


Public Interest Disclosures Steering Committee

Annual Report 2018–19

September 2019



The Public Interest Disclosures Steering Committee is established under section 6A of the *Public Interest Disclosure Act 1994* (PID Act). Under this section, the Ombudsman, as chairperson of the Steering Committee, is required to prepare an annual report of the Committee's activities and any recommendations made to the Minister (the Premier and the Special Minister of State).

The PID Act sets out the framework for protecting public officials who make reports about wrongdoing from the risk of reprisal.

Public officials can make public interest disclosures (PIDs) about corrupt conduct, serious maladministration, serious and substantial waste of public money, a government information contravention or a local government pecuniary interest contravention.

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Functions

The functions of the Public Interest Disclosures Steering Committee are set out in sections 6A and 32 of the PID Act¹. They require the Committee to:

- provide advice to the Premier on the operation of the PID Act and recommend any necessary reform
- receive, consider and provide advice to the Premier on any reports from the Ombudsman in relation to the Ombudsman's functions under the PID Act
- consult with and provide advice to a Parliamentary Joint Committee to inform their review of the PID Act.

Membership

Membership of the Steering Committee is prescribed by the PID Act.

During the reporting year, the members or their nominated representative were:

- Michael Barnes NSW Ombudsman
- Karen Smith/Kate Boyd Deputy Secretary
Department of Premier and Cabinet
- Barry Underwood Director, Office of the Auditor-General
Audit Office of NSW
- Roy Waldon Executive Director, Legal Division
Independent Commission Against Corruption (ICAC)
- Michelle O'Brien A/Chief Executive Officer
Law Enforcement Conduct Commission
- Elizabeth Tydd Information Commissioner
- Emma Hogan Public Service Commissioner
- Gelina Talbot Assistant Commissioner
Professional Standards Command, NSW Police Force
- Tim Hurst Chief Executive
Office of Local Government

The Ombudsman's Public Interest Disclosures Unit (PID Unit) provides secretariat support to the Steering Committee.

1. Section 31B of the PID Act required the Steering Committee to review any Commonwealth legislation 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. That review was completed and a report published in January 2014.

Meetings

The Steering Committee met in person twice and held one meeting on the papers during the reporting year. Meetings are an opportunity for high-level discussion of PID related matters. Members of the PID Steering Committee also discuss issues out-of-session throughout the year.

The following matters are considered as standing items at meetings:

- **The work of the PID Unit.** A report is provided to members detailing current PID Unit projects, the training and audit programs, forums, agency engagement and other public awareness activities.
- **PID statistical information.** An overview of each six-monthly reporting period is provided to the Steering Committee that includes information about the number of PIDs reported to the Ombudsman by public authorities and key trends. This information is presented in the Ombudsman's *Oversight of the Public Interest Disclosures Act Annual Report*².
- **Roundtable PID updates.** Members provide updates about PID-related activities.

The following matters were also considered by the Steering Committee during the reporting period (either during formal meetings or out-of-session):

- approval of the Steering Committee's *Annual Report 2017–18*. The chairperson submitted the report to the Premier and it was tabled in the Legislative Council on 18 June 2019 and the Legislative Assembly on 20 June 2019
- the review of the PID Act that was undertaken by the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission
- the attribution of liability for failing to prevent detrimental action
- research into the nature of government functions and services currently provided by the private and not-for-profit sectors, and how other jurisdictions within Australia have dealt with this issue
- encouraging cultural change within public authorities by including wording and/or statements in their codes of conduct that explicitly recognises whistleblowing as ethical and appropriate conduct in the best interests of the organisation
- findings from *Whistling While They Work 2* research project, of which the NSW Ombudsman is a partner organisation
- the potential application of the new Commonwealth whistleblower protection provisions in the *Corporations Act 2001* (that commenced on 1 July 2019) to some NSW government entities.

These matters are expanded on in the section below.

2. These reports are available on the NSW Ombudsman's website: www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/public-interest-disclosures.

Matters of significance considered by the Steering Committee

Parliamentary review of the PID Act

In October 2017, the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (JPC) completed its review of the PID Act and tabled a report making 38 recommendations for revision or amendment. The recommendations focus on simplifying the disclosure process, improving remedies for detrimental action, refining reporting requirements and clarifying the PID Act.

On behalf of the Premier, the Government formally requested that the PID Steering Committee examine in detail the implementation issues arising from the JPC's recommendations and, in due course, to consider the draft Bill prepared in response to the PID Act review.

Liability for failing to prevent detrimental action

The Ombudsman's *Oversight of the Public Interest Disclosures Act 1994 Annual Report 2017–18* raised concerns that public authorities are more likely to fail in their obligations to prevent harm to a reporter than take overt reprisal action. The report recommended one way to help address this issue would be to:

'include a corresponding provision that allows reporters to seek remedies in cases where damage has occurred because the authority has failed to fulfil their duty to prevent reprisal and are therefore liable. This may help to address management apathy by increasing the risk involved in not dealing with PIDs appropriately as well as increase the effect of loss aversion'.

The Committee considered this recommendation and noted recent amendments to the *Corporations Act 2001* (Cth) take this approach. The Committee agreed in principle that such an approach would benefit the NSW PID scheme but that further consideration would need to be given to questions of implementation.

Research on external providers

In its review of the PID Act, the JPC recommended:

'that the *Public Interest Disclosures Act 1994* be amended to enable a person to be deemed to be a public official under the Act, to provide protection to those who report wrongdoing but do not fall within the definition of public official'.

The Committee decided research was needed into:

- the nature of government functions and services currently provided by the private and not-for-profit sectors
- the view of PID practitioners
- how other state and territory jurisdictions have dealt with this issue
- options NSW could consider for legislative reform.

As secretariat to the Steering Committee, the Ombudsman's office undertook this research and provided the Committee with a copy of the survey findings at the Committee meeting held in January and a discussion paper at their meeting in April.

One part of the research involved sending a questionnaire to approximately 440 practitioners. We received 37 partial or complete responses, making a total response rate of 8%. These findings could not be considered as representative of the NSW public sector as a whole, but they appear to suggest that expanding the definition of 'public official' is not seen as a significant issue by practitioners.

The first part of the survey asked about the number of contractors engaged by the authority and the type of work the contractor performs. The second section sought information about how the authority has handled PIDs from or about external providers, including any benefits or difficulties encountered.

Findings of note were:

- External providers are used by more than 80% of respondents.
- Amending the definition of 'public official' is not seen as a big challenge because:
 - respondents will treat PIDs from internal staff and external providers in much the same way
 - respondents do not anticipate receiving a large number of reports from external public officials.
- The main challenge respondents foresee is not having the legal authority to investigate a third party.

Another component of the research considered the way other jurisdictions in Australia have dealt with this issue. A comparison of jurisdictions demonstrated:

- Four jurisdictions have removed the distinction between public officials and 'natural persons' for the purposes of making a PID. For example, in Western Australia, 'any person may make an appropriate disclosure of public interest information to a proper authority.'³
- Six jurisdictions have expanded the definition of public authority to capture certain external providers within the legislation. For example, in Queensland, a public authority also includes 'an entity, prescribed under a regulation, that is assisted by public funds.'⁴ The Victorian jurisdiction has defined public authority as 'a body that is performing a public function on behalf of the State or a public body or public officer (whether under contract or otherwise).'⁵
- The Commonwealth has adopted a 'deeming provision' whereby an 'authorised officer' of a public authority can classify an individual as a public official for the purposes of making a PID. The authorised officer who receives a disclosure may make this determination if he or she believes on reasonable grounds the individual has information that concerns disclosable conduct, and the individual proposes to or has already disclosed this information to the authorised officer.
- All jurisdictions, with the exception of NSW, have given the Auditor General power to audit entities receiving public money.

3. S 5(1) *Public Interest Disclosure Act 2003* (WA).

4. S 6(1)(k) *Public Interest Disclosure Act 2010* (Qld).

5. S 6(a) *Protected Disclosure Act 2012* (Vic).

These four approaches were presented to the Committee as options to consider. The Committee concluded that the model in the Commonwealth was most appropriate for NSW and recommended it be included in the upcoming revision of the PID Act. The Ombudsman's office will develop guidance for public authorities on when and in what circumstances it is appropriate to 'deem' a person to be a public official for the purposes of the PID Act.

Recognising PIDs in codes of conduct

The Committee received a proposal from the National President of Whistleblowers Australia Inc that suggested cultural change within public authorities could be encouraged by including wording and/or statements in their codes of conduct that explicitly recognises whistleblowing as ethical and appropriate conduct in the best interests of the organisation.

The Committee agreed expanding the references to PIDs in codes of conduct would be beneficial and help to encourage better reporting cultures. The Committee noted the importance of the Office of Local Government's (OLG) model code of conduct for local authorities and the Public Service Commission's (PSC) model code of conduct for public officials in NSW.

The chairperson of the Committee wrote to the OLG and PSC in June 2019 and asked that they consider including reference to the importance of encouraging whistleblowing when the relevant codes of conduct are next revised.

Findings from the Whistling While They Work 2 Project

Whistling While They Work 2 is a research project involving five universities and 22 integrity and governance organisations, including the NSW Ombudsman. The most recent report released presents the initial results from the Integrity@WERQ employee survey phase of the project, drawing on the experiences of 17,778 individuals across 46 organisations in Australia and New Zealand. This is thought to be the largest dataset to have been collected for the specific purpose of understanding whistleblowing in organisations, and the first to be conducted across the public and private sectors, using the same methodology, at the same time.

The Committee considered findings relating to the value of risk assessment and proactive management, as well as how to identify those reports that have a higher risk of poor outcomes. Key findings included:

- An assessment of the risks of detrimental impact to reporters is far less frequent than suggested by many organisations' claims. Less than 10% of reporters indicated that any risk assessment took place, either when they first made their report or later when conflicts or problems arose.
- Conducting risk assessments was associated with greater management action to proactively manage problems.
- When organisations assess risk early, reporters perceive better treatment from both managers and colleagues, and face, on average, half as many repercussions.
- Risk factors for higher reporter repercussions and management mistreatment include:
 - greater seniority of the alleged wrongdoer(s)
 - confidentiality not being maintained
 - type of wrongdoing – that is, a mix of public interest-type wrongdoing and personal or workplace grievances, as opposed to purely public interest types
 - greater number of people involved in the alleged wrongdoing ('extent of wrongdoing').

Other key findings from the research include that:

- There is a surprising similarity in the basic nature and dynamics of whistleblowing between public and private sector respondents. There is a broad consensus in both sectors that reporting suspected wrongdoing is vital to the ongoing success of organisations, with fundamental reforms – from managerial changes to new training and other procedures – arising from employee reports in 58% of cases.
- Reporters responded that they were treated badly by their management or colleagues in 42% of cases and experienced negative repercussions (including stress and reduced work performance) in up to 81% of cases.
- Recognising ‘mixed’ public interest and grievance wrongdoing types, and the significance of ‘collateral’ or informal detrimental effects (not just reprisals) seems key to achieving better reporter outcomes.

New Commonwealth whistleblower protection legislation

The Commonwealth *Treasury Laws Amendment (Enhancing Whistle-blower Protections) Act 2019* (Cth Act) was passed by Parliament and assented to on 12 March 2019. The provisions with potential relevance to NSW entities insert new provisions in the *Corporations Act 2001* (Cth) and commenced on 1 July 2019.

The amendments in the Cth Act are expressed to apply not only to any company, but also to “a corporation to which paragraph 51(xx) of the Constitution applies”. This means that any entity that is a trading or financial corporation to which paragraph 51(xx) of the Constitution applies will be subject to the new regime.


The scope of paragraph 51(xx) of the Constitution is not entirely clear. High Court⁶ and Federal Court⁷ authorities suggest that a significant number of entities established under NSW laws may be constitutional corporations, and therefore will be subject to the new Commonwealth whistleblower regime. This could potentially include a number of local councils, health bodies, state-owned corporations, universities, and transport agencies.

The *Corporations Act* is an unusual Commonwealth statute in that it expressly provides that it is intended to operate concurrently with State law. Particularly given that provision, we do not expect that the new sections to be inserted by the new Cth Act will be taken to have been intended to ‘cover the field’, in the sense of operating to the exclusion of existing State whistleblower laws.

Accordingly, any entity that is currently subject to the NSW PID Act will continue to be required to comply with the requirements of the PID Act, even if it also becomes subject to the Commonwealth regime. This does not preclude the possibility that there could arise a direct inconsistency between the new Cth Act and the PID Act or some other NSW law. For example, there may be circumstances in which it is impossible to obey both the new Commonwealth law and a relevant NSW law. In such a case, section 109 of the Constitution (which generally provides that a Commonwealth law prevails to the extent of any inconsistency with a State law) may come into play.

6. eg., *Communications etc and Allied Services Union of Australia v Queensland Rail* (2015) 218 ALR 1; *New South Wales v Commonwealth* (2016) 229 CLR 1 (the Work Choices case).

7. eg., *Quickenden v O’Connor* (2001) 109 FCR 243 (the University of Western Australia case); *United Firefighters Union v Country Fire Authority* (2015) 315 ALR 460.



Agencies that may be subject to the concurrent operation of the new Commonwealth legislation have been encouraged to seek legal advice on their obligations under the new Cth Act, including what changes to internal policies may need to be made to minimise the risk of inadvertent non-compliance.

The Ombudsman is also currently reviewing its guidance materials for agencies in relation to the PID Act, to identify any changes that may need to be made in light of the potentially concurrent operation of the Commonwealth Act for some entities.

Recommendations to the Minister

The Committee did not make formal recommendations over the reporting year but provided advice to government in response to its proposed reform of the PID Act.

