was made directly to or referred to the public authority**
- **the categories of conduct alleged**
- **what action was taken in response to the PID**
- **whether the allegations were wholly or partially substantiated**
- **whether the PID resulted in systemic or organisational changes or improvements**
- **when the PID was received and finalised.**

A purported PID is when the person making the report claims it is a PID or explicitly requests protection under the PID Act but the report does not meet the criteria set out in the legislation. While these reports show that staff are aware of the PID Act, they can also demonstrate a lack of understanding of what constitutes a PID, either by the reporter or the public authority. An explicit request for protection may also indicate that staff have little confidence in how they or their report will be treated.

As noted in our background paper, we are aware of one person who made more than 40 reports to a public authority, which were claimed to be PIDs. The public authority approached our office for assistance in managing the person, which we did by providing advice to the authority, facilitating a mediation and corresponding with the person. The relevant authority has expressed concerns that their PID report (submitted to our office and contained in their annual report) does not accurately capture their workload or the resources they have needed to dedicate to responding to the numerous purported PIDs from the person.

We believe it would be worth collecting information about the number of purported PIDs received by each public authority, the number of public officials who made them and the broad reasons why each report does not meet the criteria in the PID Act.[28] In a situation such as the one referred to above, our office would be able to intervene early so we could assist the public authority to respond and manage the reporter's expectations. The data could also inform the selection of public authorities to audit or target for training. Knowing why public officials think they are making PIDs, when they are not, would also inform the development of our training, guidance and awareness activities.

Requiring public authorities to report on the number of purported PIDs would increase the likelihood that appropriate records are kept of these matters. We have dealt with complaints from public officials who believed they made a PID, but in response to our enquiries the public authority has indicated they had not kept a file note or any other record of the

[28]I.e. it did not allege any of the categories of conduct; the reporter did not have an honest belief on reasonable grounds that shows or tends to show the wrongdoing; the reporter is not a public official; the allegations are not about a public official or public authority; the report was not made to an appropriate officer; the report primarily questions the merits of government policy; or the report was made substantially to avoid dismissal or disciplinary action.

conversations in which the reporter claimed they had made a PID. It is difficult in these situations for our office to form a view on what was actually said.

Such a reporting requirement would also help in addressing the common misconception that reporters who claim they are making a PID automatically receive the protections of the Act or, conversely, that a report is not a PID if the reporter does not specifically claim they are making one.[29] Increasing the understanding of public authorities that they need to determine whether to treat a report as a PID would ensure more robust assessments are conducted.

Recommendation 8: The PID Regulation be amended to require public authorities to provide information to the Ombudsman under section 6CA about the number of purported PIDs received, the number of public officials who made them and the broad reasons why each purported PID does not meet the criteria in the PID Act.

Some public authorities have raised concerns about the frequency of submitting PID reports to our office. Reporting on a six-monthly basis may be onerous for small public authorities in particular, including local Aboriginal land councils, who rarely if ever receive PIDs. In consulting with public authorities, there was wide support to move to reporting to our office on an annual basis.

We do not, however, support a move to exception-based reporting, whereby public authorities only provide a report when they receive a PID. Our experience is that the need to provide a report is a useful prompt for the authority to consider their obligations under the PID Act, such as whether nominated disclosures officers have considered whether any reports of wrongdoing they have received are PIDs, whether its timely to raise staff awareness, and to notify our office of any changes in contact details for the PID coordinator.

Recommendation 9: Section 6CA of the PID Act be amended to only require public authorities to provide a report to the Ombudsman for a 12 month period (ending on 30 June in any year).

Our background paper also discusses the low compliance and difficulties experienced by public authorities in meeting the requirements of section 31 of the PID Act to include PID information in a report to be tabled in Parliament. This is particularly so for local government, as the *Local Government Act 1993* annual reporting requirements allow five months for councils to prepare a report and do not require that they be tabled by Parliament.[30] This has led to many councils submitting a separate annual report specific to PIDs to the NSW Ombudsman and the Minister in order to meet the requirements set out in the PID Act, and imposes an additional regulatory burden.

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

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[29] These misconceptions are discussed further on pp.16–17 of the *Oversight of the PID Act annual report 2014–2015*.
[30] Section 428.

Recommendation 10: Section 31 of the PID Act be repealed and replaced with a requirement on the Ombudsman to prepare and provide a report to Parliament based on the information received from public authorities under section 6CA.

There are a small number of public authorities that do not have any staff, including:

- trusts or superannuation funds
- entities that hold assets but are supported by staff of another public authority
- local Aboriginal land councils that are in administration.

Nevertheless, the obligations under the PID Act in relation to establishing a policy and providing a report to the Ombudsman technically still apply. This is not practical and we support an exemption from the legislative obligations for public authorities with no staff.

Recommendation 11: The PID Act provide that any obligations on public authorities under that Act do not extend to authorities without any staff.

Protecting public officials while removing administrative burdens

Our background paper outlined the problems encountered by public authorities in relation to PIDs made by public officials in the course of day-to-day functions (such as managers, investigators or internal auditors) or under a statutory or other legal obligation. Some examples of matters that have been raised by public authorities include:

- supervisors or managers forwarding or referring issues that have been reported to them to the appropriate area for consideration and action
- investigators referring information that they have obtained during the course of preliminary enquiries to internal corruption prevention units for the purpose of making a section 11 notification to the Independent Commission Against Corruption (ICAC)
- reports made by the NSW Police Force to a public authority advising them that a public official has engaged in wrongdoing (i.e. criminal activity)
- internal auditors or corruption prevention managers identifying possible indicators of corrupt conduct such as duplicate payments to suppliers and invoices that look suspicious.

In the majority of these cases, the benefit in assessing and counting these reports as PIDs is not clear. They involve staff who are simply doing their job without fear of reprisal. In our view, the PID Act was designed to encourage and facilitate reporting of wrongdoing by public officials who would otherwise not come forward.

Despite this, there are some cases where role reporters may seek to rely upon the protections in the PID Act. In the responses to the initial consultation paper there was overall support from public authorities for maintaining the protections in the PID Act for some role reporters. Internal auditors, in particular, expressed this view.

One recent example is that of Ms Tara McCarthy, the former NSW State Emergency Service Deputy Commissioner, who reported wrongdoing that she uncovered in the course of her everyday responsibilities to the Commissioner and then was dismissed from her job. Other examples are:

- an internal auditor who was moved aside from his position as a manager after presenting a report making findings of corrupt conduct against a member of staff
- a manager who made a PID to the ICAC after his area conducted an investigation into fraud at a council and thereafter said he was subjected to detrimental action in reprisal

- a head of finance who reported issues relating to fringe benefits tax infringements by her predecessor and others and subsequently alleged reprisal.

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.

Such a provision could also apply to others who are requested to provide information about serious wrongdoing, such as witnesses interviewed as part of an investigation conducted by a public authority. Our experience is that, similar to role reporters, public authorities are not considering whether witnesses who provide evidence of serious wrongdoing are making PIDs. We recognise that doing so would pose an administrative burden on public authorities in terms of assessing whether the PID Act applies to all such statements and the subsequent obligations. However we also believe that witnesses to any investigation conducted by a public authority should not face detriment for having provided information and be able to rely on the protections of the Act if needed.

This is consistent with the protections provided in section 37 of the *Ombudsman Act 1974* to any person who assists the Ombudsman and the protections from liability under section 109 of the *Independent Commission Against Corruption Act 1988*. We note that section 57 of the Commonwealth PID Act protects witnesses from legal liability in relation to information they provide in the course of an investigation of a PID. However, as stated in the SC's review of that Act, the protection of witnesses in an issue that could arise whenever an investigation is taking place, regardless of how that issue came to light.

Recommendation 12: The PID Act 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 PID, but only for the purpose of the protections of the Act.

Review of the *Public Interest Disclosures Act 1994*

Background paper prepared by the NSW Ombudsman

Contents

Introduction

The Ombudsman's office has prepared this background paper to inform the review of the *Public Interest Disclosures Act 1994* (PID Act) by the Joint Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission (JPC).

The paper describes the problems and issues that have arisen in relation to the PID Act. It also identifies options for legislative change, while noting the benefits and risks of each. In preparing this paper, the Ombudsman's office:

- sought the views of representatives of public authorities, including at two consultation forums focused on the review of the legislation held in Sydney and Orange, as well as via telephone and email
- reviewed PID-related complaints and enquiries received, as well as questions asked during training sessions and practitioner forums
- drew on the findings of, and recommendations arising from, PID audits
- compared PID-related legislation and engaged with similar oversight agencies in Australian jurisdictions
- considered relevant research, particularly on best practice PID legislation.

The background paper was also provided to members of the PID Steering Committee (SC) to assist their consideration of issues. The SC comprises representatives from the:

- NSW Ombudsman
- Department of Premier and Cabinet
- Audit Office of NSW
- Independent Commission Against Corruption (ICAC)
- Police Integrity Commission (PIC)
- Office of Local Government (OLG)
- NSW Police Force (NSWPF)
- Information Commission
- Public Service Commission (PSC).

Parts of this paper draw upon minutes of meetings of, and associated discussions amongst the members of, the SC. However, the views expressed in this paper do not necessarily represent the views of the SC, except where indicated by reference to a specific decision or recommendation of the SC itself. Nor does this paper necessarily reflect the views of any particular member of the SC and it is possible that individual agencies represented on the SC will hold different views.

The following have been raised with the SC as key considerations to be borne in mind in strengthening or improving the operation of the current regime:

- *Simplifying the Act* — Many of the provisions are unduly complex, technical and create barriers to the Act achieving its objective to encourage and facilitate disclosures of public interest wrongdoing and provide broad protection to those who make them.
- *Encouraging prevention* — The primary focus of the legislation currently is on providing legal mechanisms to remedy reprisal, rather than on preventing adverse outcomes through ensuring authorities have strong, proactive systems in place.
- *Reducing administrative burdens* — From a public authority perspective the legislation should not place unnecessary burdens on public authorities, and any amendments should be practical and able to be implemented.

- *Ensuring accountability* — It is important that information is collected about the use of the PID Act, implementation is oversighted and coordination of investigating and other key authorities occurs (a function currently discharged by the SC).

Terms of reference

Section 32(1) of the PID Act states:

> *(1) A joint committee of members of Parliament is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.*

The JPC has indicated that, in conducting this statutory review, it will 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 SC and the Ombudsman
b) whether the structures in place to support the operation of the public interest disclosures scheme remain appropriate
c) the need for further review of the Act.

In conducting its inquiry, the JPC is to consider the SC's review of the Commonwealth public interest disclosure legislation dated January 2014.

This paper addresses each of the terms of reference and, where relevant, refers to the SC's recommendations in its review of the Commonwealth legislation.

Objects of the PID Act

Section 3 the PID Act states:

> *(1) The object of this Act is 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 disclosures concerning such matters, and*
>
> *(b) protecting persons from reprisals that might otherwise be inflicted on them because of those disclosures, and*
>
> *(c) providing for those disclosures to be properly investigated and dealt with.*
>
> *(2) Nothing in this Act is intended to affect the proper administration and management of an investigating authority or public authority (including action that may or is required to be taken in respect of the salary, wages, conditions of employment or discipline of a public official), subject to the following:*
>
> *(a) detrimental action is not to be taken against a person if to do so would be in contravention of this Act, and*
>
> *(b) beneficial treatment is not to be given in favour of a person if the purpose (or one of the purposes) for doing so is to influence the person to make, to refrain from making, or to withdraw a disclosure.*

There is widespread acceptance that the legislative policy behind the PID Act is desirable. The exposure of serious wrongdoing in the public sector is an agreed objective. Reporters of

such wrongdoing perform an essential service in our society and provide an invaluable early warning system for management. As public officials, they are uniquely placed to expose serious problems with systems, competence and resources as well as the integrity of public sector authorities. The best source of information concerning wrongdoing within an authority is from the people who work there.

The object provision sets out three mechanisms by which the objective of the PID Act is to be achieved, namely by:

- enhancing procedures for making such disclosures
- protecting reporters from reprisals
- providing for disclosures to be properly investigated and dealt with.

In their review of the Commonwealth legislation, the SC recommended that section 3(1) of the PID Act be expanded to include the overarching objective 'to promote the integrity and accountability of the public sector', while not replacing the more specific objectives already provided for in the Act. The SC thought that this terminology emphasises the values that guide the legislation.

Part 1: The effectiveness of the 2010 amendments to the PID Act

The *Protected Disclosures Amendment (Public Interest Disclosures) Act 2010* implemented the major recommendations made by the Joint Parliamentary Committee on the ICAC (ICAC Committee) in their 2009 report *Protection of public sector whistleblower employees*. This paper considers the substantial amendments in turn.

Name of Act

Following the 2010 amendments, the name of legislation changed from the *Protected Disclosures Act* to the *Public Interest Disclosures Act*. A subsequent amendment in 2011 replaced all references to 'protected disclosures' with 'public interest disclosures'.[1]

The symbolic change in terminology had important effects, by:

- moving the focus from how the legislation is to achieve its objective (that is, by providing protection) to its actual objective (that is, facilitating the making of disclosures in the public interest)
- emphasising the wider importance of disclosures about 'public interest' wrongdoing, as opposed to personal grievances
- removing the assumption that a reporter will always need protection, when research and the Ombudsman's office's audit of allegations of reprisal show that most PIDs are handled without the reporter being treated badly or suffering detriment.[2]

Definition of public authority

The head of the definition of a public authority includes "any public authority whose conduct or activities may be investigated by an investigating authority" (section 4). The 2010 amendments amended the definition of a public authority in s.4 to specify the following:

a) a Division of Government Service,[3]
b) a State owned corporation and any subsidiary of a State owned corporation
c) a local government authority,
d) the NSW Police Force, PIC and PIC Inspector,
e) the Department of Parliamentary Services, the Department of the Legislative Assembly and the Department of the Legislative Council.

The broad scope of the definition means it is difficult to ascertain the exact number of public authorities that have responsibilities under the PID Act. For example, the definition also captures:

- authorities that fall within the jurisdiction of the Audit Office of NSW that may not perform public functions or are otherwise considered part of the public sector
- authorities such as trusts or funds that do not employ any staff.

In relation to the state government, many principal departments have sought to centralise their handling of PIDs, including by establishing a policy that applies to many entities within their cluster and reporting to the NSW Ombudsman on behalf of these authorities. The implications of this arrangement in terms of who can make and receive a PID are discussed further below.

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[1] *Public Interest Disclosures Amendment Act 2011*.
[2] Smith, R & Brown, AJ 2008, 'The good, the bad and the ugly: Whistleblowing outcomes' in AJ Brown (ed.), *Whistleblowing in the Australian public sector*, ANU E Press, Canberra, pp.109-135.
[3] On the commencement of the *Government Sector Employment Act 2013*, "a Division of Government Service" was replaced with "a Public Service agency".

Further, there are a number of small entities or public officials that technically fall within the definition of a public authority such as:

- Crown Lands reserve trusts (of which there are approximately 700)[4]
- official community visitors to children and young people in out-of-home care and children, young people and adults with a disability in care (30)
- official visitors to correctional facilities (52)
- official visitors to mental health inpatient facilities.

Options for consideration

To help clarify the definition of a public authority, in their review of the Commonwealth legislation, the SC recommended that subsidiary agencies be taken to relate to parent agencies. The particular terminology used would be different in NSW. A change along these lines would recognise in the PID Act that certain public authorities are considered part of other authorities for the purposes of meeting any obligations set out in the Act, such as the reporting requirements or establishing a PID policy.

Similar provisions already exist:

- As prescribed by clause 6 of schedule 4 to the *Government Information (Public Access) Act 2009* (GIPA Act), regulations may declare that a specified agency is not to be regarded as a separate agency, but instead is to be regarded (for the purposes of the Act) as part of another specified agency. Schedule 3 to the Government Information (Public Access) Regulation 2009 contains a list of agencies that are considered to be part of other agencies for the purpose of the GIPA Act.
- Section 4B of the *Privacy and Personal Information Protection Act 1998* (PPIP Act) enables the regulations to declare that a public sector agency is to be regarded as being part of another public sector agency for the purposes of the Act. It also enables the regulations to declare that a part of a public sector agency is to be regarded as being a separate public sector agency from the public sector agency of which it forms part for the purposes of the Act.

Further, clause 2(4) of schedule 4 of the GIPA Act states:

> *An unincorporated body that is a board, council, committee, subcommittee or other body established or continued by or under the provisions of a legislative instrument for the purpose of assisting, or exercising functions connected with, an agency is not to be regarded as a separate public authority and instead is to be regarded as part of and included in the agency.*

An alternative approach that may be more flexible is for public authorities to notify the NSW Ombudsman of any such arrangements.

Local Aboriginal land councils

There are 120 Local Aboriginal Land Councils (LALCs) located across NSW. LALCs are independent of the NSW state government, however, they are deemed to be public authorities for the purposes of legislation relating to accountability. Under section 248(2) of the *Aboriginal Land Rights Act 1983* (ALR Act), each LALC is taken to be a public authority for the purposes of the *Ombudsman Act 1974*, the *Independent Commission Against Corruption Act 1988* (ICAC Act) and the GIPA Act. This means that certain investigating authorities,

[4] Department of Primary Industries 2014, 'Fast facts about Crown lands', accessed 20 July 2016: http://www.crownland.nsw.gov.au/crown_lands/comprehensive_review_of_nsw_crown_land_management/fast_facts.

including the ICAC and the NSW Ombudsman, have powers to investigate or require information from LALCs.

Despite the ALR Act clearly outlining that LALCs are public authorities for the purpose of accountability, in response to requests for PID statistical reports from the NSW Ombudsman, a number of chief executive officers have suggested that LALCs are not public authorities. One of the more common reasons for this misconception is because they are not state funded.

This perception would be put beyond doubt and the PID Act applied to LALCs, by altering the definition of a public authority in s.4 of the Act to specifically list LALCs alongside other public authorities.

Definition of public official

'Public official' is currently defined broadly in section 4A(1) of the PID Act as:

> *(a) An individual who is an employee of or otherwise in the service of a public authority...*

While examples of individuals who are captured in that definition are then set out in the section, the section also specifies that they are not intended to limit the broader definition. In 2010, the definition of a public official in s.4 of the PID Act was amended to clarify:

- that a member of Parliament (MP) was a public official, but not for the purposes of a disclosure made by the MP
- that it included an employee of the Legislative Council and Legislative Assembly
- that it included an individual engaged by a public authority under a contract to provide services to or on behalf of the public authority' ('independent contractors').

Ministers of Parliament

In its 2009 report, the ICAC Committee recommended that protection be available to parliamentary employees and volunteers under the PID Act because there is otherwise no statutory basis for the protection of disclosures about MPs to the NSW Ombudsman and the Audit Office.

In highlighting the importance of protecting public officials who may disclose wrongdoing by MPs, the case of Gillian Sneddon is noteworthy. Ms Sneddon was a staff member of former MP Milton Orkopoulos and made serious criminal allegations against him, of which he was convicted. In June 2011, she was awarded $438,613 in compensation following her treatment in the workplace after raising her concerns that resulted in a psychiatric injury.

Contractors

In response to a recommendation by the ICAC Committee following its review of protections for those who report wrongdoing, an amendment extended the operation of the PID Act and its protections to certain persons who are not public sector employees but are involved in the provision of public sector services under contract. Specifically, section 4A(1)(f) of the PID Act was amended to at the time read as follows:

> *...an individual who is engaged by a public authority under a contract to provide services to or on behalf of the public authority (referred to in this section as independent contractor to the public authority).*

There were, however, some doubts as to the precise coverage of the new definition, in particular whether it extended to an individual employed by an organisation that is contracted to provide services to or on behalf of the public authority. In order to address these concerns,

the SC sought advice from the Solicitor General on the application of the new provision. The SC subsequently recommended to the Premier that the definition be simplified and clarified to more unambiguously state those who are covered by it. The *Public Interest Disclosures Amendment Act 2013* extended the definition of a public official in section 4A to include:

> *(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.*

This subsequent amendment has been largely effective. However, determining whether or not a person falls within the definition of a public official requires consideration of the particular circumstances, including the specific terminology used in any contract. The following examples and case study show that this determination is not always clear:

- Non-government organisations (NGOs) are increasingly seen to be delivering what were once government services. An example of this is in the provision of social housing services by NGOs in the expanding community housing sector. Employees of NGOs granted funding by the Department of Family and Community Services, for example, are generally not captured by the definition of 'public official' as the funding agreements specifically provide that the NGOs are not providing services to or on behalf of the Department.
- Whereas section 4(1)(b) appears clear in providing that contractors engaged by a public authority are captured in the definition of public official, the position of subcontractors is not as clear. In audits of public authorities, the Ombudsman's office has reviewed matters where allegations of corrupt conduct were made about staff of companies that were subcontracted to provide services to a contractor to the public authority. It may be that such a person is unlikely to be considered a public official, yet subcontractors, much like head contractors, may engage in wrongdoing and equally are able to play an important role in reporting wrongdoing in the public interest.
- A query was raised during a training session run by the Ombudsman's office about an accounting officer in a contracted company who does not directly provide the services specified in the contract, but in preparing the invoice for the public authority adds additional hours of work performed. It is unclear whether their conduct would be considered that of a public official, despite it being in the public interest that it be disclosed.

Case study 1: Legal Aid panel lawyers

The *Legal Aid Commission Act 1979* sets out the principal functions of the Commission and the manner in which legal aid may be provided – including by arranging for the services of private legal practitioners to be made available. This is conducted by the Commission through panels of private legal practitioners ('panel lawyers'). Before legal aid work can be assigned, the panel lawyer is required to enter into a 'service provision agreement' with the Commission under the Legal Aid Commission Act.

During an audit of Legal Aid PID reports and policy and procedures for handling PIDs, the NSW Ombudsman considered whether Legal Aid panel lawyers may be public officials for the purposes of the PID Act.

The NSW Ombudsman noted that the service provision agreement appeared to be a vehicle by which the Commission's function under section 11(1)(a) of the Legal Aid Commission Act are performed. The service provision agreement (by its Recitals) is intended 'to make provision for the terms upon

which the Lawyer will provide legal services as a member of the Panel' and among other matters, regulates the acceptance of assignments to panel lawyers for the provision of legal services to legally aided clients.

The NSW Ombudsman noted that if the service provision agreement entered into between the Commission and the panel lawyer is a contract within the meaning of the PID Act, panel lawyers would be public officials for the purposes of the PID Act. This would mean that panel lawyers can make a PID under the PID Act and be able to claim the protections of the Act if they suffered reprisals as a result of reporting wrongdoing.

In response to the NSW Ombudsman, the Commission stated that the service provision agreement is not a contract to provide legal services to or on behalf of Legal Aid as defined under the PID Act. The Commission noted that under section 12(i) of the Legal Aid Commission Act, the Commission cannot interfere with the relationship between the private lawyer and the client, and that the private lawyer performing legal work for an individual is not performing a public function.

Volunteers

In its 2009 report, the JPC recommended that the NSW Ombudsman and the SC consider whether public sector volunteers should generally receive protection under the PID Act. At the time, the JPC reported that it did not receive adequate evidence to help it understand the number of volunteers there may be in the public sector and what practical difficulties there may be to extending the application of the PID Act to these volunteers. The JPC, however, acknowledged that volunteers can be in a good position to observe and report misconduct.

The Ombudsman's office examined the annual reports of public authorities to determine the extent of volunteers in the public sector in 2011. This research revealed that there were at least 88,000 volunteers across a variety of emergency services, arts, environment and health authorities. The Rural Fire Service, for example, has the largest volunteer base of all Australian public sector organisations, with 70,552 at the time.[5]

The SC then sought the views of the Solicitor General on the application of the PID Act to those volunteering with public authorities, particularly in those cases where they perform a statutory function. To put beyond doubt that certain people who volunteer with a public authority are deemed to be public officials, the SC recommended an amendment to the PID Act.

The Public Interest Disclosures Amendment Act 2013 included the following in the definition of a public official in section 4A:

> *(2) Without limiting subsection (1) and to avoid doubt, particular examples of public officials are as follows:*
>
> *(a) a volunteer rural fire fighter who is an officer or other member of a rural fire brigade under the Rural Fires Act 1997,*
>
> *(b) a volunteer officer or volunteer member of an SES unit (within the meaning of the State Emergency Service Act 1989),*
>
> *(c) an officer of the Royal Society for the Prevention of Cruelty to Animals, New South Wales who is an inspector under the Prevention of Cruelty to Animals Act 1979,*
>
> *(d) a person who is employed by a management company for a managed correctional centre (within the meaning of the Crimes (Administration of*

[5] Rural Fire Service, 2010, *Annual report 2009-2010*.

Sentences) Act 1999) to perform duties at the correctional centre and who is authorised under section 240 of that Act to perform those duties,

(e) an accredited certifier (within the meaning of the Environmental Planning and Assessment Act 1979).

Threshold test for protection

The 2010 amending Act changed the threshold test for disclosures from 'that shows or tends to show' to 'that the person making the disclosure honestly believes, on reasonable grounds, shows or tends to show' the relevant conduct. It appears that this partly objective (i.e. shows or tends to show) and partly subjective test (i.e. the belief of the reporter) has proved effective.

Options for consideration

Legislation in other jurisdictions contain alternative threshold tests for protection — meeting either an objective/subjective test or an objective test, i.e. either that the information in a disclosure 'tends to show' irrespective of the person's belief, or the person making the disclosure 'believes on reasonable grounds that the information tends to show', one or more instances of the relevant conduct.[6] This is also the approach the *Whistling While They Work* project recommended for best practice legislation.[7]

The benefit of such an approach is that it extends protection to public officials who disclose serious wrongdoing, even if they did not actually realise the nature or significance of what they were disclosing. Questions have been raised about whether a reporter needs to know that what they are alleging specifically constitutes corrupt conduct, for example, for their report to be considered a PID, or whether they simply need to believe it is wrong.

In reviewing the Commonwealth legislation, the SC stated: "...the current threshold tests for protection in NSW were introduced after careful consideration of the issue by Parliamentary committees and the Parliament, and after input from many of the relevant NSW authorities involved in investigating PIDs, and should not be changed in the absence of evidence that they are inadequate".[8]

Another risk to altering the threshold test to 'tends to show' is that it may capture disclosures by people merely reporting wrongdoing as part of their role in situations where they have not formed a belief that the wrongdoing occurred. An example of this is a manager who receives a report from a staff member and automatically refers it on to the appropriate area in the organisation for action. However, this would not be of concern if the administrative burdens around treating such reports by 'role reporters' were removed.[9]

Referred and misdirected disclosures

In 2010, a provision relating to 'referred' disclosures was amended to 'misdirected' disclosures (section 15). This had the effect of extending protection to disclosures that were made to the incorrect investigating authority, regardless of whether they were referred. This provision remains important, particularly given the overlapping jurisdictions of investigating

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[6] Section 9(1)(a), *Protected Disclosure Act 2012* (Vic); section 12(3), *Public Interest Disclosure Act 2010* (Qld); section 7(1)(a), *Public Interest Disclosure Act 2012* (ACT); section 26, *Public Interest Disclosure Act 2013* (Cth).

[7] Brown, AJ et al 2008, 'Best-practice whistleblowing legislation for the public sector: the key principles', *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp.283-284.

[8] SC 2014, *Review of the Commonwealth public interest disclosure legislation*, p.4.

[9] Refer to further discussion in section 'PIDs made in the course of day-to-day functions or under a statutory or other legal obligation' on p.25.

authorities and the limited understanding of public officials about which is the appropriate investigating authority to receive a disclosure.

Later in this paper, the restrictions in the PID Act in only allowing a PID to be made to the public authority to which it relates or to which the reporter belongs are discussed.[10] The structure of the public sector means it is not always apparent which authority this is. Further, there are a number of bodies that, although not investigating authorities under the PID Act, have a role in receiving allegations from public officials of another public authority about that authority. It may therefore be appropriate to extend the misdirected disclosure provision beyond investigating authorities to PIDs received by public authorities.

A further amendment to the provisions that allow for the referral of PIDs by a public official or investigating authority clarified that a PID remains protected after it is referred. While the intent of this amendment remains important, questions have arisen in its operation. Public and investigating authorities that have been referred matters have enquired about whether they need to continue to treat them as PIDs if their assessment of whether the report meets the criteria set out in the PID Act differs from that of the referring authority. For example, a report made to a Minister was referred by a public authority to another public authority under section 25 of the PID Act. The receiving authority assessed the report as not being a PID as it did not meet the limited circumstances where an MP can receive a PID.

While this example may be relatively straightforward, many decisions about whether a matter should be treated as a PID are subjective. There can be valid differences of opinion about whether certain conduct constitutes maladministration of a serious nature or sufficient information has been provided to meet the threshold test. One option is for the legislation to clarify that, when a disclosure is referred, the receiving authority can conduct its own assessment of whether to continue treating it as a PID. It can, however, be confusing for public officials who are told by one authority that their disclosure meets the threshold for a PID, when another then informs them they have a different view.

PID Steering Committee

Though the SC was established in legislation under section 6A of the PID Act in 2011, the Protected Disclosure Act Implementation Steering Committee had been in existence since July 1996. This former committee was an inter-departmental committee formed by the Premier to address specific needs identified in the ICAC research, *Monitoring the impact of the Protected Disclosures Act 1994 in NSW public sector agencies and local councils*. The former committee was responsible for functions including the provision of training, advice and assistance to public authorities, a role which now sits with the NSW Ombudsman. The former committee, as is the current SC, was active in instituting or supporting legislative changes.

Membership of the SC is now established under the PID Act. The SC is chaired by the NSW Ombudsman and initially included representatives of the Department of Premier and Cabinet, the Audit Office, the ICAC, the PIC, the OLG and the NSWPF. The Information Commissioner was included on the SC by legislative amendment in 2011 and the Public Service Commissioner in 2013.

The functions of the SC are set out in sections 6A, 31B and 32 of the PID Act:

[10] See section 'Who can receive a PID (and in what circumstances)?' – 'Within public authorities' on p.30.

- to provide advice to the Premier on the operation of the PID Act and recommend any necessary reform
- to receive, consider and provide advice to the Minister (the Premier) on any reports from the Ombudsman in relation to the Ombudsman's functions under the PID Act
- to review any Commonwealth legislation that is introduced in response to the 2009 report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* of the House of Representatives Standing Committee on Legal and Constitutional Affairs. This review was completed and a report released in January 2014[11]
- to consult with and provide advice to a Parliamentary Joint Committee to inform their review of the PID Act.

The SC generally meets three times per year either in person or on the papers whereby meetings are conducted electronically. Meetings are an opportunity for high level discussion of PID related matters, as senior officials are brought together to ventilate any issues.

The following matters are considered as standing items at meetings:

- *Possible legislative amendments:* The SC identified and made recommendations to the Premier in relation to the need for legislative amendments for matters which were causing difficulties for the operation of the PID legislation. The SC also identified possible legislative amendments to be considered as part of the broader statutory review of the PID Act.
- *The work of the PIDU:* A report is provided to members detailing current PIDU projects, the training and audit programs, forums, agency engagement and other public awareness activities. An overview of each PID reporting period is also provided to the SC which includes information about the number of PIDs reported and key trends.
- Roundtable updates about PID related activities.

Legislative amendments sought by the SC

The SC made submissions to the Premier recommending legislative amendments to address issues in the PID Act including the following which have been implemented:

- Specifying the reporting requirements in the Public Interest Disclosures Regulation 2011 (PID Regulation) to enable more meaningful oversight of whether the PID Act is achieving its purpose of encouraging and facilitating reporting of wrongdoing.
- Extending the time period for the prosecution of matters under the PID Act.
- Providing clarity around whether the PID Act covers contractors and volunteers as public officials.
- Removal of the requirement that a PID must be made voluntarily.
- Providing clarity around public officials with reporting responsibilities as a part of their day to day core role and responsibilities for the purposes of six-monthly and annual reporting.
- Including the Public Service Commissioner as a member of the SC.
- Changing the PID Act to allow some information sharing between investigating authorities.
- Amending the PID Act to exempt certain public authorities for reporting purposes.

[11] Available on the NSW Ombudsman's website: http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/15195/Review-of-the-Commonwealth-public-interest-disclosure-legislation.pdf.

The SC also recommended amending the PID Regulation to confer a dispute resolution function on the Ombudsman to give effect to section 26B of the PID Act.

Issues considered by the SC during the 2015–2016 financial year

- The Information Commissioner's development of PID guidance material.
- Outcomes from the Ombudsman's office's audit of allegations of reprisal across the NSW public sector.
- Implications of the decision in relation to the unsuccessful prosecution under the PID Act of Murray Kear, former Commissioner of the NSW State Emergency Service (SES).
- Consideration of the Law Enforcement Conduct Commission Bill 2016 in relation to consequences for the PID Act.
- Approval of the SC Annual Report 2014–2015.[12]

Issues considered by the SC during the 2014–2015 financial year

- Ways in which the 20th anniversary of the PID legislation could be promoted. For example, the OLG issued a Circular to all General Managers in support of the PID Act and reminding officers of their obligations under the legislation.
- Possible further amendments to the PID Act.
- Approval of the SC Annual Report 2013–2014.[13]

Issues considered by the SC during the 2013–2014 financial year

- Review of the Commonwealth PID legislation.
- Clarification of reporting categories listed in amended PID Regulation.
- Providing copies of de-identified PID audit reports to the OLG where the audit related to a council.
- Conciliating disputes arising out of the making of a PID.
- Clarifying the definition of a public authority in light of amendments to the *Government Sector Employment Act 2013* in relation to separate public authorities and reporting requirements under the PID Act.
- Approval of the SC Annual Report 2012–2013.[14]

Issues considered by the SC during the 2012–2013 financial year

- Clarifying the definition of a public authority for reporting purposes.
- Status of proposed legislative amendments and comment on the draft amendment Bill.
- Expanding protection against reprisals in the PID Act to those investigating disclosures.
- Approval of the SC Annual Report 2011–2012.[15]

Issues considered by the SC during the 2011–2012 financial year

- Drafting and adopting the SC's terms of reference.[16]
- Possible additional members of the SC.
- PID reporting regulations including consideration of the information required to be reported to the Ombudsman under the PID Act in relation to PIDs. It was recognised

[12] Provided to the Premier for tabling in Parliament and attached to this paper.
[13] Provided to the Premier for tabling in Parliament and attached to this paper.
[14] Available on the NSW Ombudsman's website: http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0019/15184/Public-Interest-Disclosures-Steering-Committee-Annual-Report-2012-13.pdf.
[15] Available on the NSW Ombudsman's website: http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/8805/Public-Interest-Disclosure-Steering-Committee-2011-2012.pdf.
[16] Available on the NSW Ombudsman's website: http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0005/8429/terms-of-reference-for-the-Public-Interest-Disclosures-Steering-Committee-March-2015.pdf.

that time was needed by public authorities to establish data collection and reporting systems and that reporting would bring additional work to public authorities. The SC agreed to adopt a stage approach to reporting by public authorities with the first stage based on the categories as identified during the review of the PID legislation. The second stage required more comprehensive reporting on PIDs. The SC wrote to the Premier with recommendations for the drafting of the PID Regulation in relation to reporting.

- The NSW Ombudsman's model internal reporting policy.
- Advice from the Solicitor General in relation to the application of the PID Act to contractors and volunteers.

Options for consideration

Under section 6A(6) of the PID Act, the Ombudsman (as chairperson of the SC) is required to prepare an annual report of the SC's activities and any recommendations made to the Minister during the financial year. Under section 6B(3) of the PID Act, the Ombudsman is required to prepare and provide a report to Parliament on its oversight role and functions under the Act.

A summary of the SC's annual report is included in the NSW Ombudsman's oversight of the PID Act annual report and the two reports are cross-referenced. To simplify these reporting requirements and avoid any duplication, an option may be to amend the legislation providing for inclusion of the SC's activities and any recommendations made to the Minister as part of the NSW Ombudsman's oversight of the PID Act annual report.

Oversight of Act by NSW Ombudsman

As per section 6B, the NSW Ombudsman's functions in connection with the operation of the PID Act are:

- to promote public awareness and understanding of the PID Act and to promote the object of the Act
- to provide information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to the PID Act
- to issue guidelines and other publications for the assistance of public authorities and investigating authorities in connection with their functions under the PID Act and public officials about the protections afforded under the Act
- to audit, monitor and provide reports to Parliament on the exercise of functions under the PID Act and compliance with the Act by public authorities
- to provide reports and recommendations to the Minister about proposals for legislative and administrative changes to further the object of the PID Act.

Appendix 1 provides a summary of the work of the NSW Ombudsman's PID Unit over the five year period 1 July 2011 to 30 June 2016. The NSW Ombudsman decided to meet its obligation to provide monitoring reports, auditing reports and a report on its activities in a single annual report on the oversight of the PID Act. These reports therefore go beyond reporting on the activities of the Ombudsman's office, to examine the implementation of the PID Act across the public sector.[17]

Section 6C of the PID Act allows the NSW Ombudsman to require information and documents for the purposes of an audit. This provision has proved effective in response to

[17] Available on the NSW Ombudsman's website: http://www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/public-interest-disclosures.

concerns raised by a few public authorities that they would be breaching confidentiality or waiving legal professional privilege by providing such information.

Options for consideration

Section 26B provides for the Ombudsman's role in the resolution of disputes arising as a result of a public official making a PID. While the SC has reviewed a draft Regulation making provision for this function, it is yet to be introduced in Parliament. For the sake of simplicity, it may be preferable for this function to be placed in section 6B of the PID Act, which outlines the Ombudsman's oversight functions under the legislation. Any such provision could also be extended to the resolution of disputes arising as a result of a public official purporting to make a PID.[18]

In other jurisdictions, public authorities are required to forward all possible disclosures to the relevant PID oversight agency, which then makes a determination on whether the matter is a PID.[19] There are benefits of such an approach, including that:

- in performing such a clearinghouse role, the oversight agency has visibility over all PIDs made and can intervene in matters where appropriate
- it would provide certainty to both reporters and public authorities in relation to when the PID Act applies.

In the NSW context, however, the majority of PIDs concern corrupt conduct and are therefore already subject to notification and monitoring by the ICAC or the PIC. Any duplication of roles and functions should be avoided, particularly from the point of view of reducing the administrative burden on public authorities.

Obligations on public authorities

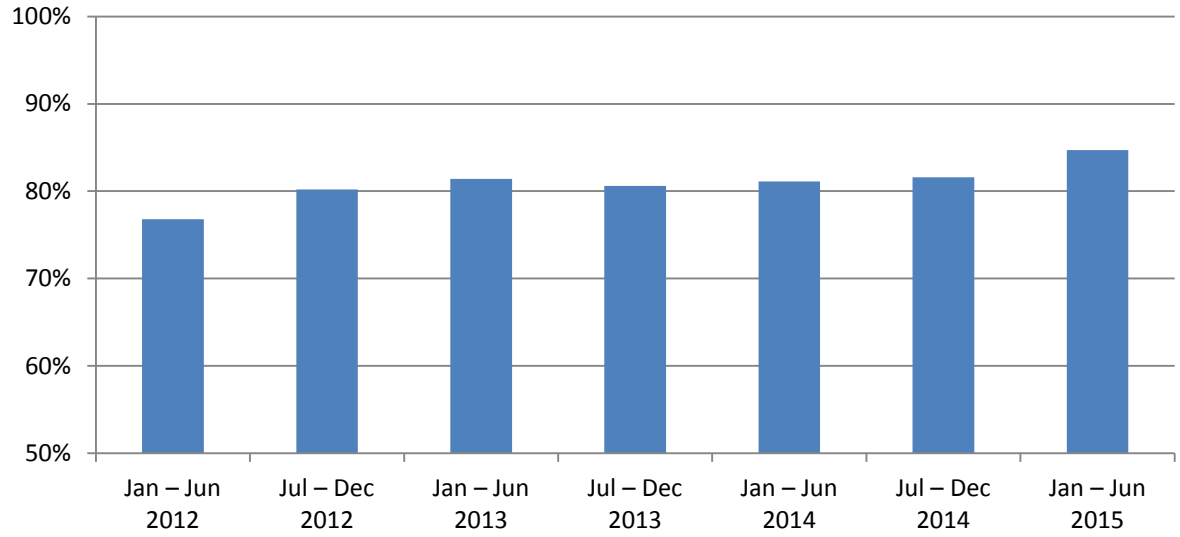
Establishing a policy

An internal reporting policy is an important starting point for public authorities to clearly demonstrate their commitment to supporting the reporting of wrongdoing by staff and properly handling such matters. The 2010 amendments required public authorities to have a policy that provides for its procedures for receiving, assessing and dealing with public interest disclosures (section 6D). They must have regard to (but are not bound by) any NSW Ombudsman guidelines and model policy in formulating such a policy.[20]

In their six-monthly reports to the NSW Ombudsman, public authorities are required to indicate whether they have an internal reporting policy. As shown in the figure below, there has been an increase in the proportion indicating they have an internal reporting policy, from 77% in the first reporting period (January to June 2012) to 85% in the January to June 2015 period.

[18] See section 'Misuse of the PID Act' on p.45 for an example of such a dispute resolution attempted by the Ombudsman's office.
[19] *Protected Disclosure Act 2012* (Vic); *Public Interest Disclosures Act 2002* (Tas).
[20] The relevant publications are *Guideline A2: Internal reporting policy and procedures*, *Model internal reporting policy for state government*, *Model internal reporting policy for local government* and *Model internal reporting policy for local Aboriginal land councils*.

Figure 1. Proportion of public authorities that reported having an internal reporting policy over time



The Ombudsman's office routinely follows-up with those authorities that indicate they do not have a policy by emailing them a copy of the relevant model internal reporting policy for their sector and offering assistance. Many LALCs in particular indicate they do not have an internal reporting policy or have not raised staff awareness — 49% and 38% respectively in the January to June 2015 period. To assist these authorities, the Ombudsman's office developed a model internal reporting policy specifically for LALCs that they can easily adapt and adopt.

In 2013, the Ombudsman's office asked public authorities to upload a copy of their PID policies in response to a sector-wide survey. Each of the 106 policies provided was assessed against specific requirements in the PID Act and the model internal reporting policies. It was pleasing to find that almost all clearly had regard to the model internal reporting policies. Where a small number of authorities did not fully comply with the technical requirements of the PID Act, it was generally because they had not revised their policy since the 2010 amendments to the Act.

Option for consideration

One issue of concern is that only one in five public authorities indicated in their six-monthly reports to the NSW Ombudsman that they have a link to their internal reporting policy on their website. While many more make their policy available on their intranet, it is not simply staff members who can make a PID to a public authority. Contractors and public officials who do not belong to a public authority also need to be provided with accessible information about how and to whom they can make a PID about the staff of the authority. It is also possible that public officials currently working in an authority will wish to access PID information away from their workplace, because of fear or discovery or reprisal.

The Information Commissioner has recently advised that an authority's internal reporting policy is not a policy document required to be made available under the GIPA Act. This is because section 23 of the GIPA Act defines policy documents as those used by the agency where members of the public are or may become entitled, liable or affected, while the PID Act is specific to public officials rather than members of the public.

One option is for the PID Act to require that public authorities publish their PID policy on their website. The risk is that this may increase the number of people attempting to make a disclosure when they are not entitled to do so.

Reporting requirements

One of the difficulties in evaluating the effectiveness of the PID system in NSW previously has been the lack of information about its implementation. This information is vital to ensure the objects of the legislation are being achieved in practice.

In its final report, the ICAC Committee recommended introducing statutory reporting requirements for public authorities to obtain information in relation to disclosures being made in the public sector.

The 2010 amendment initially only provided for public authorities to include information about PIDs in their annual report under section 31 of the PID Act. It was subsequently realised that there was a need to provide information directly to the NSW Ombudsman for more timely monitoring.

In July 2011, the Ombudsman's office issued a consultation paper to seek the views of public authorities on the reporting requirements. In recognition that any new reporting requirement would have resourcing implications for public authorities and in order to allow authorities the time needed to develop effective and accurate reporting systems, the consultation paper recommend a staged approach to the introduction of reporting requirements.

Following this, the SC considered what information public authorities should be required to provide and made a recommendation to the Premier that resulted in the introduction of the PID Regulation. As a result, from 1 January 2012, public authorities have been required to collect and report the following statistical information in relation to their obligations under the PID Act in their annual report and six-monthly reports to the NSW Ombudsman:

a. the number of public officials who have made a public interest disclosure to the public authority,

b.the number of public interest disclosures received by the public authority in total and the number of public interest disclosures received by the public authority relating to each of the following:

- *i. corrupt conduct,*
- *ii. maladministration,*
- *iii. serious and substantial waste of public money or local government money (as appropriate),*
- *iv. government information contraventions,*
- *v. local government pecuniary interest contraventions,*

c. the number of public interest disclosures finalised by the public authority,

d. whether the public authority has a public interest disclosures policy in place,

e. what action the head of the public authority has taken to ensure that his or her staff awareness responsibilities under section 6E(1)(b) of the Act have been met.

The Ombudsman's office developed the PID online reporting tool to allow public authorities to quickly and easily provide information every six months. It allows one registered user in each public authority to login securely; submit a report; and view, update and print a PDF file of the statistical information provided.

As noted below, the SC subsequently recommended that amendments be made to the PID Regulation to provide for the separate reporting of PIDs made:

- PIDs made by public officials in performing their day to day functions as such public officials
- PIDs made under a statutory or other legal obligation
- all other PIDs.

Appendix 2 provides a summary of the information provided by public authorities in their six-monthly reports to the NSW Ombudsman.

Essentially, it provides high level information about the number of PIDs made in NSW each year, which are included in the Ombudsman's office's oversight of the PID Act annual reports. It also allows consideration of:

- the number of PIDs received given the number of staff in an authority — to identify authorities that are receiving a high or low number of PIDs to inform the Ombudsman's office audit program
- whether the number of PIDs received by a public authority changes over reporting periods
- which public authorities do not have an internal reporting policy or have not conducted staff awareness — the Ombudsman's office provides these authorities with either a copy of the relevant model internal reporting policy or let them know about the training provided.

Options for consideration

Approximately 80% of public authorities do not report receiving PIDs in any given period. Small public authorities, including LALCs, that six-monthly reporting is onerous. An option is to change reporting to the NSW Ombudsman from a six-monthly to an annual basis. This suggestion received wide support from public authorities in the PID Unit's consultations.

The feedback from public authorities also supported a move to capture additional information, particularly in relation to the outcomes of PIDs. Presently, it is unknown how many PIDs are substantiated or result in improvements to organisations. Effective monitoring of the system depends on this type of information being available.

One option is to move to the second phase of reporting, as outlined in the Ombudsman's office's 2011 consultation paper. This model could require public authorities to provide information on every PID received, such as:

- whether the PID was made directly to or referred to the public authority
- the categories of conduct alleged
- what action was taken in response to the PID
- whether the allegations were wholly or partially substantiated
- whether the PID resulted in systemic or organisational changes or improvements
- whether the reporter made allegations of detrimental action in reprisal.

During consultations with the Ombudsman's PID Unit, authorities questioned the need to provide information every six months about whether they had a PID policy. However, in the most recent reporting period, 15% of authorities, many of whom are LALCs, indicated they do not have such a policy. To enable monitoring of this, public authorities could be required to notify the NSW Ombudsman before adopting or amending their PID policy or

procedures.[21] This would enable more effective monitoring of the number of officers nominated to receive disclosures and whether policies are up-to-date, and could inform the Ombudsman's office's provision of training and audit program.

If changes to the reporting requirements result in public authorities only being required to report annually to the NSW Ombudsman, consideration then needs to be given to the value of requiring public authorities to include information about PIDs in their annual report. An audit conducted by the Ombudsman's office analysed the extent to which public authorities complied with section 31 for three financial years (2014–2015, 2013–2014 and 2012–2013). This showed that there has been a steady decline in the number of annual reports forwarded to the NSW Ombudsman. In 2012–2013 46 councils and 20 state government agencies provided reports and in 2014–2015 22 councils and 11 state government agencies provided reports. This is a low proportion of the total number of public authorities in NSW (approximately 450).

To ensure the same Parliamentary oversight, an alternative option is that the NSW Ombudsman includes the detailed information provided by public authorities to them in the oversight of the PID Act annual report that is required to be tabled. This would also ensure that information about PIDs dealt with by public authorities that are not required to produce an annual report, such as LALCs, is publicly available and tabled in Parliament.

If this option is not adopted, the problems experienced by local government in meeting the annual reporting requirements set out in the PID Act should be addressed. Section 31 is based on the annual reporting requirements of state government agencies and is in many ways inconsistent with the annual reporting requirements for local government set out in section 428 of the *Local Government Act 1993* (LG Act). This has led to many councils submitting a separate annual report specific to PIDs to the NSW Ombudsman and the Minister in order to meet the requirements set out in the PID Act. This practice imposes an additional regulatory burden on councils that appears to be of no value and runs counter to the intention that the information be publicly available.

This issue was recently canvassed in the Independent Pricing and Regulatory Tribunal's review of the regulatory burden on local government.[22] The Ombudsman's office submitted at that time that section 31 of the PID Act be amended in the following ways so as to reduce the compliance burden:

- require the information to be included in council's annual report under the LG Act
- extend the timeframe in which the annual report should be provided from four to five months to be consistent with the timeframe provided in the LG Act
- remove the requirement for the Minister to table the report in each House of Parliament as the LG Act already requires that the report be publicly available on council's website
- remove the requirement for public authorities to submit a copy of the annual report to the NSW Ombudsman.

[21] See section 22 of the *Government Information (Public Access) Act* for a similar requirement on agencies in relation to agency information guides.
[22] Independent Pricing and Regulatory Tribunal 2016, *Review of reporting and compliance burdens on local government – Draft report*, pp.123-125.

Confidentiality

In relation to confidentiality, the 2010 amending Act introduced one more exception to the general principle that confidentiality should be maintained, being where it is generally known that the PID has been made because the reporter has voluntarily identified themselves. This amendment was important in allowing public authorities to proactively manage the workplace in situations where the reporter is breaching confidentiality.[23]

Strengthening the protections

Taking reprisal action constitutes misconduct

The ICAC Committee recommended that the PID Act be amended to include provisions making it clear that taking detrimental action against a public official in reprisal for making a PID is misconduct as well as a criminal offence. This change recognised that public authorities have a responsibility to take action internally in relation to detrimental action. The Committee noted that the criminal offence provisions have rarely been used and there have been no successful criminal prosecutions under the PID Act. It was thought that the lower standard of proof for proving misconduct — i.e. on the balance of probabilities as opposed to the standard of proof for criminal offences — might facilitate taking action against individuals that have engaged in reprisals.

As public authorities are not obliged to advise the NSW Ombudsman of instances of reprisal and the outcome of their handling of these cases, it is difficult to identify if the disciplinary provisions of the PID Act have been used since they were introduced.

In 2015 the Ombudsman's office conducted an audit of the handling of allegations of reprisal across the NSW public sector ('reprisal audit'). The public authorities audited only identified 18 cases of alleged reprisal over a two year period from 1 January 2012. The Ombudsman's office reviewed those cases and found that public authorities were unlikely to take disciplinary action in response to allegations of reprisals. Of the cases reviewed, only six were investigated by the public authority or an oversight body. In most cases the decision not to investigate was appropriate for a variety of reasons. Of the cases that were investigated only two led to disciplinary action being taken. In the other cases the responses included:

- facilitated mediation
- continued monitoring of the situation by the relevant senior manager and sending warning letters to the subject officer reminding them of the provisions of section 20 of the PID Act
- no further action as no evidence of reprisals.

Options for consideration

Maintaining the provision

It is clear that public authorities do not always take disciplinary action in the context of allegations of reprisal. This can be for various reasons:

- there is no substance to the allegations
- the nature of reprisal means it is difficult to gather evidence to substantiate the allegations
- an investigation that leads to disciplinary outcomes is not necessarily appropriate in circumstances where the parties need to continue to work together.

[23] See further discussion below in 'Maintaining confidentiality' on p.42 and 'Responding to the conduct of reporters and others involved in the reporting process' on p.45.

It is clear, however, that there are some cases where disciplinary action may be appropriate to send a strong message to the subject officer and others in the organisation that reprisals will not be tolerated.

Obligation to notify the Ombudsman of the receipt of an allegation of reprisal

Observations in relation to this aspect of the reprisal provisions have been limited due to the low numbers of cases of reprisal that were reported to the NSW Ombudsman for the purposes of the audit. This may be because few instances of reprisal occurred, however it is likely that more cases occurred but were not identified or recorded appropriately.

Greater insight into the working of this and other aspects of the reprisals provisions could be provided if public authorities were required to notify the NSW Ombudsman of allegations of reprisal as soon as such allegations are made or reprisal action identified. This would enable timely advice and assistance to be provided to the public authority in relation to the PID matters that are most high-risk and resource intensive. There was widespread support for this suggestion at the practitioners' forums that were held as part of the PID Unit's consultation process.

Compensation for reprisals

In 2010 the PID Act was amended to provide that reporters have the right to seek damages if they have suffered loss as a result of detrimental action taken in reprisal. The provision expressly recognises that reporters have a right to remedies that will provide restitution to them for the losses that they have suffered as a result of coming forward. All Australian jurisdictions besides South Australia have similar provisions in their PID legislation. In the Commonwealth, in addition to the right to compensation, the legislation provides that Part 3.1 of the *Fair Work Act 2009* (Cth) applies to the making of PIDs if a public official is an employee.[24]

There have been no reported cases of action for damages in NSW. This is not surprising given the low numbers of reported cases of reprisals as evidenced by the Ombudsman's office's reprisal audit. In the Australian Capital Territory, there was an unsuccessful claim for damages arising from the making of a report.[25] The case was dismissed as the report did not meet the criteria to be a PID.

Given that the provisions have not been used in NSW it is difficult to assess their effectiveness. Nevertheless the provisions act as a deterrent and are considered to be a key component of best practice PID legislation.

Options to improve the provisions

Vicarious liability

The section of the Commonwealth legislation dealing with the payment of compensation includes provision for employers to be held jointly and severally liable to pay compensation in certain circumstances.[26] In Queensland similar provisions exist, following a decision by the Queensland Court of Appeal in *Howard v State of Queensland* that found the right to claim compensation under section 43 of the then *Whistleblower Protection Act 1994* (Qld) did not extend to the reporter's employer to make them vicariously liable for the detriment suffered.[27]

[24] Sections 22–22A, *Public Interest Disclosure Act 2013* (Cth).
[25] *Berry v Ryan* [2001] ACTSC 11.
[26] Section 14, *Public Interest Disclosure Act 2013* (Cth).
[27] *Howard v State of Queensland* [2000] QCA 223.

There is no equivalent provision in the NSW Act. Including a provision expanding liability to employers in relation to compensation may reinforce the importance of effectively preventing or minimising reprisal and detrimental action for the authority concerned.

Costs

Participants at training sessions conducted by the Ombudsman's office have raised concerns 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. This supports the SC's recommendation 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.[28]

Injunctions to prevent reprisal

In its review of the *Protected Disclosures Act 1994* (PD Act), the ICAC Committee found that there was support for including a provision to provide for injunctive relief to restrain detrimental action occurring prior to investigation. At that time similar provisions existed in the ACT and Queensland. Similar provisions now exist in all relevant jurisdictions except for South Australia. The provisions were included to act as a deterrent and to limit or prevent the damage caused by reprisals.

In NSW the provision has been used on two occasions:

- In *Cessnock City Council v Rush [2012] NSWLEC 178.* On 20 March 2012 the Council commenced proceedings in the Supreme Court to restrain the councillors from taking action to terminate the employment of the general manager on the grounds that this would constitute detrimental action. An interlocutory injunction was granted by the Supreme Court on 21 March 2012 restraining the councillors from taking action to dismiss the general manager.
- In *Ryde City Council v Petch; ICAC v Ryde City Council [2012] NSWSC 1246* the Mayor sought an injunction to restrain the councillors from implementing a decision to terminate the general manager's employment contract until after an ICAC investigation was concluded. Following this a number of councillors, including the Mayor were found to have engaged in corrupt conduct by the ICAC.

In the same year, the general manager of Auburn Council advised councillors that he would be seeking an injunction under the PID Act if they continued to push for his sacking.

In the cases above the injunction provision was utilised to prevent the termination of employment of the general manager, following reports of corrupt conduct. The deterrent effect of this provision has been demonstrated in the case of Auburn Council.

[28] SC 2014, *Review of the Commonwealth public interest disclosure legislation*, p.10.

Part 2: The structures in place to support the operation of the PID scheme

This section of the paper outlines various issues that have arisen with the implementation of the PID Act.

Who can make a PID?

Further to the discussion above around contractors and volunteers, further issues have arisen concerning the definition of a public official in section 4A of the PID Act.

'Deeming' provision

The SC has worked on the basis that the current approach in the PID Act to provide protection to those connected with the public sector is appropriate. This is for two reasons. 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 disciplinary provisions under section 20 would not assist members of the public as there is no employment relationship that could be jeopardised.

However, as some of the amendments above illustrate, difficulties can arise in defining who such insiders are. One option for addressing this issue is to include a similar provision to section 70 of the Commonwealth PID Act whereby a person can be deemed a public official:

> *(1) If:*
>
> *(a) an authorised officer of an agency believes, on reasonable grounds, that an individual has information that concerns disclosable conduct; and*
>
> *(b) apart from this subsection, the individual was not a public official when the individual obtained the information; and*
>
> *(c) the individual has disclosed, or proposes to disclose, the information to the authorised officer;*
>
> *the authorised officer may, by written notice given to the individual, determine that this Act has effect, and is taken always to have had effect, in relation to the disclosure of the information by the individual, as if the individual had been a public official when the person obtained the information.*
>
> *(2) The authorised officer may make the determination:*
>
> *(a) on a request being made to the authorised officer by the individual; or*
>
> *(b) on the authorised officer's own initiative.*

Such a provision would be a safeguard to provide protection to those who report wrongdoing and require protection but do not otherwise fall within the definition of public official. It may remove the need for further amendment to the definition of a public official. This suggestion received support from public authorities during consultation.

In 2014–2015, 18% of PIDs in the Commonwealth were made by persons deemed to be a public official. A significant proportion of these are likely to have been anonymous disclosures and the deeming decision based on the fact that the person receiving the disclosure could not confirm whether the reporter was a public official.[29] The Commonwealth Ombudsman has advised that there have been few queries from agencies about how this provision should operate. In their guide for agencies, they provide the following advice:

[29] Commonwealth Ombudsman 2015, *Annual report 2014-2015*, p.69.

An authorised officer might consider it appropriate to deem an individual to be a public official if the individual is not a public official, but nevertheless has 'inside information' about the agency's wrongdoing. Examples might include:

- *a current or former volunteer with an agency*
- *a member of an advisory body to a Commonwealth agency (where the members terms of engagement do not meet the definition of a public official)*
- *an employee of an organisation that receives grant funding from the Australian Government, or*
- *state and territory department officials who work alongside Commonwealth officials.*[30]

The Ombudsman's office has received enquiries from both Commonwealth public officials and NSW public authorities in relation to this last point. In one matter, a Commonwealth public official made a report to a NSW public authority about wrongdoing by one of their staff members. There was a significant risk of reprisal against the reporter and the public authority was concerned that legislative protection, in particular the requirement to keep the reporter's identity confidential, did not apply.

Some of the risks in including such a provision include:

- reporters may be unaware prior to making a disclosure whether or not the relevant authority would deem them to be a public official
- it may increase the expectations of members of the public that the PID Act could and should apply to them, and subsequently increase the workload of public authorities in assessing and responding to such requests.

Former public officials

In reviewing the Commonwealth legislation, the SC recommended that the definition of a public official be extended to former public officials, but only in relation to matters they became aware of because of their former capacity as a public official. This was based on the belief that the former public officials may have valuable information to provide about serious wrongdoing and may still face detrimental action in reprisal.

The Ombudsman's office is aware of situations in which former public officials have sought protection under the PID Act. In one example, a contractor raised concerns about serious and substantial waste with their project manager who was not nominated to receive disclosures. His contract was terminated a week later. Only then did he seek to contact the Ombudsman's office and the relevant authority about possible reprisal.

However, the Commonwealth Ombudsman has reported on the unintended consequences of former public officials being able to make PIDs in their jurisdiction. In one case, a former public official, who was also a blogger, was encouraging public officials to inform him of wrongdoing so that he could make disclosures on their behalf.[31] A further issue is where former public officials purport to make a PID relating to information they have obtained in their personal capacity, for example, as a client of Centrelink or the Department of Veterans' Affairs.[32]

[30] Commonwealth Ombudsman 2016, *Agency guide to the Public Interest Disclosure Act 2013*, p.4.
[31] Commonwealth Ombudsman 2014, *Annual report 2013-2014*, p.81.
[32] Commonwealth Ombudsman 2015, *Annual report 2014-2015*, p.82.

There can be additional risks in bringing former public officials within the scope of the PID Act:

- while the legal forms of protection may be relevant (i.e. in terms of defamation proceedings), there is limited practical protection that public authorities could proactively provide
- it could be difficult for public authorities to identify and verify that a reporter used to be a public official
- it could increase the number of PIDs, and the associated workload on public authorities.[33]

Therefore, it may be that the provision whereby a person can be deemed to be a public official would sufficiently extend protection to former public officials where this is warranted.

PIDs made in the course of day-to-day functions or under a statutory or other legal obligation

In 2012, the Ombudsman's office issued a consultation paper in relation to disclosures made by role reporters, that is, public officials making reports of wrongdoing as part of their day to day functions, including managers, investigators and internal auditors. This was in response to enquiries from public authorities about whether the PID Act would apply to such reports. The SC therefore sought views from public authorities regarding how they would deal with a report of wrongdoing from these staff and whether they needed or wanted the protections of the PID Act.

One concern that public authorities identified was that they would face an additional administrative burden if they needed to fulfil the PID Act requirements in relation to all reports of wrongdoing made by role reporters. Another issue related to the counting of those reports as PIDs and how it would be possible to distinguish between reports made by public officials who would not have otherwise made the reports and those who did so as part of their ordinary responsibilities.

Following the receipt of responses to the consultation paper the SC decided that it would recommend changes to the PID Act including:

- the repeal of section 9 requiring disclosures to be voluntary
- consideration of methods to reduce the administrative requirements relating to reports by role reporters.

Section 9 of the PID Act was subsequently repealed. In addition amendments were made to the PID Regulation to provide for the separate reporting of PIDs made:

- by public officials in performing their day to day functions as such public officials
- under a statutory or other legal obligation.

The PID Act was also amended to make it clear that the obligation in an authority's internal reporting policy to provide a copy of the policy and acknowledgement letter to reporters does not apply to these categories of reporters.

Issues identified in considering reports made by role reporters as PIDs

Since these changes were made, a number of examples of what have come to be known as 'technical PIDs' have been drawn to the attention of the Ombudsman's PID Unit. In the

[33] In 2014-2015, 8% of PIDs in the Commonwealth were made by former public officials. See Commonwealth Ombudsman 2015, *Annual report 2014-2015*, p.69.

majority of these cases the benefit in assessing and counting these reports as PIDs is not clear. Some examples of matters that have been assessed as 'technical PIDs' by public authorities include:

- supervisors or managers forwarding or referring issues that have been reported to them to the appropriate area for consideration and action
- investigators referring information that they have obtained during the course of preliminary enquiries to internal corruption prevention units for the purpose of making a section 11 notification to the ICAC
- reports made by the NSWPF to a public authority advising them that a public official has engaged in wrongdoing (i.e. criminal activity)
- internal auditors or corruption prevention managers identifying possible indicators of corrupt conduct such as duplicate payments to suppliers and invoices that look suspicious.

Despite this, there are some cases where role reporters may seek to rely upon the protections in the PID Act. In the responses to the initial consultation paper there was overall support from public authorities for maintaining the protections in the PID Act for some role reporters. Internal auditors, in particular, expressed this view.

One recent example is that of Ms Tara McCarthy, the former SES Deputy Commissioner, who reported wrongdoing that she uncovered in the course of her everyday responsibilities to the Commissioner and then was dismissed from her job. Other examples include:

- an internal auditor who was moved aside from his position as a manager after presenting a report making findings of corrupt conduct against a member of staff
- a manager who made a PID to the ICAC after his area conducted an investigation into fraud at a council and thereafter said he was subjected to detrimental action in reprisal
- a head of finance who reported issues relating to fringe benefits tax infringements by her predecessor and others and subsequently alleged reprisal.

Options for consideration

One option to address the difficulties outlined above is to include provision 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 a role reporter suffers detrimental action following making their report they are entitled to the protections of the Act against reprisals. They are also entitled to the other legal remedies provided in the Act.

One downside to this approach is that the role reporter may not know that they have made a PID, particularly in the absence of acknowledgement and assessment by the public authority concerned, and so may not be aware that they are eligible for the protections in the PID Act.

PIDs made by public officials in their private capacity

Only disclosures made by public officials are protected by the PID Act. A difficulty arises where there is no obvious connection between the reporter and the public authority or subject

of the disclosure. For example, should the protection of and obligations imposed by the legislation extend to public officials who make disclosures (which comply with the requirements of the Act) about such public officials as traffic police with whom they come into contact while driving their private vehicles or council staff who deal with their private development applications?

Cases have arisen where a person who happens to be a public official makes a report completely unconnected to their role or employment purporting that it is a PID. For example:

- Members of the public who claim to be public officials reading about certain claims made in the media and providing it to investigating authorities as evidence of corrupt conduct.
- A public authority received allegations about one of their employees via a hotline. The reporter happened to be an employee of a local health district and was therefore a public official, however she was making the allegations about her neighbour in her capacity as a member of the public.
- The Ombudsman's office has also received complaints from people who happen to be public officials who purport to be making PIDs. The allegations they raise, however, concern their private interests, for example about a dispute with their local council or a tribunal where they are pursuing a private matter.

Technically, these matters can meet the criteria set out in the PID Act, even if the person making the disclosure has no connection to a relevant public authority.[34] However, it is clearly not the intention of the Act to extend protection to disclosures by people of information or material of which they became aware or otherwise obtained other than by virtue of their capacity as public officials.

One option is to consider whether the protections in the PID Act should be limited to public officials who make disclosures in their capacity as public officials or who make disclosures of information or material of which they became aware or have obtained by virtue of the fact that they are public officials. Such a provision, however, would need to be carefully worded to ensure that it does not disallow protection for genuine reporters.

Protections for other public officials

In reviewing the Commonwealth legislation, the SC considered the legal protection of other people involved in the reporting process.[35] While acknowledging the need for people involved in investigations to be able to act appropriately without fear of consequences, the SC did not recommend equivalent provision in the NSW PID Act at that time as there was no evidence of this fear. They further noted that protection for witnesses could arise regardless of the source of information that triggered an investigation.

The Ombudsman's office has since fielded enquiries from public authorities seeking advice about whether witnesses interviewed as part of a workplace investigation who make disclosures of serious wrongdoing could be making PIDs. Technically, they could be if the person conducting the interview is nominated to receive disclosures. However, this poses an administrative burden on public authorities in terms of assessing whether the PID Act applies to all such statements and the subsequent obligations. It may be simpler for the legislation to

[34] It should be noted that all such matters received by the NSW Ombudsman were not assessed as PIDs because there was a lack of information/evidence to support the reporter's belief, on reasonable grounds, that the information showed or tended to show the alleged conduct.
[35] SC 2014, *Review of the Commonwealth public interest disclosure legislation*, p.9.

provide that, similar to role reporters, public officials who make a disclosure in the course of an ongoing investigation receive the legal protections of the Act while the other statutory obligations in relation to PIDs do not apply.

This is consistent with the protections provided in section 37 of Ombudsman Act to any person who assists the Ombudsman and the protections from liability under section 109 of the ICAC Act.

What can a PID be made about?

This section considers issues that have arisen as to whether the current categories of conduct in the PID Act are appropriate, by comparing the legislation to other jurisdictions. Feedback from public authorities about excluding particular conduct from the categories of conduct is also included.

In comparison to some jurisdictions where any breach of the code of conduct can be the subject of a PID, one of the benefits of the NSW PID Act is seen to be the requirement that the report must disclose conduct of a serious nature in the public interest. This high bar test reflects the significant legal protections in the PID Act.

Despite this, during consultations with the Ombudsman's office, public authorities mentioned that it is often difficult to assess what is 'serious' in relation to PIDs alleging maladministration. The Ombudsman's office provided advice on this issue at a practitioner forum on this topic as well as in *Guideline B2: What should be reported?*, but it is recognised that any such assessment remains subjective.

Danger or risk to public health, safety or the environment

The table in Appendix 3 sets out the substantive types of wrongdoing that can currently be the subject of PIDs. As it shows, NSW is the only jurisdiction in Australia to not provide protection for disclosures about danger or risk to public health, safety or the environment.

The Ombudsman's office consulted with five agencies with responsibilities under PID legislation in other jurisdictions that include these categories of conduct. Very low numbers of PIDs are reported under these categories, which may suggest that inclusion of these categories in NSW would not greatly expand the number of PIDs received by authorities. The benefit of including the categories would be to ensure that public officials are protected for raising matters that are perceived by the community as in the public interest. Some concerns were expressed by agencies regarding:

- lack of definitions which would assist in determining or quantifying key aspects such as 'risk' and 'danger'
- duplication with other legislation such as workplace health and safety
- difficulties where staff of the receiving authority are not content experts and are not appropriately qualified to understand/address such technical matters.

It may be considered most beneficial to give priority at this point in time to addressing fundamental/operational aspects of the PID Act, rather than expanding the legislation to include additional categories of conduct. Many disclosures relating to these matters may still be categorised as PIDs as the conduct may be captured under the broad scope of the definitions of maladministration in the PID Act and corrupt conduct in the ICAC Act.

An exception to this would be conduct such as that disclosed by head nurse Toni Hoffman about Dr Jayent Patel, a former surgeon of Bundaberg Base Hospital, who was accused of gross incompetence that led to the death of patients. This is not an isolated incident, as recent media reports of serious hospital errors in NSW Health have shown.[36] It is clearly in the public interest that such matters are disclosed; the question is whether bringing them into the scope of the PID Act would encourage their disclosure.

PID practitioners in health agencies have suggested to the Ombudsman's Office that there is quite a prescriptive system in place for managing complaints about clinicians, including the mandatory requirement that they be registered in NSW Health's Incident Information Management System (IIMS). These practitioners have also indicated that, as primarily internal audit specialists, they would not have the clinical knowledge to assess and deal with PIDs about public health and safety.

Given that the PID Act was drafted taking into account the specific jurisdiction and functions of various investigative agencies, one option worthy of consideration is the inclusion of the Health Care Complaints Commission (HCCC) as an investigating authority. Section 8(2)(a)-(c) of the *Health Care Complaints Act 1993* provides an indication of the type of serious wrongdoing that a disclosure to the HCCC could allege:

> *(a) raises a significant issue of public health or safety, or*
>
> *(b) raises a significant question regarding a health service that affects, or is likely to affect, the clinical management or care of an individual client, or*
>
> *(c) if substantiated, would:*
>
> *(i) provide grounds for disciplinary action against a health practitioner, or*
>
> *(ii) be found to involve gross negligence on the part of a health practitioner, or*
>
> *(iii) result in the health practitioner being found guilty of an offence under Division 1 or 3 of Part 7 of the Public Health Act 2010.*

Grievances

A common issue for public authorities is the number of reports claiming to be PIDs that concern grievances or matters personally affecting an individual that should be dealt with under other processes. While reports of wrongdoing in the public interest frequently also involve personal, employment and workplace grievances, a public interest matter could generally be distinguished if it appears that, once the personal interests in the subject matter are satisfied, there will remain some greater organisational issue or impact.

It would appear there is scope for strengthening the object of the PID Act to facilitate disclosures in the public interest by excluding matters which are not intended to fall within this object, such as grievances. The Northern Territory PID Act for example, excludes matters based solely or substantially on 'an employment related grievance (other than a grievance about an act of reprisal) or other personal grievance'.[37] This approach would appear to be preferable given that it would be difficult, if not impossible, to provide a public interest test or definition.

The Ombudsman's office received consistent and strong feedback from public authorities that grievance matters should be specifically excluded under the PID Act as they are not

[36] See, for example, Aubusson, K 2016, 'Do we need to tell patients: What the secret admission exposes about the NSW's hospital scandals', *Sydney Morning Herald*, 5 August 2016.
[37] Section 10(2)(b), *Public Interest Disclosure Act 2008* (NT).

disclosures in the public interest. The ability to refer to a specific exclusion in the PID Act would assist clear communications between public authorities and staff when giving reasons as to why a concern raised will not be treated as a PID.

Any legislative amendment in the PID Act would need to achieve a balance between excluding conduct which is not in the public interest while ensuring that reporters are not deterred from raising concerns. The PID guidelines emphasise the need for reports of wrongdoing to be seen as an ordinary, encouraged practice and ensuring that systems and procedures are in place for dealing with matters that are not PIDs including complaints and grievances.

Who can receive a PID (and in what circumstances)?

Within public authorities

One of the pitfalls for public officials wanting to make a disclosure is the possibility of not making it to the right person. Under the PID Act, protections will only apply if certain conditions are met, one being that the report is made to one of the people specifically authorised by the Act to receive them (such as the principal officer of a public authority, another officer of the authority nominated to receive them or a specified investigating authority). Another condition is that, if a PID is made to an officer in a public authority, the officer must be in the authority to which the reporter belongs or to which the wrongdoing relates.

The underlying issue is the PD Act 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. These clusters bring together a group of entities to allow similar and complementary government services to be coordinated more effectively within broad policy areas. While Schedule 1 of the Government Sector Employment Act 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.

Reporters are unlikely to be aware of these complexities. The consequence is that staff may unintentionally miss out on the protections of the PID Act if they make a disclosure to the wrong public authority or person. For example:

- One principal department that was audited by the Ombudsman's office had a hotline for reports of misconduct by officers of all agencies within its cluster. A report by a staff member of an agency about another staff member of that agency made to the hotline could therefore not be considered a PID as it was not made to the authority to which the reporter belonged or to which the wrongdoing related. In many cases these reports were made anonymously, so the principal department could not contact the reporter to advise them to make the report directly to the relevant agency in order to receive the protections provided by the PID Act.
- Staff from separate public authorities who work together in the one location or who perform functions for another public authority may come across wrongdoing by staff of another public authority. In the transition to Service NSW, it was unclear whether Roads and Maritime Service (RMS) employees were considered public officials of RMS or Service NSW. Further, Service NSW is entering into an arrangement with

local government staff in regional locations to act as agents for Service NSW on a fee for service basis.

While section 15 of the PID Act provides for misdirected disclosures, this only relates to disclosures not made to the appropriate investigating authority. One option may be to extend this section of the Act to reports not made to the appropriate public authority or appropriate officer within an authority. Alternatively, the requirement that PIDs must be made by staff of the relevant authority or to the authority where the conduct occurred could be removed.

Many principal departments have also sought to centralise the handling of PIDs and, in doing so, have developed an internal reporting policy that applies to numerous entities within their cluster. This can be a sensible approach, particularly when the entities are small, such as boards and committees. It also provides staff of such entities with an additional independent reporting avenue to the principal department. One of the drawbacks to such an approach is that the number of officers nominated to receive disclosures is often limited, for example to the head of the related entity. It is questionable too whether staff of the related entities are aware that the policy applies to them. This has the impact of limiting the number of reports of wrongdoing by staff of related entities that receive the protections of the PID Act.

Generally, many public authorities limit the number of officers nominated to receive disclosures to staff in specialist units or very senior management. One of the most common recommendations made in the Ombudsman's office's audits of public authorities is to increase the number of nominated officers to include those staff who routinely receive such reports or are most likely to. These recommendations also consider the accessibility of such officers, particularly if the authority has staff in various locations.

The PID Act also does not contemplate disclosures being made to hotlines (including via telephone, email or an online form), which is the preference of many reporters. A number of public authorities have internal hotlines manned by central investigation or corruption prevention units to receive reports of misconduct. In some cases, the Ombudsman's office has recommended as part of an audit that the authority ensure their internal reporting policy nominate officers generally responsible for receiving or responding to reports made via hotlines. However, at least one public authority has contracted a private company to provide hotline services. Even if provided for in their PID policy, it is unlikely that persons manning this hotline could be considered as officers of the public authority for the purposes of receiving a PID under section 14(2).

Public authorities have questioned whether they can nominate people who are employed outside the authority to receive disclosures in accordance with s.14(2), such as staff providing shared services. It may be the legislation should be widened to allow public authorities to nominate any person or avenue (as opposed to an 'officer of the public authority') to receive a report.

More broadly, the Act could provide for a PID to be made to an officer of a public authority who has a role in receiving or taking action on such information. This would be consistent with the common understanding that whistleblowing involves reporting concerns to people or entities that are believed to be in a position to take action. For example:

- Section 5(2)(b) of the *Whistleblowers Protection Act 1993* (SA) provides that a disclosure can be made "to a person to whom it is, in the circumstances of the case, reasonable and appropriate to make the disclosure".

- Despite the *Public Interest Disclosure Act 2010* (Qld) providing that a person must use an authority's procedure for making a PID, it also provides that the person may make the disclosure to:

Section 17(3)(e) an officer of the entity who has the function of receiving or taking action on the type of information being disclosed.

Examples of officers for paragraph (e)

1 an officer of an entity's ethical standards unit, if the disclosure is made under section 13(1)(a)(i)

2 a health officer or environmental officer of a department having a statutory or administrative responsibility to investigate something mentioned in section 12(1)(a), (b) or (c) or section 13(1)(c) or (d)

3 the officer of an entity in charge of its human resource management if the public interest disclosure is made under section 12(1)(d) and is about detriment to the career of an employee of the entity.

If combined with the removal of the requirement that a PID be made to an authority to which the reporter belongs or to which the disclosure relates, this would also address the fact there are many public authorities with a role in oversighting or dealing with wrongdoing in other public authorities that are not specified investigating authorities under the PID Act. For example:

- in relation to wrongdoing within LALCs, the Office of the Registrar of the *Aboriginal Land Rights Act 1983* (who has a role in investigating misconduct by board members) and the state NSW Aboriginal Land Council
- principal departments where their cluster agencies are clearly separate public authorities, such as the Ministry of Health in relation to wrongdoing within local health districts
- NSW Treasury in relation to wrongdoing by members of Audit and Risk Committees
- the Health Care Complaints Commission in relation to certain conduct by health professionals
- the NSW Electoral Commission in relation to its role in enforcing provisions of the *Parliamentary Electorates and Elections Act 1912*, the *Election Funding, Expenditure and Disclosures Act 1981* and the *Lobbying of Government Officials Act 2011*.

An alternative option to address this issue is for the PID Act to provide that a public authority can receive disclosures about 'anything the entity has a power to investigate or remedy' or the reporter 'honestly believes' that they do.[38]

Managers and supervisors

The Ombudsman's office's audits of public authorities have confirmed research that most disclosures of wrongdoing within organisations are made to supervisors or managers.[39]

In one of the public authorities audited by the Ombudsman's office, six of the 20 PIDs reviewed were made by managers who had not directly witnessed the wrongdoing itself but were passing information on to the central unit responsible for dealing with disclosures. Under these circumstances, the protections of the PID Act would not apply to those staff who had witnessed the wrongdoing, but to the individuals that brought these matters to the

[38] See section 15, *Public Interest Disclosure Act 2010* (Qld).

[39] For example, Donkin, M, Smith, R and Brown, AJ 2008, 'How do officials report? Internal and external whistleblowing', *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp.83-108; Ethics Resource Centre 2012, *Inside the mind of a whistleblower: A supplemental report of the 2011 National Business Ethics Survey*, United States.

attention of an officer nominated to receive disclosures. The staff member who witnessed the alleged wrongdoing is most in need of the protections of the Act, particularly the protections against reprisals.

To address this issue, the Ombudsman's office's advice to agencies is that the managers who receive reports from their staff should encourage them to make the report directly to a nominated officer so this person is entitled to receive the protections of the PID Act. They also advise nominated officers who have received a referral from a manager to contact the initial reporter directly. However, this advice highlights one of the limitations of the legislation in creating barriers to achieving its objective to encourage and facilitate disclosures.

Under the Commonwealth Act disclosures can also be made to a supervisor of the discloser (section 26), who is then obliged to give the information to an authorised officer of the agency (section 60A).[40] In their review of this legislation, the SC recommended all supervisors be able to receive PIDs to ensure the majority of staff who report wrongdoing are protected for doing so. This recommendation recognises that all levels of management should have the knowledge and capacity to identify PIDs (particularly given the focus in the NSW legislation on serious conduct) and to take appropriate action in response.

However, public authorities would face difficulties in ensuring that all supervisors and managers are trained to identify PIDs and refer them to the appropriate area. Many supervisors are also relatively junior. When combined with possible options to allow disclosures to be made verbally and without the reporter declaring them to be PIDs, it requires supervisors to identify comments made in the course of a conversation as a possible PID, which may be unduly onerous.

Other internal recipients

The Queensland Act provides for a PID to be made to a member of a public sector entity's governing body, if such a body exists.[41] The Ombudsman's office is aware of at least one report of serious wrongdoing made to the chair of a governing board about the principal officer of the authority.

The Queensland Act also provides that, for departments, a PID can be made to the Minister responsible for its administration. [42] Under section 19 of the NSW PID Act, a PID can be made to an MP in limited circumstances only. To make a PID to an MP, a reporter must have first made the PID to an investigating or other authority, must have reasonable grounds for believing that the disclosure is substantially true, and the disclosure must be substantially true.[43] The Ombudsman's office is aware through its PID oversight role that public officials report wrongdoing directly to Ministers about matters relating to their portfolio. It would appear to be a perception across the sector that a Minister is a valid external avenue to make a complaint. However, a PID made directly to a Minister would not attract the legal protections of the Act.

[40] The *Public Interest Disclosure Act 2010* (Qld) also provides for PIDs to be made to another officer of the entity who, directly or indirectly, supervises or manages the person (s.17(3)(d)).
[41] Section 17(3)(c), *Public Interest Disclosure Act 2010* (Qld).
[42] Section 17(3)(b), *Public Interest Disclosure Act 2010* (Qld).
[43] Section 19, PID Act.

Inserting a provision in the NSW Act to allow PIDs to be made to a public authority's governing body or directly to a responsible Minister would facilitate reporting, and appear to be consistent with an already established perception that such avenues are available.

One risk is that Ministers are generally not in a position to investigate, and would likely need to refer the disclosures to the appropriate public authority or investigating authority for consideration as to what, if any action will be taken.

To investigating authorities

The current approach enshrined in the PID Act recognises the specialist expertise of investigating authorities in receiving and dealing with disclosures within their jurisdiction. Despite supporting this overall approach, three issues can arise when considering disclosures made to investigating authorities.

The limiting effect of the PID Act criteria

PID legislation generally tends to impose eligibility criteria to limit the people and the circumstances where the protections of the Act will be available. This is justified on the basis that the protections provided are very powerful or special and should only be available to certain people in certain limited circumstances.

The anomaly in NSW is that almost exactly the same protections are provided without question to any member of the public or any public official who makes a complaint to the Ombudsman, the ICAC or the PIC.[44] What this means in practice is that any complaint from a public official to one of these investigating authorities has equivalent protections to the PID Act without the need to meet any other criteria at all. One unfortunate implication of this is that it is in the interests of public officials in NSW to make disclosure directly to one of these investigating authorities and not to the relevant public authority.

Despite this, while the legislation of investigating authorities could provide legal protection, it is not geared to trigger the vital, internal management procedures on which the practical protection of most reporters depends.

Additional restrictions placed on PIDs made to investigating authorities

The PID Act currently provides that any disclosure made to an investigating authority must be 'made in accordance with' the relevant legislation under which they operate. In some cases, this has the effect of placing extra criteria on what constitutes a disclosure. For example, in accordance with section 460(2) of the LG Act, a complaint to the OLG about a local government pecuniary interest contravention:

> *(a) must be in writing, and*
> *(b) must identify the complainant and the person against whom the complaint is made, and*
> *(c) must give particulars of the grounds of the complaint, and*
> *(d) must be verified by statutory declaration, and*
> *(e) must be lodged with the Departmental Chief Executive.*

It is important to avoid undue complexity in the PID Act to ensure that unnecessary hurdles are not placed in the way of potential reporters. At the same time, it is recognised that the references to the requirements of the operating legislation ensure consistency in how

[44] Section 37, *Ombudsman Act 1974*; ss.93-94, *Independent Commission Against Corruption Act 1988*; ss.113-114, *Police Integrity Commission Act 1996*.

investigating authorities deal with PIDs and other complaints. For example, section 89(4) of the GIPA Act provides:

> *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 Government Information (Information Commissioner) Act 2009.*

This provision recognises that individuals have an external right of review to the NSW Civil and Administrative Tribunal and associated remedies for both applicants and agencies including substitution of the agency's decision by the Tribunal. In the Information Commissioner's view, this provision places appropriate limitations on the matters that can be considered as a complaint under the *Government Information (Information Commissioner) Act 2009* 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.

Inconsistencies between PIDs made to public and investigating authorities

There are also inconsistencies in how the PID Act has been drafted that further limit who can receive a PID about certain matters:

- Disclosures about a local government pecuniary interest contravention can only be made to the OLG (under section 12B) and not to the relevant council (under section 8 or section 14).
- Section 11(1)(b) appears to limit what disclosures can be made to the Ombudsman about maladministration to conduct "in the exercise of a function relating to a matter of administration conferred or imposed on a public authority or another public official". This does not seem to apply to disclosures about maladministration made to public authorities (under s.8 or s.14) or other investigating authorities such as the PIC (under section 12A(1)), the PIC Inspector (under section 12A(2) or the OLG (under section 12B).

While the then PD Act was originally drafted to link particular categories of conduct to the jurisdiction of the relevant investigating authority, there is now an appropriate focus on PIDs being made to the relevant public authority. Any re-write of the PID Act could therefore simplify these complexities by first setting out the conduct that can be the subject of a PID and then the possible recipients.

How can a PID be made?

The SC noted in its 2014 report on the review of the Commonwealth PID legislation that section 28 of the Commonwealth Act provides clarity on issues such as whether disclosures can be made orally or in writing, anonymously and without the discloser asserting that they are making a PID.

The NSW PID Act is silent on these issues and questions often arise on each of the above issues throughout implementation of the PID Act. For example, in the Ombudsman's office's audits of public authorities, they have reviewed anonymous reports that, based on the information provided, were clearly from public officials. Enquiries from authorities and complaints dealt with by investigating authorities have also revealed that it is a common misperception that reporters need to declare they are making a PID, as the case study below from the ICAC highlights.

Case study 2: PID misconceptions

The ICAC received a report from a public authority pursuant to section 11 of the ICAC Act about an allegation that section 20 of the PID Act had been breached. This section makes it a criminal offence to take detrimental action against a person substantially in reprisal for the making of a PID.

The public authority had failed to recognise the fact a PID had been made before the alleged detrimental action taking place because it did not properly consider whether a report by a contractor to a line manager constituted a PID.

After making enquiries with the public authority it became apparent senior management was not conscious of the fact that the PID Act may apply because the reporter had not flagged an intention of the matter to be treated as a PID.

Source: NSW Ombudsman, Oversight of the PID Act annual report 2014-2015, p.17.

The Ombudsman's office's PID guidelines set out a clear view on each of the above matters which is of assistance to public authorities. The model internal reporting policies for public authorities also encourage reporters to make disclosures in writing to avoid confusion or misinterpretation. However, the policies also state that wrongdoing can be disclosed verbally and it is the responsibility of the person receiving the report to commit it to writing. The model policies have been widely adopted and the Ombudsman's office is not aware of this presenting a problem for public authorities. Such an approach is also consistent with best practice in complaint handling, including for people with a disability who may have difficulties making a complaint in writing.[45]

In their review of the Commonwealth PID legislation, the SC recommended that the PID Act be amended to specifically provide that a PID 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 PID Act.[46] The SC's view was that addressing these matters in the PID Act would put them beyond doubt and facilitate the reporting of wrongdoing, which is consistent with the objective of the legislation.

Enabling a PID to be made orally may remove a possible barrier to reporting — not only for those who are unable to make a report in writing, but for those who do not wish to engage in an ongoing formal process and would like to simply provide information about wrongdoing which they have witnessed. There are however some possible consequences, including:

- It may be more difficult for public authorities to determine when an oral disclosure amounts to a PID in terms of understanding the content and applying the threshold test.
- There may be confusion in circumstances such as where an abusive outburst in an inappropriate context which may warrant some form of management response but, if it were to include a possible 'oral PID', any response might be susceptible to being challenged as a reprisal.
- Difficulties managing confidentiality where an oral disclosure is made to one person (to whom such a PID can be made) but in the presence of others (to whom it cannot).
- An oral disclosure could be open to misinterpretation or subjective 'para-phrasing' by the receiver.

[45] Australian and New Zealand Standard 2014, *Guidelines on complaint handling in organizations*, AS/NZS 10002:2014, p.22.
[46] SC 2014, *Review of the Commonwealth public interest disclosure legislation*, p.4.

- Taken together with another possible amendment which would provide for all supervisors to be able to receive PIDs, the ability to make an oral PID without identifying it as such would mean those supervisory staff are responsible for identifying and dealing with possible PIDs made during a conversation.[47]
- Oral disclosures made during the course of an investigation by witnesses or sources for example, that otherwise satisfy the requirements of the PID Act, would be PIDs. Taken together with another possible amendment which would provide for such disclosures to be considered PIDs only so far as they attract the legal protections (not the administrative requirements) may address any concern about possible additional requirements on authorities.[48]

Any disclosure made orally, anonymously or without the reporter asserting that they are making a PID would still need to meet the threshold requirements of the PID Act before it would be treated as a PID. The reporter would therefore need to provide sufficient detail or evidence to support their allegations. Consideration could also be given to requiring authorities that receive oral disclosures to reduce the disclosure to writing as soon as practicable, as is required in section 12(4A)(b) of the Ombudsman Act.

How do the reprisal provisions operate?

Section 20 of the NSW 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.*

The taking of detrimental action is a criminal offence and consequently the criminal standard of proof applies. However there is a reverse onus of proof in proceedings for an offence under s.20. Once it has been established that the detrimental action occurred, it is up to the defendant to prove that the detrimental action taken was not substantially in reprisal for the person making a public interest disclosure.

The reverse onus of proof was inserted by the *Protected Disclosures Amendment (Police) Act 1998*, after it was recommended by the then Committee on the Office of the Ombudsman and the PIC. The committee recommended the amendment to make it easier for reporters to establish the offence of detrimental action. Despite this there have been no successful prosecutions for breaches of s.20 of the PID Act, nor for breaches of similar PID legislation across Australia.

In a recent case brought under s.20, *DPP v Murray Kear*,[49] which is discussed in more detail below, the DPP suggested that this reverse onus should be interpreted in the following way: once the prosecution has provided evidence to a *prima facie* level that there has been a PID and detrimental action has been taken, the onus reverts to the defence to prove, on the balance of probabilities, that the detrimental action was not substantially in reprisal for the making of the PID. Magistrate Grogin, in his decision in this matter, said that this position 'reflects the objects of the Act as stated in s3.'[50]

[47] See further above under the heading, 'Who can receive a PID (and in what circumstances)? – Managers and supervisors'.
[48] See further above under the heading 'Who can make a PID? – Protections for other public officials'.
[49] *DPP v Murray Kear*, unpublished decision, 16 March 2016.
[50] At 16.

A public authority must refer any evidence of an offence under s.20 to the Commissioner of Police or the ICAC. Evidence of an offence that relates to the NSWPF must be referred to the PIC.

An investigating authority must, after completing or discontinuing an investigation into an alleged offence refer any evidence of the offence to the Commissioner for Police.

How has it been interpreted?

The NSW detrimental action provisions require that the detrimental action be taken 'substantially' in reprisal for the making of the PID. This means that the making of the PID (or the report of wrongdoing) has to be the main contributor or primary cause of the detrimental action taken. The provisions pre-suppose that the making of a PID is a discrete occurrence and that the reporter comes to the making of the report of wrongdoing with clean hands. However, in the cases where detrimental action is alleged to have been taken, there are usually other factors that may have led to such action occurring, many of which may have occurred/existed prior to the PID being made. The Ombudsman's office's reprisal audit found that in 79% of cases reviewed there was already a history of conflict in the workplace prior to the PID and allegations of reprisal being made.

While there have previously been attempted prosecutions under the *Police Act 1990* and private prosecutions under the PD Act, the prosecution of *DPP v Murray Kear* was the first under the PID Act. Mr Kear, the former Commissioner of the SES, was alleged to have taken detrimental action substantially in reprisal against Ms McCarthy, his former Deputy Commissioner by dismissing her from her position at the SES. It was alleged that Mr Kear did so in reprisal for Ms McCarthy making a series of PIDs about corrupt conduct by the other Deputy Commissioner, Steven Pearce.

The charges against Mr Kear were dismissed. On 25 May 2016, Mr Kear made a successful claim for costs.

The decision

The parties were not in dispute as to whether detrimental action was taken. It was admitted that dismissing Ms McCarthy constituted detrimental action within the meaning set out in section 20(2) of the PID Act.

In interpreting the reprisal provisions, Magistrate Grogin cited, in relation to the term reprisal, that this 'denotes an act of revenge or retribution from an action of another.'[51] In relation to the term 'substantially' he said that 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.'[52]

In relation to the question of whether the action taken by Kear was substantially in reprisal for making the PIDs, it was considered relevant that there was a toxic relationship between Ms McCarthy and Mr Pearce and that this fragmented the senior leadership group at the SES. Magistrate Grogin said that there were 'many factors behind the dismissal of Ms McCarthy' and that 'there was no element of revenge, pay-back or retaliation.'

[51] At 12.
[52] At 80.

The effect of the decision

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. Further, in the reprisal audit, the majority of the claims of detrimental action were levelled at management, as in the Kear case, rather than the subject of the PID. In these cases it is unlikely the reporter could prove that the action taken by management was motivated by revenge.

The fact that Ms McCarthy was perceived by Mr Kear and other members of the SES leadership to be difficult and the fact that this caused tension in the leadership group was considered to be relevant to the assessment of whether the action taken was substantially in reprisal for the making of the PID. In the matters reviewed during the reprisal audit, reporters rarely came to the making of a PID with a clean slate. The matters were typically characterised by a high degree of conflict, much of which precedes and in some cases causes the making of the PID. Unpicking the PID from the pre-existing conflict that exists can be difficult. A public authority will often be able to point to some pre-existing conflict or performance management issues as the reason for taking action against an individual who has made a PID. It may be possible too for the action to be framed as part of a restructure or due to resourcing issues.

Options for consideration

Use of the term 'substantially'

In an issues paper published on best practice whistleblowing regimes, Brown noted that it "remains easy for the current approach — "a substantial reason" — to be misinterpreted as meaning "the" substantial reason, or the major or dominant reason for the detrimental action".[53] Further, best practice would be to follow either "the US precedent that the whistleblowing issue need simply be identified as a "contributing factor" in the detrimental action, or as previously recommended by both Queensland's Electoral & Administrative Review Commission and the Commonwealth Ombudsman, "a ground of any significance" in the taking of the action."

For this reason, in the Commonwealth PID Act, the provision setting out the prohibition on taking reprisals states that a person takes a reprisal:

- if they cause detriment to another person,
- if the person taking the action believes or suspects that the second person has made or proposes to make a PID, and
- if that belief or suspicion is the reason, or part of the reason, for the act.[54]

In the *Public Interest Disclosure Act 2012* (ACT), section 40(3) provides that:

> *(3) In determining whether a retaliator has taken detrimental action because of a public interest disclosure, it is sufficient if a reason mentioned in subsection (2) is a contributing reason.*

Proximate cause

There was evidence given at the hearings that Mr Kear's motivation at the time of making the decision to dismiss Ms McCarthy was the fact that she made "three unsubstantiated allegations" (i.e. the PIDs). In his decision, however, Magistrate Grogin focused on the

[53] Brown, AJ 2006, *Public Interest disclosures legislation in Australia*, p.36.
[54] Section 13, *Public Interest Disclosure Act 2013* (Cth).

breakdown of the longer term working relationship and assumed a course of conduct over time.

Consideration could be given to whether section 20 should clarify that the motive 'substantially in reprisal' should take into account the proximate cause for taking the detrimental action.

Use of the term 'reprisal'

As discussed above, the use of the term 'reprisal' may have the effect of unduly narrowing the detrimental action provisions. In the ACT, the PID Act does not use the term reprisal in the offence provisions, stating that:

40 Offence—taking detrimental action

*(1) A person commits an offence if the person (the **retaliator**) takes detrimental action because of a public interest disclosure.*

Maximum penalty: 100 penalty units, imprisonment for 1 year or both.

*(2) For this Act, a retaliator **takes** detrimental action because of a public interest disclosure if the retaliator takes, or threatens to take, detrimental action against someone else because—*

(a) a person has made, or intends to make, a public interest disclosure; or

(b) the retaliator believes that a person has made or intends to make a public interest disclosure.

(3) In determining whether a retaliator has taken detrimental action because of a public interest disclosure, it is sufficient if a reason mentioned in subsection (2) is a contributing reason.

Referring evidence of an offence be referred to the police

The Ombudsman's office is aware of two cases where evidence of an offence under the PID Act reprisal provisions was referred to the police. In the first case, a public authority wrote to the NSWPF advising that an external investigation had concluded that a former staff member had engaged in detrimental action as set out in section 20(1) of the PID Act. The Acting Commissioner wrote back to the public authority stating that the NSWPF could not take action due to the limitation period for the offence having already expired. This, however, was a misunderstanding and the time frame for taking action had not expired at the time that the evidence was referred to the NSWPF.

In the second case an investigating authority referred possible evidence of reprisal to the NSWPF. It was referred to the relevant local area command for investigation. The police advised that the investigation was referred to the DPP for consideration of prosecution and that the response from the DPP was that there was no reasonable prospect of conviction.

Knowledge that a PID was made

Public authorities have sought advice about whether it is enough for the person taking the detrimental action to know that a report of wrongdoing has been made or whether they need to know that a public interest disclosure has been made. The Ombudsman's office has taken the view that it would be unnecessarily restrictive for the PID Act to be interpreted in such a way. It should be sufficient that a person took the detrimental action because they believe another person made a report of wrongdoing, i.e. the person does not need to know that it falls within the definitions in the PID Act. In many cases the person taking the detrimental action either will not be aware of the PID Act, or even if they are aware, will not be aware of

whether the authority has assessed the report as a PID. For example section 19 of the Commonwealth PID Act states:

> *(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the other person made, may have made or intended to make a public interest disclosure.*

In one case that was reviewed by the Ombudsman's office, where ultimately evidence of an offence under the PID Act was referred to the NSWPF by the public authority concerned, the subject officer sought to argue that they did not know that a PID had been made, although it was clear that they were aware that allegations had been made against them by the reporter.

The obligations on principal officers and public authorities

Internal reporting systems

The addition of section 6E in the PID Act in 2011 saw responsibility placed on the head of a public authority to ensure that:

> *(a) the public authority has the policy required by section 6D, and*
> *(b) the staff of the public authority are aware of the contents of the policy and the protections under this Act for a person who makes a public interest disclosure, and*
> *(c) the public authority complies with the policy and the authority's obligations under this Act, and*
> *(d) the policy designates at least one officer of the public authority (who may be the principal officer) as being responsible for receiving public interest disclosures on behalf of the authority.*

Given the significance of organisational commitment in creating a positive internal reporting climate, it remains important that senior management personally take responsibility for implementing the PID Act within their authorities.

As noted above, many public authorities limit the number of officers nominated to receive disclosures to staff in specialist units or very senior management. One of the most common recommendations made in the Ombudsman's office's audits of public authorities is to increase the number of nominated officers to include those staff who routinely receive such reports or are most likely to. These recommendations also consider the accessibility of such officers, particularly if the authority has staff in various locations. For example:

- a public authority with 74,000 staff or volunteers had nominated two officers to receive disclosures in addition to the principal officer
- a public authority with a workforce of 10,450 had nominated two officers to receive disclosures in addition to the Chief Executive.

This limited number of staff who can receive disclosures could be addressed by allowing PIDs to be made to supervisors or managers. Alternatively, the responsibility of a principal officer under section 6E(d) could be extended to the obligation on principal officers contained in section 59(3)(b) of the Commonwealth legislation:

> *to ensure that the number of authorised officers of the agency is sufficient to ensure that they are readily accessible by public officials who belong to the agency...*

When a PID is made

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.

Maintaining confidentiality

Section 22 of the PID Act, titled 'confidentiality guideline', provides for the information that might identify a reporter to be kept confidential, subject to a range of exemptions:

- the person consents in writing to the disclosure of the information
- it is 'generally known' that the person has made the PID as they have voluntarily identified themselves as the person who made the PID
- it is essential for the identifying information to be disclosed to a person to satisfy the principles of natural justice or for the effective investigation of the matter
- it is otherwise in the public interest to do so.

This provision is a good example of a principles-based approach in the Act as it emphasises that maintaining the confidentiality of the reporter is preferred, while recognising a variety of situations where this is not practical or appropriate. In their review of the Commonwealth legislation, the SC expressed the view that this is preferable to legislation in other jurisdictions where breaching confidentiality is a criminal offence.[55] The breaches of the guideline that have come to the SC's attention have generally been inadvertent and are likely to have occurred whether or not there was a criminal penalty attached.

Public authorities have queried why the provision does not extend to the reporter, the subject/s of the allegations or witnesses. Section 22(2) provides for an authority's procedures to ensure that a reporter maintains confidentiality in connection with a PID and the following is included in the Ombudsman's office's model internal reporting policies:

> *If you report wrongdoing, it is important that you only discuss your report with those responsible for dealing with it. This will include the disclosures coordinator and the principal officer. The fewer people who know about your report, before and after you make it, the more likely it will be that we can protect you from any reprisal.*
>
> *Any staff involved in the investigation or handling of a report, including witnesses, are also required to maintain confidentiality and not disclose information about the process or allegations to any person except for those people responsible for handling the report.*

The failure of staff, including reporters themselves, to maintain confidentiality remains a problem for the effective management of PIDs by public authorities. Case study 3 on page 46 is an example of how breaches of confidentiality by the reporter made it difficult for the authority to manage the risk of reprisal. A legislative obligation to not disclose information subject to a range of exemptions may have greater weight in ensuring appropriate conduct from all parties involved in the reporting process.

A public authority raised another issue with the Ombudsman's office about the confidentiality provision. The authority was issued a subpoena for records about a staff member and was

[55] See, for example, section 20, *Public Interest Disclosures Act* (Cth); section 65, *Public Interest Disclosure Act* (Qld).

concerned about releasing information concerning a PID. According to legal advice, compliance with the subpoena required the production of all of the PID-related records concerning that former staff member. This was because there was no available claim of privilege or immunity to resist producing PID-related records under common law or legislation (including s.22 of the PID Act). There raises a public interest concern that confidential PID-related records will be readily amenable to disclosure under a third party subpoena.

The possible implications of a recent Queensland Supreme Court decision should also be noted. The decision held that a breach of natural justice had occurred because the subject of the investigation had not been given access to all the information and documents relied on by the decision-maker, including unredacted copies of all witness statements.[56] Should this become the accepted interpretation by the courts, it would be problematic in the PID context given that the PID Act specifically provides that an exception to confidentiality is that it is essential for the principles of natural justice (section 22(1)(b)). A requirement that a decision-maker/investigator provide the degree of disclosure called for in this case could have the effect of sterilising the confidentiality safeguards provided for reporters. Investigators would no longer be in a position to give confidentiality undertakings to reporters, other than in limited circumstances.

Taking appropriate action

The PID Act has little say on the third core objective, of ensuring that disclosures are properly dealt with. The Act currently does this by requiring that authorities notify reporters of the action taken or proposed to be taken in response to their report (section 27) and by providing for a subsequent disclosure to be made to an MP or journalist in certain limited circumstances (section 19).

In setting out principles-based obligations for public authorities, consideration could be given to specifically requiring that, when a PID is made, it is assessed and appropriate action is taken in response. When people who witness wrongdoing are asked why they did or did not report it, their belief that something will or could be done in response is the most frequent answer.[57] Obliging organisations to receive, assess and take action on a report can increase the confidence of staff to raise any concerns, knowing they will be taken seriously.[58]

The SC has not adopted the position that the PID Act require disclosures to be investigated (subject to a range of exemptions), even though this is the approach currently taken in most other Australian jurisdictions.[59] Few concerns have been raised with the SC that investigations are not initiated into the allegations made in PIDs.

The nature and scale of the action warranted to address a disclosure will depend on the seriousness of the allegations. At one end of the spectrum, all that may be required is to assess

[56] *Vega Vega v Hoyle* [2015] QSC 111.
[57] Merit Systems Protection Board 2011, *Blowing the whistle: Barriers to Federal employees making disclosures*, US Government Printing Office, Washington DC; Near, JP & Miceli, MP 1996, 'Whistle-blowing: Myth and reality', *Journal of Management*, 22(3), pp. 507-526; Near, JP, Rehg, M, Van Scotter, J & Miceli, MP 2004, 'Does type of wrongdoing affect the whistle-blowing process?', *Business Ethics Quarterly*, 14(2), 219-242; Wortley, R, Cassematis, P & Donkin, M 2008, 'Who blows the whistle, who doesn't and why?'. In AJ Brown (ed.), *Whistleblowing in the Australian public sector*, ANU E-Press, Canberra, pp. 53-82.
[58] Miceli, MP & Near, JP 2006, 'How can one person make a difference? Understanding whistle-blowing effectiveness'. In MJ Epstein and KO Hanson (eds.), *The accountable corporation*, Praeger, Westport, pp. 295-324.
[59] Section 8, *Public Interest Disclosure Act 2003* (WA); section 30, *Public Interest Disclosure Act 2010* (Qld); section 18, *Public Interest Disclosures Act 2012* (ACT); section 47, *Public Interest Disclosure Act 2013* (Cth); sections 39 & 63, *Public Interest Disclosures Act 2002* (Tas); sections 20 & 21, *Public Interest Disclosures Act 2008* (NT).

the disclosure and provide an explanation to the reporter. In fact, many matters are formally investigated, resulting in a significant cost to the organisation and stress to staff, when the wrongdoing can otherwise be rectified or informal resolution can be more appropriate. Ensuring there is a flexible approach to dealing with disclosures means that existing investigative processes and expertise are recognised and used appropriately.

Communicating with the reporter

Currently the PID Act places two relevant requirements on public authorities:

- section 6D(1A) requires the policy of a public authority to provide that a copy of the policy and an acknowledgement, in writing, of the receipt of the disclosure is to be provided to a person who makes a PID within 45 days
- section 27 requires investigating and public authorities to notify the person who made the disclosure, within six months of the disclosure being made, of the action taken or proposed to be taken in respect of the disclosure.

Most staff who report wrongdoing need to be told how their report is being handled so they feel their concerns are being taken seriously. A failure to communicate and provide regular updates is likely to lead to an assumption that nothing is being done, which can heighten the reporter's concerns and have a negative impact on the workplace.

Nevertheless, authorities have raised questions with the Ombudsman's PID Unit about meeting these obligations in certain situations, such as when the reporter is anonymous or cannot be contacted. The PID Unit has also been told by public authorities that some reporters, once disclosing information about wrongdoing, do not wish to be further involved in the process or be kept informed about what action is being taken.

Taking a principles-based approach might involve removing the specific requirement that a reporter be sent an acknowledgement letter and a copy of the policy within 45 days of a PID being made. The PID Act had already been amended to state that this requirement does not apply in relation to PIDs made by public officials performing their day-to-day functions or under a statutory or legal obligation. This recognises that there are situations where acknowledging a PID is undesirable and merely an administrative burden on public authorities.

An alternative option is to provide in the legislation that, where possible and appropriate, authorities should give information to or communicate with reporters when key decisions are made, such as:

- that their report has been received
- that their report has been assessed and will be treated as a PID
- what action will taken in respect of their report and the likely timeframes involved
- the outcome of any action taken.

In Tasmania, for example, a reporter must be told whether their disclosure is a PID 'within a reasonable time'.[60]

Preventing reprisal and responding to any allegations

The Ombudsman's office's complaint handling and audit work has identified that public authorities typically fail to undertake risk assessments regarding the risk of reprisal to a reporter. In cases where authorities have conducted such an assessment, doing so often has

[60] Section 31, *Public Interest Disclosures Act 2002* (Tas).

not identified any tangible risk to the reporter or identified any practical steps to mitigate the risk of reprisal.

Additionally, in the Ombudsman's office's reprisal audit, only one public authority completed a risk assessment following the receipt of the PID. In each case that was reviewed as part of the audit, a risk assessment was warranted and would have assisted the public authority in managing and preventing reprisals occurring. In the majority of the cases that were reviewed, confidentiality was not able to be maintained following the receipt of the PID or during the course of the investigation and a risk assessment would have been helpful in identifying risks to the reporter.

A provision requiring public authorities to take reasonable steps to prevent reprisals occurring and taking appropriate action to remedy them when allegations are made would strengthen the reprisal provisions. It would focus the attention of public authorities on the need to assess risk as a key step in preventing and minimising reprisals.

This would be consistent with similar requirements in other jurisdictions:

- In the Commonwealth PID Act, section 59(1)(a) requires the principal officer of an agency to establish procedures for assessing the risk of reprisal against reporters who make PIDs. In addition section 59(3)(a) requires the principal officer to take reasonable steps to protect public officials belonging to the agency from detriment or threats of detriment relating to PIDs.
- In Victoria, section 58(5) of the *Protected Disclosures Act* also requires authorities to establish procedures for the protection of persons from detrimental action.
- In Queensland, section 28(1) of the *Public Interest Disclosure Act 2010* requires the chief executive officer of a public sector entity to establish reasonable procedures to ensure that public officers are offered protection from reprisal.

Responding to the conduct of reporters and others involved in the reporting process

This section considers the current provisions of the PID Act in dealing with the conduct issues including misuse and misunderstanding of the legal protections, taking reasonable management action against a reporter and obligations of reporters and others involved in the PID process.

Misuse of the PID Act

Since the introduction of the PID legislation, concerns have been raised about its misuse by public officials.[61] There is a lack of understanding about what does and does not constitute a PID and therefore attracts the legal protections of the Act.

When the PD Act was first debated in Parliament, it was noted:

> *The Government's intention is to protect the public interest and to ensure that the public system works effectively. That cannot be done by granting total immunity or a high level of immunity to people who are mischievous, vexatious or motivated by malice or ill-will and who have a reckless disregard for the truth. This objective is not achieved by encouraging such people, by providing them with a shield to which they are not entitled.*[62]

[61] NSW Ombudsman 2016, *Oversight of the PID Act annual report 2014–2015*, p.9.
[62] Hansard, Legislative Assembly, 15 November 1994, Mr Chris Hartcher, p.5035.

In some circumstances the conduct of a reporter poses a challenge for investigating and public authorities including:

- reporters attempting to use the PID Act as protection from reasonable management action taken to address unsatisfactory performance or misconduct issues, whether those conduct issues arose from a time before or following the making of a PID
- making what could reasonably be considered a pre-emptive PID where a reporter is making a disclosure as a result of concerns that they will be subjected to management action in the future, and may be able to later claim that such action cannot be taken as it would be considered reprisal for the making of a PID
- reporters placing an unreasonable burden on resources.

The Information Commissioner has observed recent challenges involving the conduct of reporters, including instances of public officials attempting to gain the legal protections by making repeat purported PIDs about the same issue to multiple investigating authorities as well as to the primary public authority.

In such circumstances, a suitable strategy needs to be developed in order to respond to the challenging conduct. For example, the Ombudsman's office recently utilised its monitoring powers under the PID Act to assist a public authority which was responding to a persistent complainant who was aggrieved as a result of management actions he saw as being taken against him. Over a period of time, the person made more than 40 complaints to the public authority, which he claimed were PIDs (each individually numbered). Following advice from the Ombudsman's office, the public authority assessed each as not meeting the criteria in the PID Act, mostly because the issues were either grievances or relatively minor. The person also made more than 10 purported PIDs directly to the NSW Ombudsman, as well as numerous GIPA Act and PPIP Act applications, complaints and communications to other public authorities and investigating authorities. The Ombudsman's office assisted by:

- monitoring all PIDs and purported PIDs received by the public authority over a period of time in order to provide advice as to whether the matters constituted PIDs
- arranging and participating in a mediation (which was not successful)
- corresponding with the complainant about possible misuse of the PID Act and the significant resource implications of the conduct on the public authority.

In NSW, as well as many other jurisdictions, there are circumstances where it is reasonable to apply certain limits in relation to the institution of legal proceedings (the *Vexatious Proceedings Act 2008*) and the making of GIPA applications (section 110 of the GIPA Act). The justification for such provisions has been to prevent the unreasonable diversion of resources and the unequitable distribution of resources. Consideration could be given to including a provision in the PID Act that would enable public authorities to be able to seek an order from the NSW Civil and Administrative Tribunal where the conduct of public officials seeking to make PID is, on an objective assessment, unreasonable. Criteria to be considered in making such a determination could include:

- that multiple complaints have been made that are repetitious in nature, are made without reasonable grounds or are lacking in any substance, have previously found to be unsubstantiated
- the number of previous or concurrent complaints made by the same person would substantially and unreasonably divert the authority's resources away from their use in the exercise of the authority's functions.

It is recognised, however, that such a provision may contradict the object of the PID Act to encourage and facilitate disclosures. While they account for a significant proportion of time and agency resources, there are also only a small number of reporters to which such a provision would apply. It may be that legislative amendment is not necessary if authorities are proactive in developing strategies to manage the unreasonable conduct.

Reasonable management action

Section 3 of the PID Act states that the legislation 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.

This means that an individual who has made a PID can still be subjected to reasonable management action, such as performance or disciplinary action. Even so, the Ombudsman's office is aware of some uncertainty by public authorities in this area. In some cases (see case study 3) authorities are hesitant to take appropriate and reasonable management action against a reporter, due to the concern that any actions may be perceived as reprisal. The Ombudsman's office has given advice about taking reasonable management action in the context of a PID to experienced staff who are well-versed in people management and dealing with PIDs. This appears to be an issue across the public sector which requires some consideration.

Case study 3: Questionable motives, escalating conflict and poor conduct

A public official made a complaint about bullying to a public authority. The authority investigated the complaint, however the investigation became protracted and ultimately the allegations were not substantiated. While the authority had originally assessed this complaint as a grievance, after finalising the investigation it was reassessed as a PID, on the request of the reporter. The reporter did not accept the outcome or findings of the bullying investigation.

Around 18 months after the original complaint, the reporter made a second complaint to the principal officer of the authority, claiming it was a PID. This complaint raised the same issues but included allegations of maladministration resulting in waste of public money. The authority decided to treat the report as a PID and outsourced the matter to an external investigator.

A few months later the reporter complained to the Ombudsman's office about the way the authority was handling the PID. The reporter also complained that detrimental action had been taken against them in reprisal for making the first complaint.

The Ombudsman's office was of the view that the first complaint was not a PID and it was also questionable whether the second complaint met the threshold of seriousness to be a PID. A request from a reporter asking for their matter to be dealt with as a PID does not necessarily mean it is a PID. Unfortunately, the reporter had been given inconsistent information from the authority about whether the complaints were being treated as PIDs.

From enquiries by the Ombudsman's office, it appeared the investigation of the second complaint was experiencing delays due to the limited availability of the external investigator. The reporter had also been uncooperative — withholding important information and breaching confidentiality. In contrast, it appeared the subject officer was fully cooperating with the investigation and maintaining confidentiality.

The reporter had been on extended leave since making the original complaint, but returned to work

around the time the Ombudsman's office became involved. The authority made considerable adjustments to support the reporter's return to work and protect them from reprisal, including moving the subject officer to a different role.

However, the reporter's failure to maintain confidentiality made it difficult to manage the risk of reprisal. Their behaviour escalated throughout the investigation. The public authority felt that it was unable to take the sort of management action that it would normally take as a result of concerns that the reporter would claim that this was reprisal. After a number of incidents that were disruptive to the workplace, the authority issued warnings and took disciplinary action. The reporter then did allege this action was taken in reprisal for the making of the disclosure, further complicating the handling of the matter.

It took over six months to finalise the second investigation. While some of the allegations were substantiated, the level of the maladministration was minor in comparison to the scale and expense of the investigation and the impact on the subject officer. Both the reporter and the subject officer left the authority.

Source: NSW Ombudsman, Oversight of the PID Act annual report 2013–2014, p.7.

The Ombudsman's office has received strong feedback through inquiries, complaints and consultation with public authorities that the PID Act should specifically provide that reasonable management action may be taken against a person who has made a PID. Providing clarity around this issue would reinforce the object of the PID Act and address any perception that the legislation provides immunity from reasonable management action for inappropriate conduct. This would include the making of a pre-emptive PID where a reporter is doing so due to concerns that they will be subjected to management action in the future.

It would appear that public authorities are seeking a clear legislative provision which would be of assistance in their decision-making and communication with reporters about conduct issues when they arise and, importantly, when responding to allegations of reprisal following reasonable management action in the context of a PID.

The Queensland PID legislation states that a manager is not prevented from taking reasonable management action in relation to an employee who has made a PID if the reasons for taking the action do not include the fact that the person has made the PID. The legislation also lists conduct which in this context may be considered reasonable management action e.g. 'a reasonable appraisal of the employees work performance'.[63] Inserting a similar provision in the NSW PID Act with regard to taking reasonable management action would emphasise that reporters are only protected from detrimental action taken substantially in reprisal for the making of a PID.

There may be some concern about public authorities using such a provision to disguise conduct which would constitute reprisal. Importantly, any public authority would still be required (as they are now) to be able to demonstrate that any action taken was reasonable and justifiable and was not substantially in reprisal for the making of a PID.

Reasonable management action may also need to be taken in circumstances in which reporters or other people involved in the reporting process have breached their obligations including, maintaining confidentiality, cooperating with an investigation or other fact finding process, and using methods to gather evidence in breach of policy.

[63] Section 45, *Public Interest Disclosures Act 2010* (Qld).

Obligations of reporters

The PID Act requires that a public official must not, in making a PID, provide false or misleading information. There is also a requirement on reporters to provide sufficient information to support any allegations made. Those provisions go some way to addressing the obligations of reporters.

The NSW Ombudsman's model internal reporting policy and other guidelines were amended in 2014 to include sections dealing with the role and responsibilities of all parties involved in the reporting process. In the model internal reporting policy, all staff are obliged to assist those dealing with a PID by supplying information on request, cooperating with any investigation, maintaining confidentiality, and adhering to the code of conduct. Those changes were made as a result of numerous matters which came to the attention of the Ombudsman, some of which were considered as case studies in the *Oversight of the PID Act annual report 2013–2014*. The case studies provided examples of reporters being uncooperative and not acting in the public interest by withholding information, causing delay to an investigation and breaching confidentiality.

Legislative provisions dealing with obligations of public officials during the reporting process 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. The Commonwealth Act places obligations on public officials to use their 'best endeavours to assist' an investigation under the Act.[64] This obligation applies to all public officials, including those who make disclosures and those who are the subject of disclosures. A possible consequence of placing legislative requirements on reporters and others involved in the reporting process could include that some investigating authorities have powers to compel, which may mean that a person in such circumstances would incriminate themselves.

[64] Section 61 of the *Public Interest Disclosures Act 2013* (Cth).

Part 3: Further review of the PID Act

As this paper has shown, ongoing monitoring of the PID Act has identified possible legislative amendments. At the same time, authorities expend time and effort implementing any changes. Five years from the commencement of any future legislative change may be an appropriate timeframe for any further review, as it recognises the need for refinement while preventing piecemeal and ad hoc changes.

This would also be an opportune time to consider any findings from the current research project *Whistling While They Work 2*. Led by Professor AJ Brown of Griffith University, this three-year Australian Research Council Linkage Project involves four universities and 21 supporting organisations across Australia and New Zealand, including the NSW Ombudsman. It is the most comprehensive study of internal reporting of wrongdoing across the public, private and not-for-profit sectors undertaken internationally. One of its key research questions is to examine what legislative reforms are necessary to increase the rate of effective and equitable outcomes from the whistleblowing process.

Appendix 1: Summary of the work of the NSW Ombudsman's PID Unit 2011–2016

Statutory functions	Goals	Activities	Key achievements
PUBLIC AWARENESS AND ENGAGEMENT			
• Promote public awareness and understanding of the PID Act. • Provide information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to the Act.	• Engage with stakeholders. • Raise awareness of PIDs across the public sector. • Support and strengthen the disclosures coordinator role. • Provide advice to public authorities and public officers.	• Establish a specialist PID Unit for the oversight role and to champion good practice across the NSW public sector in relation to internal reporting. • Deliver training to PID practitioners about an overview public authorities' responsibilities under the PID Act and the roles and responsibilities of parties involved in disclosures. • Coordinate PID practitioner forums.	**PID Unit** • Established a specialist PID Unit responsible for coordinating the implementation of the Ombudsman's roles under the Act and providing support to public authorities and public officials. **Face-to-face training and e-Learning** • 7,161 public officials attended 273 general awareness PID training sessions: This provides staff with information about the why, what, how and who of PIDs in relation to roles, responsibilities, the internal reporting policy and procedures. • 3,372 public officials attended 232 PID management training sessions: This provides an overview of public authorities' obligations under the PID Act. It describes the responsibilities of the nominated disclosures officers and managers, and practical strategies to manage internal reports of wrongdoing. • Over 98% of the participants who attended PID training gave a positive rating for the training session, the trainer's presentation style and course content, as well as indicating they feel confident that they can implement what they learnt about PIDs in the workplace. • Developed four e-Learning modules as a quick focused training alternative to raise awareness and for public authorities to inform their staff about PIDs: 1. PID awareness module 2. PID reporting module 3. PID management module 4. PID executive module. **PID practitioner forums** • Facilitated 10 PID Practitioner Forums for PID practitioners to network, share information and gain a greater understanding of the process and obligations involved. • Over 95% of attendees rate the PID practitioner forums positively. **Engagement** • Maintain a register of contact details for PID coordinators in every public authority in NSW. • Hosted information stands at the following conferences which gave participants the opportunity to raise PID-related queries: – Corruption Prevention Network Forum – National Investigation Symposium – Australian Public Sector Anti-Corruption Conference – NSW Aboriginal Land Council Conference.

Statutory functions	Goals	Activities	Key achievements
PUBLIC AWARENESS AND ENGAGEMENT			
• Promote public awareness and understanding of the PID Act. • Provide information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to the Act. • Issue guidelines and other publications for the assistance of public authorities and investigating authorities in connection with their functions under the Act.	• Engage with stakeholders. • Raise awareness of PIDs across the public sector. • Support and strengthen the disclosures coordinator role. • Provide advice to public authorities and public officers.	• Establish an online PID community for people with a professional interest in PIDs. • Issue the PID e-News. • Make PID information available online. • Provide guidance to public authorities responsible for managing and responding to PIDs. • Support a national PID oversight network.	**Responding to enquiries** • Provided advice to public officials and public authorities in response 1,083 enquiries. **Whistling Wiki** • Established an online community named 'Whistling Wiki' with the Commonwealth and Queensland Ombudsman's offices. The Whistling Wiki provides a workspace to facilitate communication and sharing of information about PID frameworks, legislation, research, resources, policy and practice. • Invited all of the PID practitioners in NSW, Queensland and the Commonwealth as well as state oversight authorities to join the Whistling Wiki. Researchers and PID practitioners in other jurisdictions also joined. **PID e-News** • Distributed 31 issues of PID e-News, to which there were 1,037 subscribers as of 30 June 2016. **PID guidance material** • Developed 23 guidelines on various aspects of managing PIDs: – 4 guidelines on organisational commitment – 6 guidelines on facilitating reporting – 7 guidelines on assessing and investigating disclosures – 6 guidelines on supporting and protecting reporters. • Developed three model internal reporting polices for state government, local government and LALCs that public authorities have largely adopted. • Developed seven templates to assist authorities with the practical implementation of the PID system. • Developed nine fact sheets to provide advice on specific topics for particular audiences. • Developed a checklist for ensuring an internal reporting policy is best practice. • Developed a promotional poster and postcard for use by public authorities to raise awareness. • Amended all released guidance material to incorporate changes arising from amendments to the PID Act. **PID Oversight Network** • Supported the PID Oversight Network and collaborated with similar agencies across jurisdictions.

Statutory functions	Goals	Activities	Key achievements
MONITORING AND REVIEWING			
• Monitor and provide reports (monitoring reports) to Parliament on the exercise of functions under the Act and compliance with the Act by public authorities. • Audit and provide reports (audit reports) to Parliament on the exercise of functions under the Act and compliance with the Act by public authorities. • Provide reports and recommendations to the Minister about proposals for legislative and administrative changes to further the object of the Act. • Assist the SC.	• Ensure compliance with the Act. • Identify emerging trends and areas for future improvement. • Establish a baseline of PIDs reported by public authorities in NSW and monitor trends over time. • Make recommendations for reform. • Ensure an effective statutory framework is in place for the making and management of PIDs and the protection and support for people who make them.	• Prepare annual reports as required under the PID Act. • Establish a PID audit program and conduct audits of public authorities and sector-wide audits. • Facilitate the provision of six-monthly statistical reports by public authorities. • Share information with investigating authorities about PIDs. • Support the SC. • Ensure involvement in relevant research.	• Issued four PID oversight annual reports, which incorporate the reporting requirements pursuant to sections 6B(1)(f), 6B(1)(g), 6B(2) and 6B(3). **Audits** • Conducted 22 face-to-face audits of public authorities. • Reviewed 682 files during the audits — 243 PID files and 439 internal reports. • Made 159 recommendations to public authorities following audits. • Conducted a compliance audit of recommendations, which confirmed that 94% of the recommendations made were accepted. • Conducted two sector-wide PID audits: – An electronic survey of all public authorities – Examination of the handling of allegations of reprisal. **Reporting** • Established an online PID reporting tool for public authorities to provide their PID statistical reports. • Developed a user manual for PID online reporting. • Received 3,459 PID statistical reports from public authorities. • Conducted an audit of PID information included in the annual reports of public authorities. • Focused on increasing the number of reports received from LALCs. **Liaison** • Facilitated regular meetings with the Audit Office of NSW, the OLG, the ICAC, the Information and Privacy Commission and the PIC to assist with a consistent and coordinated approach and share information about PIDs handled. **Review and reform** • Provided secretariat support to the SC. • On behalf of the SC, made recommendations for legislative reform to the Premier. • Assisted with the SC's review of the Commonwealth legislation as required by section 31B of the PID Act. **Research** • Liaised with the PSC to include PID related questions in their People Matter Survey: in 2014, 63% of public officials who participated were aware of the PID Act and 86% were aware of their organisation's processes for reporting misconduct/wrongdoing. • Partnered with academics and other integrity organisations in *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*, an Australian Research Council funded Linkage Project led by Griffith University and the world's largest research project into whistleblowing to date. • Issued the WWTII threshold Survey of Organisational Processes and Procedures to all public authorities in NSW with more than 10 staff.

Statutory functions	Goals	Activities	Key achievements
COMPLAINT HANDLING AND INVESTIGATION			
• Receive PIDs about maladministration.	• Ensure timely and efficient handling of complaints. • Identify problems and deficiencies to improve the handling of PIDs.	• Assess and handle PIDs, purported PIDs and complaints about the handling of PIDs by public authorities.	• Assessed and handled 121 PIDs. • Assessed and handled 72 purported PIDs, where the complainant claimed they were making a PID but the Ombudsman's office assessed it as not meeting the PID Act criteria. • Assessed and handled 25 complaints about the handling of PIDs by public authorities. • Monitored two public authorities' compliance with the PID Act, by requiring them to notify the Ombudsman's office of all PIDs/purported PIDs received over a certain period.

Appendix 2: The PID landscape

This appendix provides information on the PIDs received by public authorities and investigating authorities from 1 January 2012 to 30 June 2015. Over this period, NSW public and investigating authorities reported receiving 2,652 PIDs. This does not include any PIDs made to MPs or journalists in the limited circumstances provided for in the PID Act.

Reporting by public authorities

Since 1 January 2012, the PID Act has required public authorities to report certain statistical information about their activities under the Act directly to the NSW Ombudsman every six months (section 6CA), as well as in their own annual report (section 31).

Statistical reports provided to the NSW Ombudsman

Table 1 shows the number of statistical reports provided to NSW Ombudsman as at 25 July 2016 for each of the seven six-month reporting periods from 1 January 2012 to 30 June 2015. Given the broad scope of the definition of a public authority, it is difficult to work out the exact number of authorities with responsibilities under the PID Act. Therefore, the proportion in Table 1 is only approximate.

Table 1. Statistical reports provided by public authorities over time

	Number of statistical reports provided	Proportion of identified authorities
Jan – Jun 2012	423	93%
Jul – Dec 2012	410	90%
Jan – Jun 2013	419	92%
Jul – Dec 2013	387	85%
Jan – Jun 2014	380	85%
Jul – Dec 2014	370	83%
Jan – Jun 2015	360	81%

A common recommendation made to public authorities arising out of audits conducted by the Ombudsman's office is to amend the statistical reports previously provided. This may be because the authority has failed to identify certain reports as PIDs or alternatively they have included matters which may not meet the criteria set out in the PID Act. The accuracy of data contained in reports from authorities is therefore unknown.

In focus: Explanation on counting

The PID Regulation outlines the information a public authority is to provide in their report to NSW Ombudsman and in their annual report. Clause 4(2)(b) states this should include the number of PIDs received by the authority.

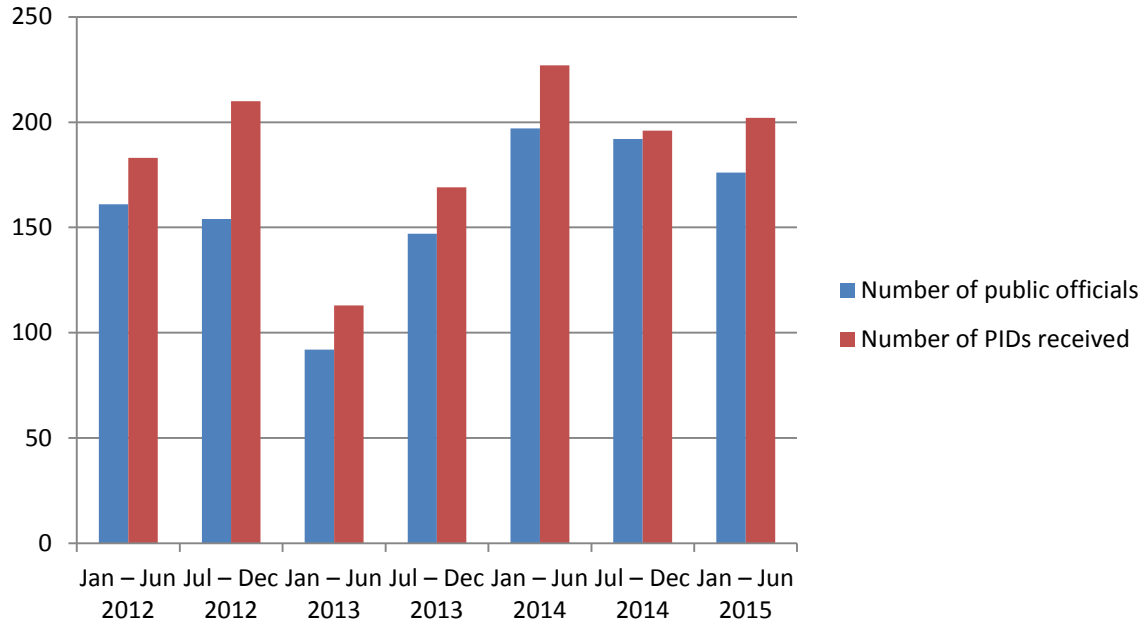
The NSW Ombudsman told public authorities the number reported to our office should refer to PIDs the authority took responsibility for handling, regardless of whether they were made directly to the authority or referred by another public or investigating authority under sections 25 or 26 of the PID Act. It should not include PIDs made directly to the authority and subsequently referred for handling by another authority under the PID Act.

This is to make sure PIDs are not double counted. A PID made directly to Authority X and then referred under s.26 of the PID Act to Authority Y should only be counted as one PID, despite the fact two authorities were involved in its handling. In future, it would be useful to collect additional information about whether PIDs were made directly to public authorities or referred from another authority.

PIDs reported by public authorities

Figure 2 shows the variation in the number of public officials who made PIDs directly to public authorities and the number of PIDs received by authorities over time. In total, public authorities reported receiving a total of 1,297 PIDs. There is clearly a great deal of variation over the seven reporting periods that is difficult to explain.

Figure 2. Number of public officials who made PIDs directly to, and number of PIDs received by, public authorities over time



1,116 public officials made PIDs directly to public authorities. The discrepancy between the number of public officials who made a PID directly to a public authority and the number of PIDs received is likely to reflect the fact that many PIDs are made to investigating authorities and referred to the public authority for handling. Amendments to the reporting requirements to require information on whether a PID was made directly to or referred to a public authority would help to clarify this and provide greater accuracy in relation to how many PIDs are made in NSW.

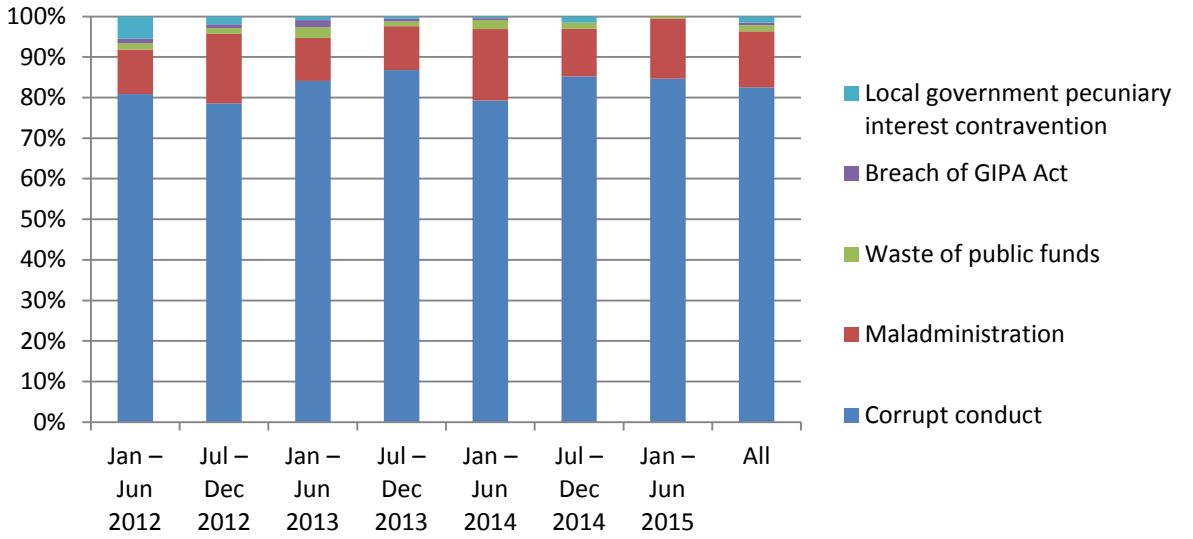
Subject matter of the PIDs

Where a PID contains multiple allegations that could fit more than one category of wrongdoing in the PID Act, the Ombudsman's office asked public authorities to only report the primary category of wrongdoing alleged — that is, the most significant or serious breach.[65] It is unknown how many PIDs primarily about corrupt conduct also contained allegations of maladministration or other categories of wrongdoing.

Of all PIDs received by public authorities, the vast majority primarily alleged corrupt conduct (82.5%, *n*=1,070), followed by maladministration (13.8%, *n*=179). Very few PIDs alleged serious and substantial waste of public funds (1.5%, *n*=20), a local government pecuniary interest contravention (1.5%, *n*=20) or a breach of the GIPA Act (0.6%, *n*=8). As Figure 3 shows, the proportion of PIDs alleging each category of conduct has remained relatively stable over time.

[65] NSW Ombudsman 2015, *Guideline C2: Reporting to the NSW Ombudsman*.

Figure 3. Primary category of wrongdoing alleged in PIDs received by public authorities over time

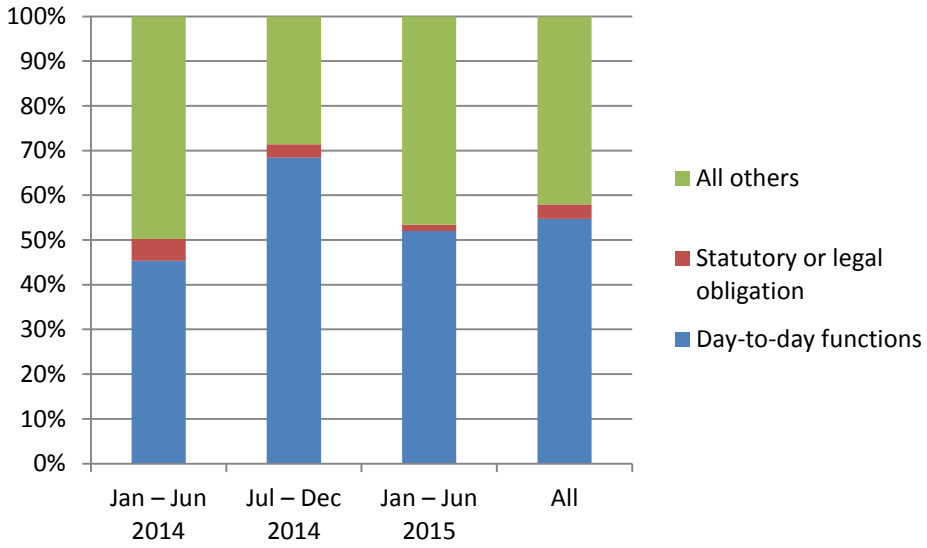


Role of public officials making PIDs

The PID Act does not distinguish reports made by public officials performing their day-to-day functions (such as managers, internal auditors, corruption prevention staff and investigators) and reports made by staff outside of their ordinary responsibilities. As long as a report is made by a public official and it meets the other requirements of the Act, it may be a PID.

Since 1 January 2014, public authorities have been required to provide information about the role of public officials making PIDs. As seen in Figure 4, more than half (55%, *n*=342) of all PIDs received by authorities since this time were reported as being made in the performance of a public official's day-to-day responsibilities.

Figure 4. Role of public officials making PIDs over time



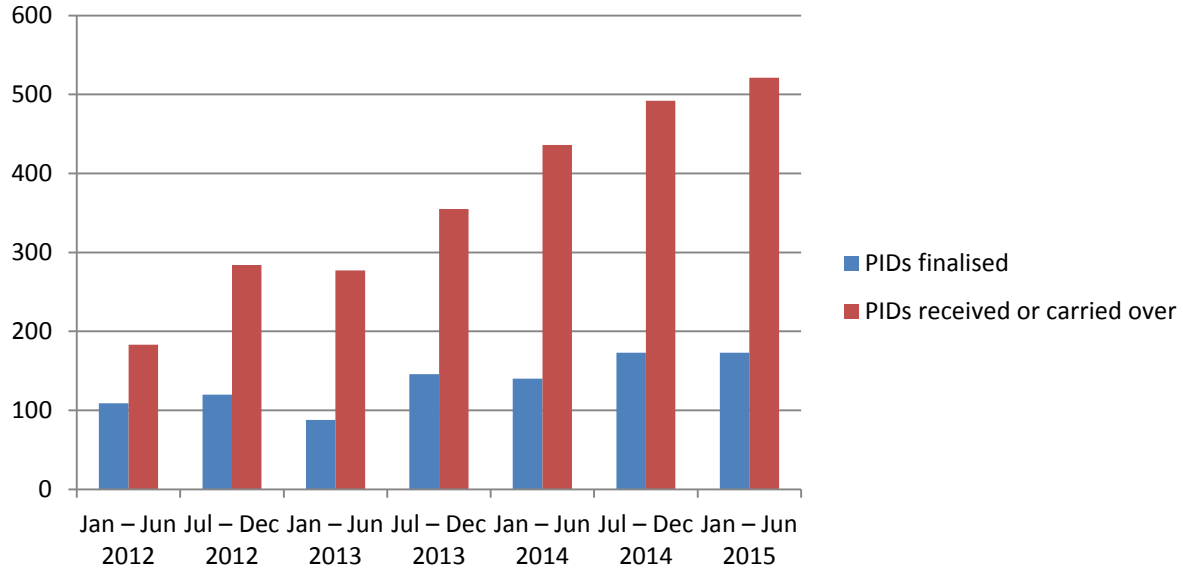
In responding to enquiries and clarifying reports provided, it's apparent that public authorities have misinterpreted these categories — for example, the belief that PIDs referred to or from ICAC should be included in the 'statutory or other legal obligation' category. Many

authorities also report all PIDs as being made by public officials performing their day-to-day functions. The information provided about these categories is therefore questionable.

PIDs received that were finalised

Figure 5 shows the number of PIDs received by public authorities that were finalised in each six-month period, as well as the number of new PIDs received or PIDs carried over from a previous reporting period. This suggests that, of the PIDs received by public authorities since 1 January 2012, 949 have been finalised while 521 remain unfinalised.

Figure 5. PIDs received by public authorities that have been finalised over time



However, interpreting this information is difficult. Instead of the number of PIDs received or carried over continuing to grow, it may be some authorities are not counting PIDs as being finalised if they were received in a previous reporting period. Based on the information provided, it is not possible to tell how long it takes an authority to finalise a PID. To address these issues, authorities could be required to provide information relating to individual PIDs (for example, the date received and the date finalised) rather than numbers of broad categories as is currently required.

Staff awareness

The heads of public authorities are responsible under section 6E(1)(b) of the PID Act for ensuring their staff are aware of the contents of the authority's internal reporting policy and the protections provided under the Act. Figure 6 shows that there has been an improvement over time in the proportion of authorities who report the head of the authority had taken action to meet their staff awareness obligations, up from 78% in the January to June 2012 period to 85% most recently.

Figure 6. Proportion of public authorities that reported raising staff awareness over time

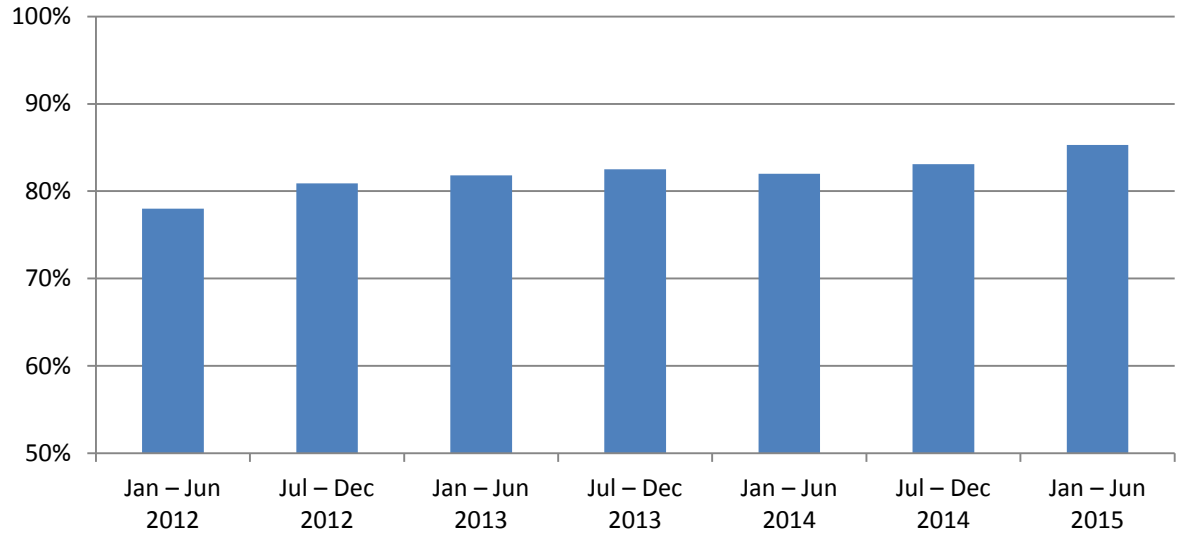
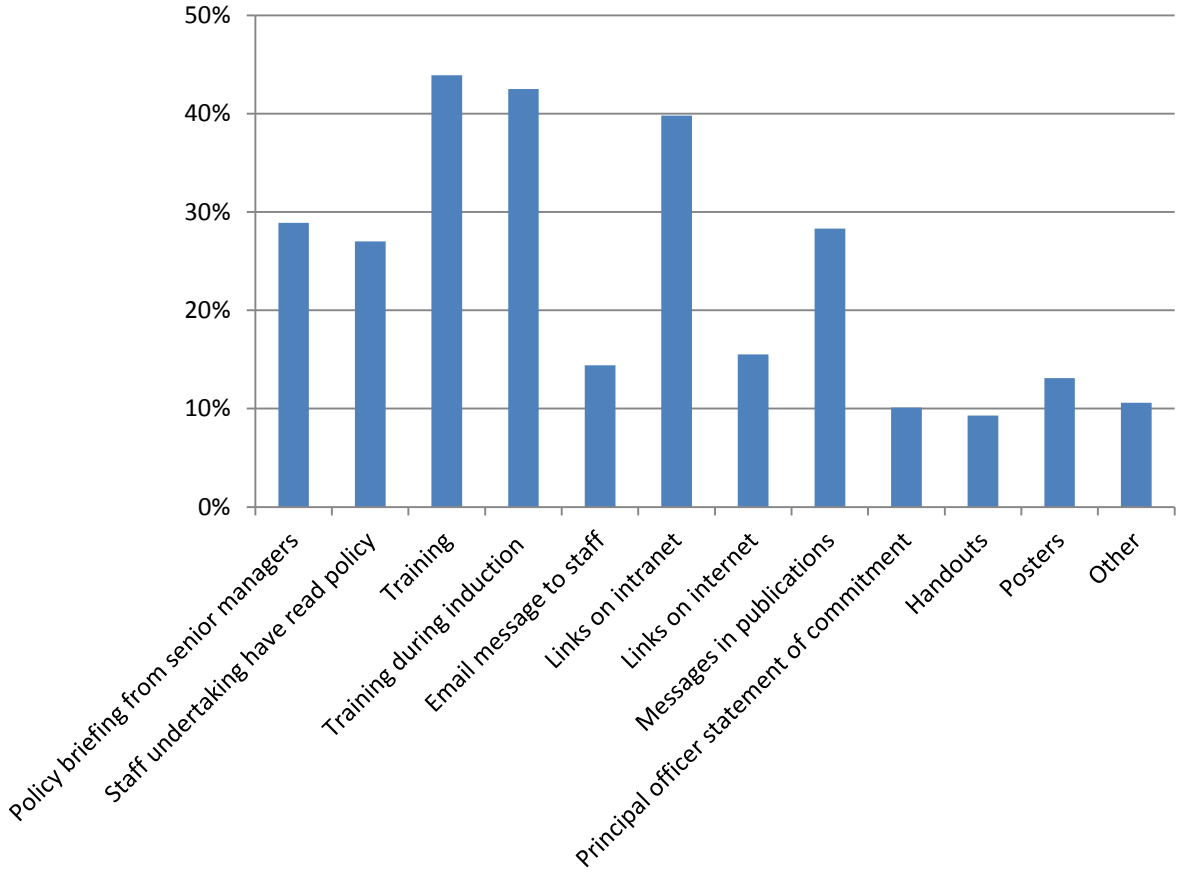


Figure 7 shows the range of actions taken by public authorities to raise staff awareness. It is included if the public authority has indicated such an activity in any reporting period. The most common strategies to raise awareness over all reporting periods to date include training staff, providing information during staff induction programs, linking to their internal reporting policy on the intranet and policy briefings. Many public authorities report that they have adopted a number of strategies in any given period.

Figure 7. Proportion of public authorities that reported adopting each awareness strategy



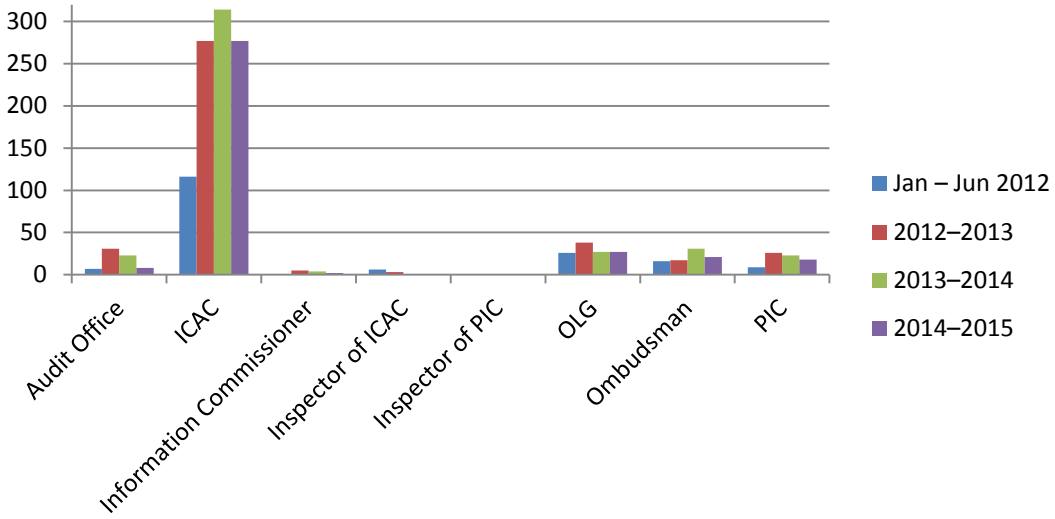
Each year, good practice examples of the innovative strategies public authorities have adopted to raise staff awareness are showcased in the NSW Ombudsman's oversight of the PID Act annual reports.

PIDs handled by investigating authorities

While not required under the PID Act, the Ombudsman's office coordinates the sharing of statistical information between investigating authorities about the PIDs handled in their capacity as investigating authorities to obtain a better picture of PIDs in NSW.

Investigating authorities received 1,355 PIDs between 1 January 2012 and 30 June 2015. Figure 8 shows the number of PIDs received by investigating authorities over time. The Inspector of the NSW Crime Commission is not included as he has not reported receiving any PIDs. ICAC have received most of the PIDs (*n*=984), followed by the OLG (*n*=118) and the Ombudsman's office (*n*=85). These accords with the trend in PIDs made to public authorities in that most allege corrupt conduct.

Figure 8. Number of PIDs received by investigating authorities over time



It is interesting that the data suggests public officials appear more likely to make a PID externally to an investigating authority than within their own public authority, given research shows employees generally prefer to report wrongdoing internally in the first instance.[66] This may be for many reasons, including:

- differing thresholds public authorities and investigating authorities take when assessing whether a matter is a PID
- reports made to investigating authorities do not need to be made to an identified officer to be considered PIDs, as is the case in public authorities
- public authorities are failing to take responsive action, leaving public officials to raise their concerns with an investigating authority.

[66] Donkin, M, Smith, R & Brown, AJ 2008, 'How do officials report? Internal and external whistleblowing' in AJ Brown (ed.), *Whistleblowing in the Australian public sector*, ANU E Press, Canberra, pp.83-108.

Appendix 3: Jurisdictional comparison of categories of conduct

Jurisdiction	Legislation	Corrupt conduct	Maladmin-istration	Misuse of public funds	Danger / risk to public health or safety	Danger / risk to environment	Illegal activity	Other categories
NSW	*Public Interest Disclosures Act 1994*	Yes	Yes	Yes	No	No	No	• Breach of GIPA • LG pecuniary interest contravention
ACT	s.8, *Public Interest Disclosure Act 2012*	Yes	Yes	Yes	Yes — a substantial and specific danger to public health or safety	Yes — a substantial and specific danger to the environment	Yes	
Cth	s.29, *Public Interest Disclosure Act 2013*	Yes	Yes	Yes	Yes — conduct that: (a) unreasonably results in a danger to the health or safety of one or more persons; or (b) unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons.	Yes — conduct that: (a) results in a danger to the environment; or (b) results in, or increases, a risk of danger to the environment.	Yes	• Scientific misconduct • Conduct that could result in disciplinary action
NT	s.5, *Public Interest Disclosure Act 2008*	Yes	Yes	Yes	Yes — substantial risk to public health or safety	Yes — substantial risk to the environment	No	• Reprisal
Qld	ss.12–13, *Public Interest Disclosure Act 2010*	Yes	Yes	Yes	Yes — a substantial and specific danger to public health or safety	Yes — a substantial and specific danger to the environment	No	• Substantial and specific danger to the health or safety of a person with a disability • Reprisal
SA	s.4, *Whistleblowers Protection Act 1993*		Yes	Yes	Yes — conduct that causes a substantial risk to public health or safety, or to the environment	Yes — conduct that causes a substantial risk to public health or safety, or to the environment	Yes	
Tas	s.3, *Public Interest Disclosures Act 2002*	Yes	Yes	Yes	Yes — a danger to public health or safety or to both public health and safety	Yes — conduct that constitutes a danger to the environment	Yes	• Professional misconduct • Misconduct, including breaches of applicable codes of conduct • Detrimental action

Jurisdiction	Legislation	Corrupt conduct	Maladmin-istration	Misuse of public funds	Danger / risk to public health or safety	Danger / risk to environment	Illegal activity	Other categories
Vic	s.4, *Protected Disclosure Act 2012*	Yes		Yes	Yes — substantial risk to public health or safety	Yes — substantial risk to the environment	Yes	• Conduct that would constitute reasonable grounds for dismissal • Detrimental action
WA	s.3, *Public Interest Disclosure Act 2003*		Yes	Yes	Yes — an act done or omission that involves a substantial and specific risk of — (i) injury to public health; or (ii) prejudice to public safety; or (iii) harm to the environment;	Yes — an act done or omission that involves a substantial and specific risk of — (i) injury to public health; or (ii) prejudice to public safety; or (iii) harm to the environment;	Yes	• Improper conduct