

Oversight of the *Public Interest Disclosures Act 1994*

Annual Report 2019–20

15 December 2020

ABN 76 325 886 267

Level 24, 580 George Street, Sydney NSW 2000

T 02 9286 1000 |

Tollfree 1800 451 524

www.ombo.nsw.gov.au



The Hon John Ajaka MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O’Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Pursuant to section 6B(3) of the *Public Interest Disclosures Act 1994* I am required to prepare and furnish to you a report of my work and activities for the 12 months ending 30 June each year. This report fulfils this requirement and also addresses the requirements under section 6B(1)(e)-(f) that I monitor, audit and report on the exercise of functions under and compliance with the Act by public authorities.

I draw your attention to the provisions of section 6B of the *Public Interest Disclosures Act 1994* and those of section 31AA of the *Ombudsman Act 1974* in relation to the tabling of the Public Interest Disclosures Oversight Annual Report and request that you make this report public forthwith.

Yours sincerely

A handwritten signature in black ink, appearing to read "Paul Miller". The signature is written in a cursive, flowing style.

Paul Miller

Acting NSW Ombudsman

15 December 2020

Oversight of the *Public Interest Disclosures Act 1994*

Annual Report 2019–20

15 December 2020

Contents

Foreword from the Ombudsman.....	1
Part 1. Public Interest Disclosures	3
1.1. Public Interest Disclosures Act.....	4
1.2. Roles and responsibilities in public interest disclosures	4
1.2.1. Public authorities.....	4
1.2.2. Investigating authorities	6
1.2.3. The PID Steering Committee.....	6
1.2.4. NSW Ombudsman.....	7
Part 2. Public Authorities: Reporting Public Interest Disclosures.....	9
2.1. Public authority reports.....	10
2.1.1. Number of reports provided by public authorities 2019-20.....	11
2.1.2. Number of reports by public authorities identifying receipt of a PID.....	11
2.1.3. Number of PIDs received	12
2.1.4. Number of PIDS finalised	12
2.1.5. Type of public authority	13
2.1.6. Subject matter of PIDs.....	13
2.1.7. Circumstances under which public officials make PIDs	14
2.2. Internal reporting policies	15
2.2.1. Staff awareness	16
2.3. PIDs handled by investigating authorities	17
2.4. Data limitations.....	18
Part 3. Training, awareness, advice and research	21
3.1. PID training.....	22
3.1.1. Learning online	24
3.2. Forums, conferences and other engagement	24
3.2.1. PID practitioner forum.....	24
3.2.2. Other forums and conferences.....	25
3.2.3. Whistling Wiki	25
3.2.4. Providing advice	25
3.3. Whistling While They Work 2 research project	26
3.4. Discussion focus: whistleblowing and the media.....	26
3.4.1. Whistleblowers in the media	27
3.4.2. When are whistleblowers protected for making disclosures to journalists in NSW?.....	29
3.4.3. The requirement that disclosures to journalists be ‘substantially true’	31
3.4.4. The Crown Solicitor’s advice on the ‘substantially true’ requirement	33
3.4.5. JPC Recommendation.....	34
Part 4. Legislative and administrative advice	37
4.1. The PID Steering Committee	38
4.1.1. The PID Bill.....	38
4.1.2. Commonwealth whistleblower legislation	39
Part 5. PID Audits.....	41
5.1.1. PID Implementation Audit.....	42
5.1.2. PID Policy Visibility Audit.....	43
5.1.3. Future audit program.....	45

ISBN: 978-1-925885-25-5

ISSN: 2201-2974

© State of New South Wales, 15 December 2020

This publication is released under a Creative Commons License CC BY 4.0

Foreword from the Ombudsman

It is my privilege as Acting Ombudsman to present the *Public Interest Disclosures Act 1994* (NSW) annual oversight report. The report outlines the activities of the Ombudsman's office in supporting officials who make public interest disclosures (PIDs), in providing advice and education to the agencies that receive them or whose conduct may be the subject of them, and in monitoring and auditing the operation of the PID Act.

I would like to acknowledge and thank the former Ombudsman, Michael Barnes, for his leadership of our PID oversight responsibilities during the year to which this report relates. Michael left this role in August 2020 to take up the role of NSW Crime Commissioner.

2020 has undoubtedly been an exceptional and difficult year. As has been the case for all workplaces, the COVID-19 pandemic posed significant operational challenges as we navigated the shift to remote working. Our face-to-face training program was suspended, and our audit program was interrupted.

In addition, and beyond the direct impact on our office, I understand that the Government's progress in preparing a Bill for a new PID Act has been further delayed. It has now been three years since the NSW Government committed to introducing new legislation to give effect to the recommendations of the 2017 *Review of the Public Interest Disclosures Act 1994* by the Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission.

The current PID Act provides important protections for public officials who report serious wrongdoing in the public interest, wrongdoing that would likely not come to light without insiders being willing to speak up. This year's report again shows how important it is for public officials to speak up when they see wrongdoing, and for them to be confident that if they do they will be supported. The report also highlights the essential role of independent integrity bodies like the ICAC, the LECC and the Ombudsman in investigating reports of wrongdoing.

As the Parliamentary Committee observed in its 2017 report, the NSW public interest disclosures legislation is the oldest in Australia, and despite piecemeal amendments over time, the current PID Act needs improvement.

I look forward to new legislation that better supports a culture where public officials are encouraged to report serious wrongdoing with full confidence that they will be protected if they do so. A new PID Act will also support us to educate stakeholders, promote better practice and develop a culture of reporting throughout the public sector, as well as to collect, analyse and report in a more meaningful way on data relating to public sector whistleblowing.

With the PID Steering Committee, we will continue to provide advice to the NSW Government to see the recommendations of the Parliamentary Committee implemented in a new PID Act.

This report

The *Public Interest Disclosures Act 1994* (PID Act) requires the Ombudsman to provide an annual report to the NSW Parliament on the Ombudsman's activities under section 6B of the Act. Sections 6B(1)(e) and (f) require the Ombudsman to report to Parliament specifically on monitoring and auditing activities.

This report meets those requirements and outlines our work to meet our responsibilities under the Act.

Part 1 briefly describes the PID Act and the various roles and responsibilities outlined within it.

Part 2 details key information from reports about public interest disclosures provided to our office by public authorities and investigating authorities for the reporting year.

Part 3 provides an overview of our role to promote the objects of the PID Act, to provide training about the PID Act, and to advise and assist public authorities in meeting their obligations under it. This part also includes a discussion on whistleblowing to media and Members of Parliament, and the degree of protection that may be provided by the PID Act in these circumstances.

Part 4 covers our responsibilities as chair of the PID Steering Committee, and our provision of advice on the administration of the PID Act.

Part 5 provides an overview of our auditing work in the reporting year.

A separate Annual Report of the PID Steering Committee will be tabled in Parliament.



Paul Miller
Acting NSW Ombudsman



Part 1.

Public Interest Disclosures

1.1. Public Interest Disclosures Act

The PID Act encourages public officials to report serious wrongdoing by providing them with certain legal protections if they do so.

The object of the PID Act is to encourage and facilitate the disclosure, in the public interest, of:

- corrupt conduct
- maladministration
- serious and substantial waste
- government information contraventions, and
- local government pecuniary interest contraventions.

Public interest disclosures (PIDs) may be made to an authority concerned – being the authority the official works for or otherwise belongs to and/or the authority whose conduct is the subject of the disclosure. However, a disclosure to such an authority will be recognised as a PID only if it is made to the principal officer of the authority or to a person who has been specified as a ‘disclosure officer’ of the authority under its internal PID policy.

PIDs may also be made to the relevant investigating authority for that particular type of wrongdoing – corrupt conduct to the Independent Commission Against Corruption, maladministration to the Ombudsman, and so on.

In certain limited circumstances, the PID Act recognises PIDs that are made to third parties – journalists and Members of Parliament. This avenue for the making of a PID is discussed further in part 3.

The PID Act requires public authorities to establish systems to deal with and investigate public interest disclosures.

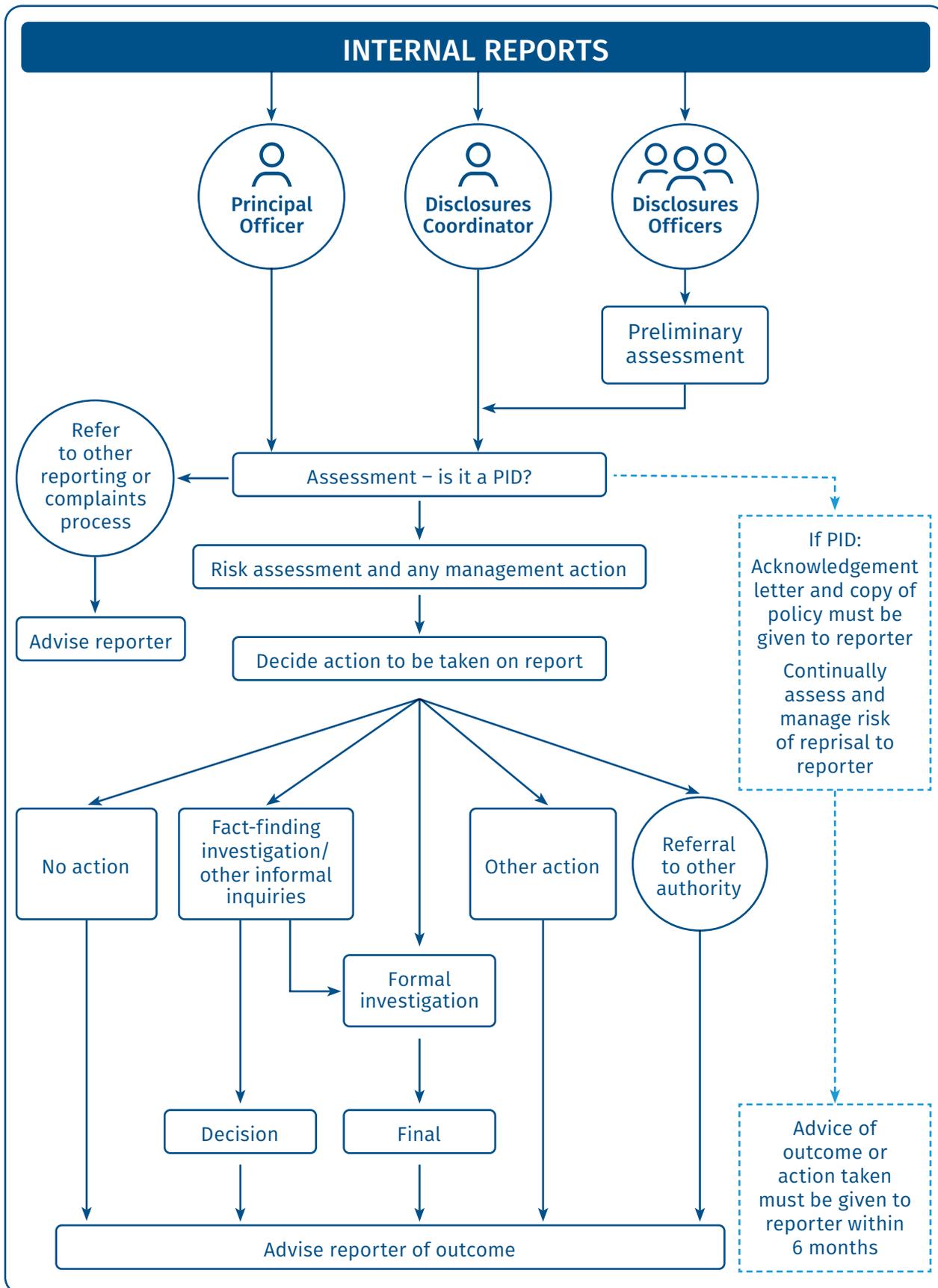
1.2. Roles and responsibilities in public interest disclosures

1.2.1. Public authorities

Section 6E of the PID Act states that the head of a public authority is responsible for ensuring that:

- The public authority has a policy that includes procedures for receiving, assessing and dealing with PIDs. This policy must have regard to guidelines developed by our office.
- The staff of the public authority are aware of the policy and the protections under the Act.
- The public authority complies with its policy and obligations under the PID Act.
- The policy designates officers to receive PIDs, commonly referred to as disclosures officers.

The internal reporting process



Typically, a disclosures coordinator is appointed to ensure the public authority's obligations under the PID Act are met. With the principal officer, they are responsible for:

- deciding whether to treat a report of wrongdoing as a PID, which they must do if it meets the criteria set out in the PID Act
- assessing the risks of reprisal and other detrimental action that a reporter may face and implementing strategies to mitigate any identified risks
- determining how to deal with a report, which may include referring the disclosure, making informal inquiries, formally investigating the allegations or taking no further action, and
- communicating with, and supporting the reporter through, the process.

1.2.2. Investigating authorities

Outside their own organisation, public officials can make PIDs directly to the following investigating authorities and in relation to different types of conduct:¹

- NSW Ombudsman
- NSW Audit Office
- Independent Commission Against Corruption (ICAC)
- NSW Information Commissioner
- Law Enforcement Conduct Commission (LECC)
- Office of Local Government (OLG)
- Inspector of the ICAC
- Inspector of the LECC.

These investigating authorities deal with PIDs in accordance with the legislation governing their operation. PIDs made to these authorities must also be made in accordance with such legislation.

1.2.3. The PID Steering Committee

The PID Act establishes the PID Steering Committee, a statutory advisory mechanism for key stakeholders to provide advice to the Ministers responsible for administering the PID Act, these being the Premier and Special Minister of State.

The PID Steering Committee comprises the heads of investigating authorities in the PID Act, the Department of Premier and Cabinet, the Public Service Commissioner and the NSW Police Force.

1. Until March 2020, the Ombudsman administered the NSW child-related reportable conduct scheme. This scheme has now been transferred to the Office of the Children's Guardian (OCG). As a result of this transfer, the OCG has been added as an investigating authority in s 4 of the PID Act. However, the OCG has not been conferred with any functions under the PID Act.

The Ombudsman chairs the PID Steering Committee and Ombudsman staff provide secretariat support.

The PID Steering Committee prepares an annual report on its work, which is required to be tabled by the Minister in Parliament.

1.2.4. NSW Ombudsman

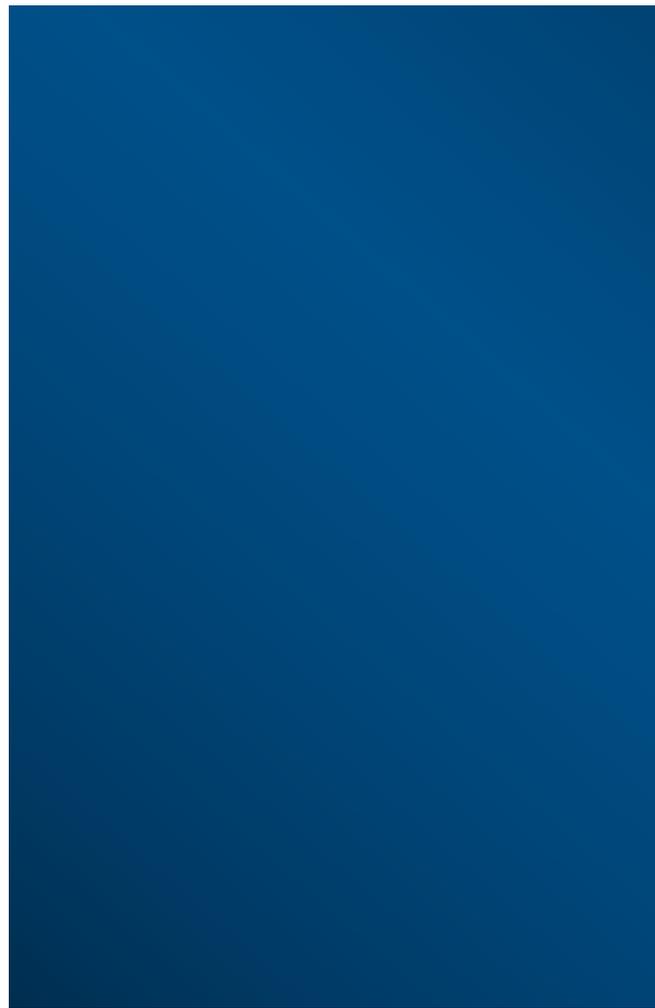
The Ombudsman has responsibility to oversight the PID Act. Our functions are to:

- promote public awareness and understanding of the Act and to promote its objective
- 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 to assist public authorities, investigating authorities and public officials
- monitor, and provide reports to Parliament on, the exercise of functions under the Act and compliance with the Act by public authorities
- audit, and provide reports to Parliament on, the exercise of functions under the Act and compliance with the Act by public authorities, and
- provide reports and recommendations about proposals for legislative and administrative changes to further the objective of the Act.

In performing our statutory functions, we aim to:

- increase awareness of the procedures for making PIDs and the protections provided by the PID Act
- improve the handling of disclosures and the protection and support for people who make them
- improve identification and remedying of problems and deficiencies revealed by disclosures, and
- ensure an effective statutory framework is in place for the making and management of disclosures and for the protection and support of the people who make them.

As an investigating authority, we also receive, investigate and otherwise deal with PIDs made to our office about maladministration.





Part 2.

Public Authorities: Reporting Public Interest Disclosures

Under section 31 of the PID Act, public authorities are required to prepare a report of statistical information on the public authority's compliance with its obligations under this Act. This report must be submitted to the responsible Minister for the public authority, and tabled in Parliament. In practice, most public authorities fulfil this obligation by including this information in their annual report.

Public authorities are required to provide us with a copy of their report. They are also required to provide us a six-monthly report with this information.

The information public authorities must report is detailed in clause 4(2) of the Public Interest Disclosures Regulation 2011 (PID Regulation):

- 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 actions 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.

Reports also need to identify the circumstances under which a public interest disclosure was made; whether by public officials in performing their day to day functions as such public officials, under a statutory or legal obligation, or in any other circumstances.

2.1. Public authority reports

The information reported to us in 2019–20 is summarised below, with some comparison over a three-year period.

It should be noted that there are limitations to the data which are detailed below.

2.1.1. Number of reports provided by public authorities 2019-20

Table 1 shows the number of reports provided to our office for 2019-20, as at 16 November 2020. In addition, during 2019-20 we also received 61 reports that related to prior reporting periods.

Table 1. Reports provided by public authorities to our office.

Reporting period	Number of identified public authorities	Number of statistical reports provided	Proportion of identified authorities
July–December 2019	397	338	85%
January–June 2020	397	323	81%

As noted in Table 1, a significant proportion of public authorities did not meet their reporting obligation (15% for the first six month report and 19% for the second six month report). We appreciate that the COVID-19 pandemic has presented significant challenges for public authorities. However, non-compliance with these reporting obligations is an issue that we have consistently highlighted since our first PID Oversight Report in 2011-12. This is despite our office adopting an active escalation process, with direct contact and reminders, to avoid the possibility of inadvertent non-compliance.

2.1.2. Number of reports by public authorities identifying receipt of a PID

Most public authorities (84%) reported that they had not received any PIDs in 2019-20.

As shown in Table 2, the proportion of authorities that reported identifying the receipt of at least one PID during the year has been consistent over the past three reporting periods.

Table 2. Number of public authorities reporting that they had received PIDs (percent reporting)

Total number of PIDs reported	2017–18	2018–19	2019–20
0	85%	83%	84%
1	6%	7%	8%
2 to 5	8%	8%	6%
6 to 10	1%	1%	1%
11 to 20	1%	1%	1%
21+	0%	0%	1%

2.1.3. Number of PIDs received

In 2019-20, 75 public authorities reported that they had received a total of 383 PIDs.

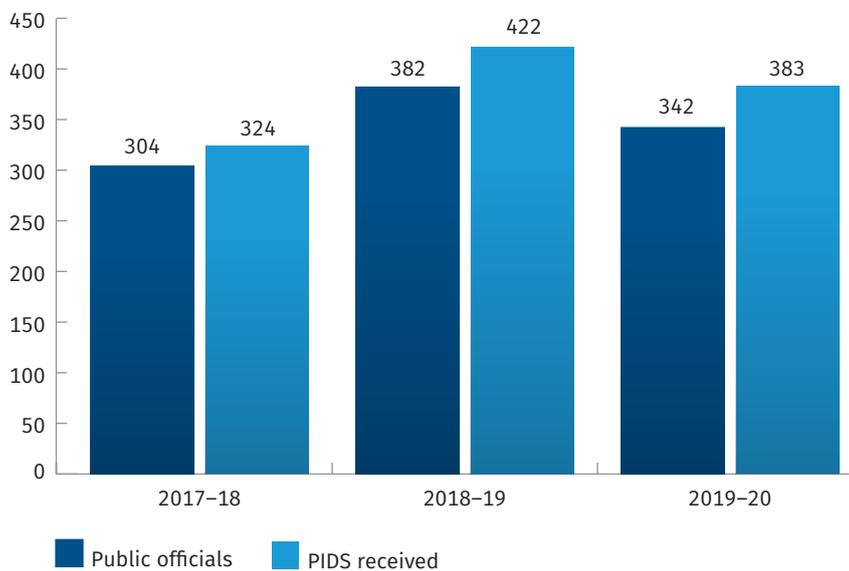
The number of public officials reported as having made a PID directly to a public authority was 342.

This number is less than the number of PIDs received, and there are likely two main reasons for this:

- Public officials may make more than one PID.
- The number of public officials making a PID is only recorded if they made the PID *directly* to the public authority that received it. In some cases, a public official may make a PID directly to one public authority (which duly records one PID received and one public official having made a PID in its report), and then that public authority refers the PID to a second public authority. The second public authority will record one PID having been received by it, but no public official having made it (as it was not made directly to that authority).

As shown in Figure 1, the 383 PIDs received (342 officials making PIDs) in 2019-20 is a decrease from the historical high of 422 received (382 officials making PIDs) in 2018-19, but still above the 324 received (304 officials making PIDs) in 2017-18.

Figure 1. Number of public officials who made PIDs directly to, and number of PIDs received by, public authorities, since 2017-18.



2.1.4. Number of PIDS finalised

Public authorities reported finalising 303 PIDs in 2019-20. That figure may include PIDs received in previous years.

2.1.5. Type of public authority

The majority of PIDs were reported by state government agencies, followed by local government and state-owned corporations.

Table 3. type of authority and number of all PIDS received

Type of public authority	Number of PIDS/% of all PIDS received for 2019-20
State Government agencies	185 (48%)
Local Government authorities	65 (17%)
State owned corporations	52 (14%)
Local Health Districts	38 (10%)
Universities	24 (6%)
Local Aboriginal Land Councils	19 (5%)
Total	383

2.1.6. Subject matter of PIDs

Under the PID Regulation, authorities must report on the number of PIDs received that relate to the following subject matter:

- corrupt conduct
- maladministration
- serious and substantial waste of public or local government money
- government information contravention, and
- local government pecuniary interest contraventions.

Most PIDs will relate to a number of the above categories – for example, corrupt conduct will generally also be a form of maladministration. In practice, for any PID, an authority will report on just one subject matter – the ‘primary’ matter - being the one that is considered to be the most serious allegation.

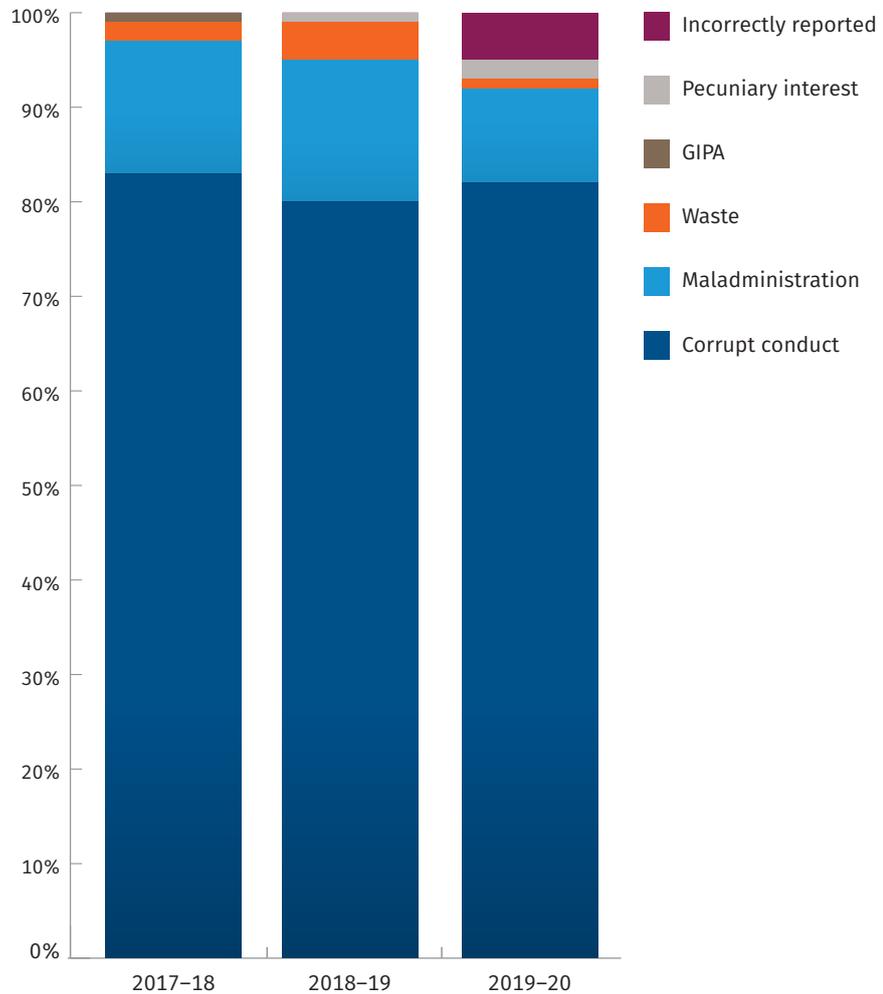
Figure 2 below shows the most serious allegation of wrongdoing in PIDs received by public authorities in the last three years.

Consistent with previous years, the primary issue in the large majority of PIDs made to public authorities in 2019-20 is alleged corrupt conduct (82%, n=315).

Corrupt conduct is the most serious of the subject matter categories, therefore, as noted above, if a PID were to allege both corrupt conduct and, say, a serious and substantial waste of public money, it would be recorded by the authority in its report as relating to corrupt conduct. Accordingly, these figures should not be taken to imply that there were far fewer PIDs relating to the other subject matter categories.

The second most common primary issue recorded (for matters that did not also involve an allegation of corrupt conduct) was alleged serious maladministration (10%, 38 PIDs).

Figure 2. Most serious allegation of wrongdoing in PIDs received by public authorities²



2.1.7. Circumstances under which public officials make PIDs

Public authorities are required to provide our office with information about the circumstances under which public officials have identified and reported PIDs. PIDs can be made:

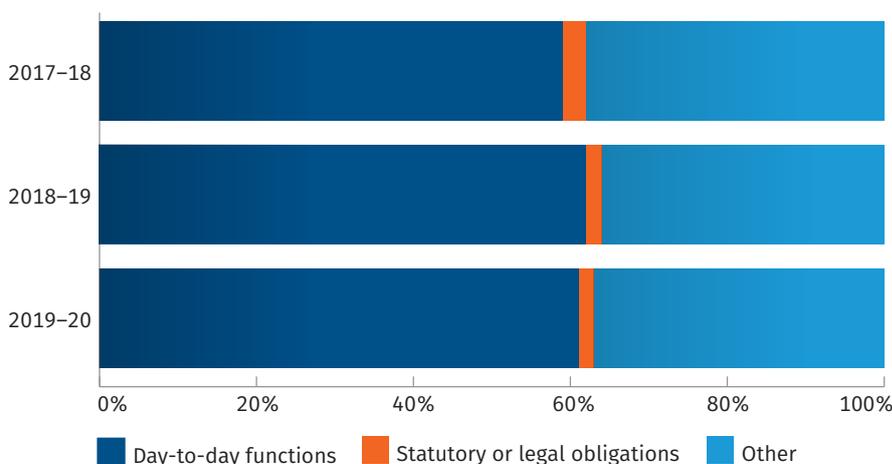
- through the performance of a person’s day-to-day functions (for example, by managers, internal auditors, corruption prevention staff, and investigators)

2. 2019-20 contains a category of ‘incorrectly reported’ PIDs due to non local government authorities receiving (and handling) 18 local government pecuniary interest contravention PIDs (which can only relate to local government authorities). These PIDs were incorrectly reported and at the time of reporting, we have not been able to clarify this with the reporting authority.

- because of a statutory or other legal obligation (for example, where public officials are required to report possible corrupt conduct to ICAC)
- through any 'other' circumstances (for example, employees who become aware of wrongdoing and voluntarily report this using the public authority's internal reporting policy).

Figure 3 shows that more than half (61%, n=208) of all PIDs received by authorities over the year were reportedly made in the performance of a public official's day-to-day functions. Seven were made by public officials as a result of a statutory or legal obligation, and 128 were made by public officials through other circumstances.

Figure 3. Role of public officials making PIDs since 2017-18



2.2. Internal reporting policies

Under section 6D of the PID Act, all public authorities must have a policy that sets out procedures for receiving, assessing and dealing with PIDs.

Table 4 shows the proportion of public authorities that reported having an internal reporting policy, broken down by type.

Table 4. Proportion of PAs that reported having an internal reporting policy

Type of public authority	% reported internal reporting policy in 2019-20
State owned corporations	100%
Universities	100%
State Government agencies	96%
Local Health Districts	96%
Local Government authorities	95%
Local Aboriginal Land Councils	70%

We continue to promote our model internal reporting policy designed specifically for Local Aboriginal Land Councils (LALCS). We will prioritise working with LALCS over the next year to assist them to meet their PID obligations.

Do all public authorities need an internal reporting policy?

We have previously been contacted for advice by public authorities, such as trusts and statutory state-owned corporations that do not directly employ any staff. These authorities have told us that they do not have an internal reporting policy, and have questioned whether they require one.

The PID Act currently makes no distinction between non-operational/unstaffed public authorities and others – all public authorities must comply with the obligations of the Act.

This includes public authorities that do not directly employ staff. In these public authorities, it is important to recognise that wrongdoing can still occur, and avenues for reporting and protections need to be provided. PIDs can be made to, and in respect of, authorities not just by their own staff, but also by staff of other authorities as well as by contractors who may be taken to be public officials in some circumstances. For example:

- unstaffed public authorities often have board members, and sometimes utilise administrative support provided by public officials working for another public authority, and
- unstaffed public authorities may contract to supply goods and services.

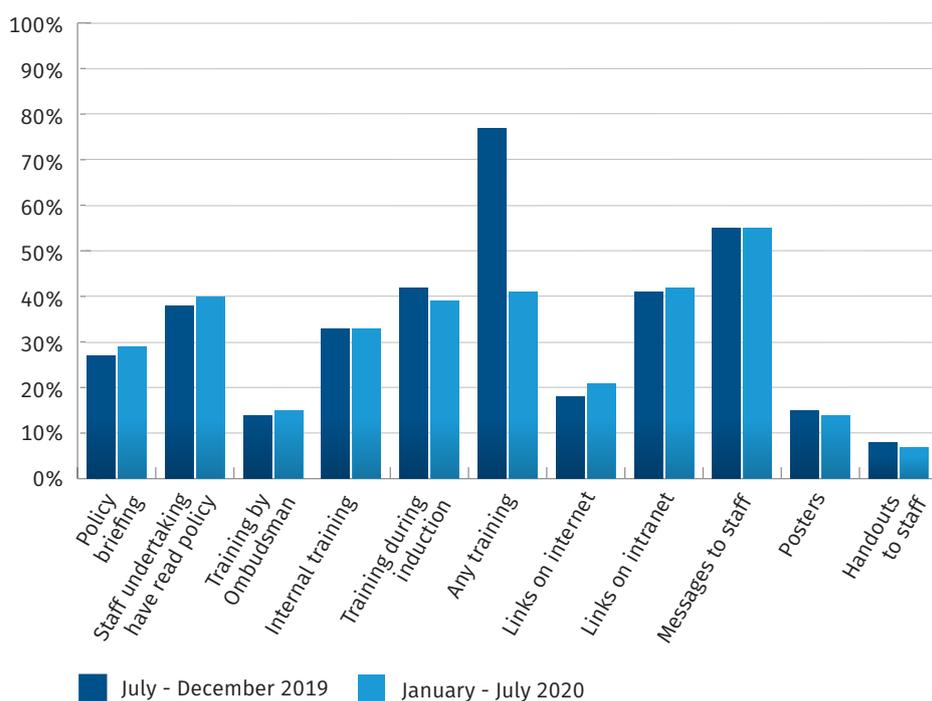
A public official should still be able to make a disclosure to the principal officer of the relevant public authority. To facilitate this, an internal reporting policy is required.

2.2.1. 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. Public authorities are required to report the different types of awareness raising activities that have occurred within the relevant reporting period.

The majority of public authorities (91%) reported that the head of the authority had taken action to meet their staff awareness obligations. As shown in Figure 4, the most common types of training and awareness activities reported during 2019-20 were training and messages to staff.

Figure 4. PID awareness raising activities



2.3. PIDs handled by investigating authorities

The PID Act establishes the following authorities as investigating authorities with functions under the PID Act:³

- Ombudsman
- Audit Office of NSW
- Independent Commission Against Corruption (ICAC)
- Law Enforcement Conduct Commission (LECC)
- The Office of Local Government
- The Information and Privacy Commission
- The Office of Inspector ICAC
- The Office of Inspector LECC

Under the PID Act, investigating authorities are not required to report statistical information to our office in their capacity as investigating authorities. However, all of the above have agreed to provide our office with details of the PIDs they have received as investigating authorities. This information provides us with a better understanding of how the PID Act is operating in practice.

3. Until March 2020, the Ombudsman administered the NSW child-related reportable conduct scheme. This scheme has now been transferred to the Office of the Children's Guardian (OCG). As a result of this transfer, the OCG has been added as an investigating authority in s 4 of the PID Act. However, the OCG has not been conferred with any functions under the PID Act.

Table 5 shows the number of PIDs received by investigating authorities over the past two years. In total, investigating authorities received 949 PIDs in 2019-20 in their capacity as investigating authorities, less than the number received in the previous year (n=1,116).

Table 5. Number of PIDs received by investigating authorities in 2018-19 and 2019-2020

	2018-19		2019-20	
Audit Office	11		5	
ICAC	763	241	697	144
Information Commissioner	2		0	
Inspector of ICAC	0		0	
Inspector of LECC	3		3	
OLG	30		21	
Ombudsman ⁴	22		5	
LECC	44		74	

■ s11 notifications ■ all others

Under section 11 of the *Independent Commission Against Corruption Act 1988*, the principal authority of any public authority is under a duty to report to the ICAC any matter that they suspect concerns or may concern corrupt conduct. Of the 841 PIDs received by the ICAC, 697 (83%) comprised notifications from principal officers of authorities under this section.

2.4. Data limitations

In our previous oversight annual reports, we have noted our concerns about the integrity and limitations of the data provided to us by public authorities. We continue to hold these concerns.

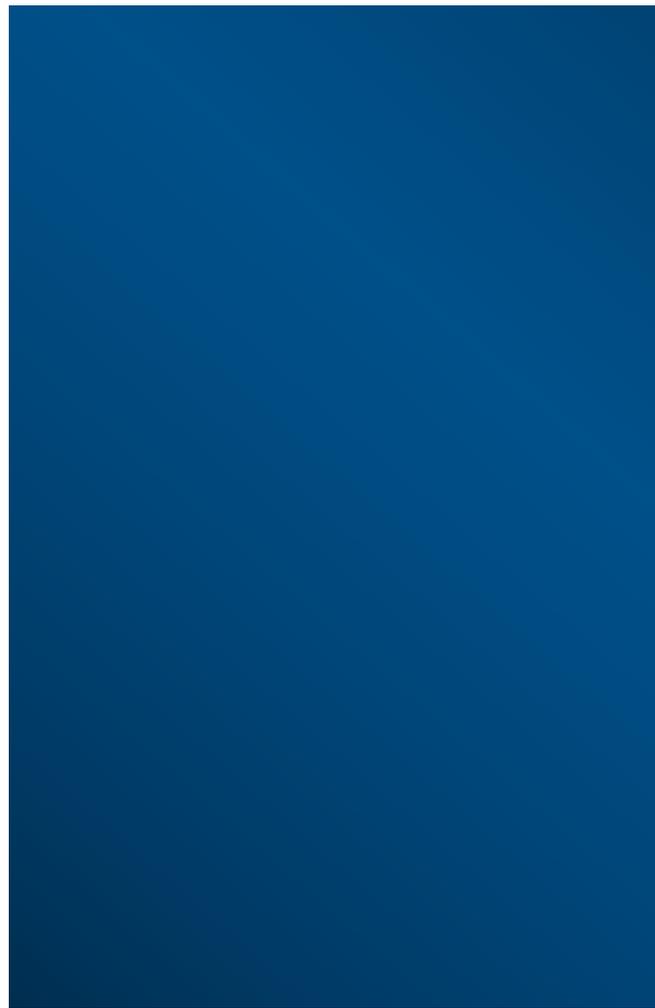
As noted above, not all public authorities comply with their obligations to report to us.

In addition, the data we report inherently assumes that all public authorities are effectively identifying, dealing with and reporting PIDs. This will only be the case if all public authorities have robust internal reporting systems, which ensure that they are properly identifying and recording internal disclosures of wrongdoing as PIDs. Where this is not the case, the number of PIDs being made in NSW is likely to be under-reported.

4. We have recently implemented more rigorous internal PID assessment and classification processes which provide greater assurance that only disclosures that meet the criteria under the Act are being recorded as PIDs.

Conversely, referral paths between investigating authorities and public authorities may result in double-counting of the total number of PIDs received. For example, two agencies may report receiving PIDs relating to the same alleged wrongdoing – such as when a staff member discloses a matter internally (reported by the relevant authority as a PID) and the principal officer subsequently reports the matter to the ICAC (reported by the ICAC as a PID).

As we work with the PID Steering Committee to advise the Government on its proposed new Public Interest Disclosures Act, careful consideration is also being given to how the reporting requirements can be improved. These improvements would seek to ensure that the reported data can be interpreted and analysed meaningfully to provide a more accurate picture of the amount and type of whistleblowing that is occurring across different agencies, time and subject matters, as well as to more closely assess whether PIDs are being handled appropriately by authorities.





Part 3.

Training, awareness,
advice and research

3.1. PID training

Our oversight role includes promoting the objects of the PID Act and providing advice and assistance to public authorities in discharging their functions under the Act.

We provide a range of PID training programs for public authorities. We deliver this training to individual public authorities, or as open sessions involving participants from a range of public authorities. Our PID training products include:

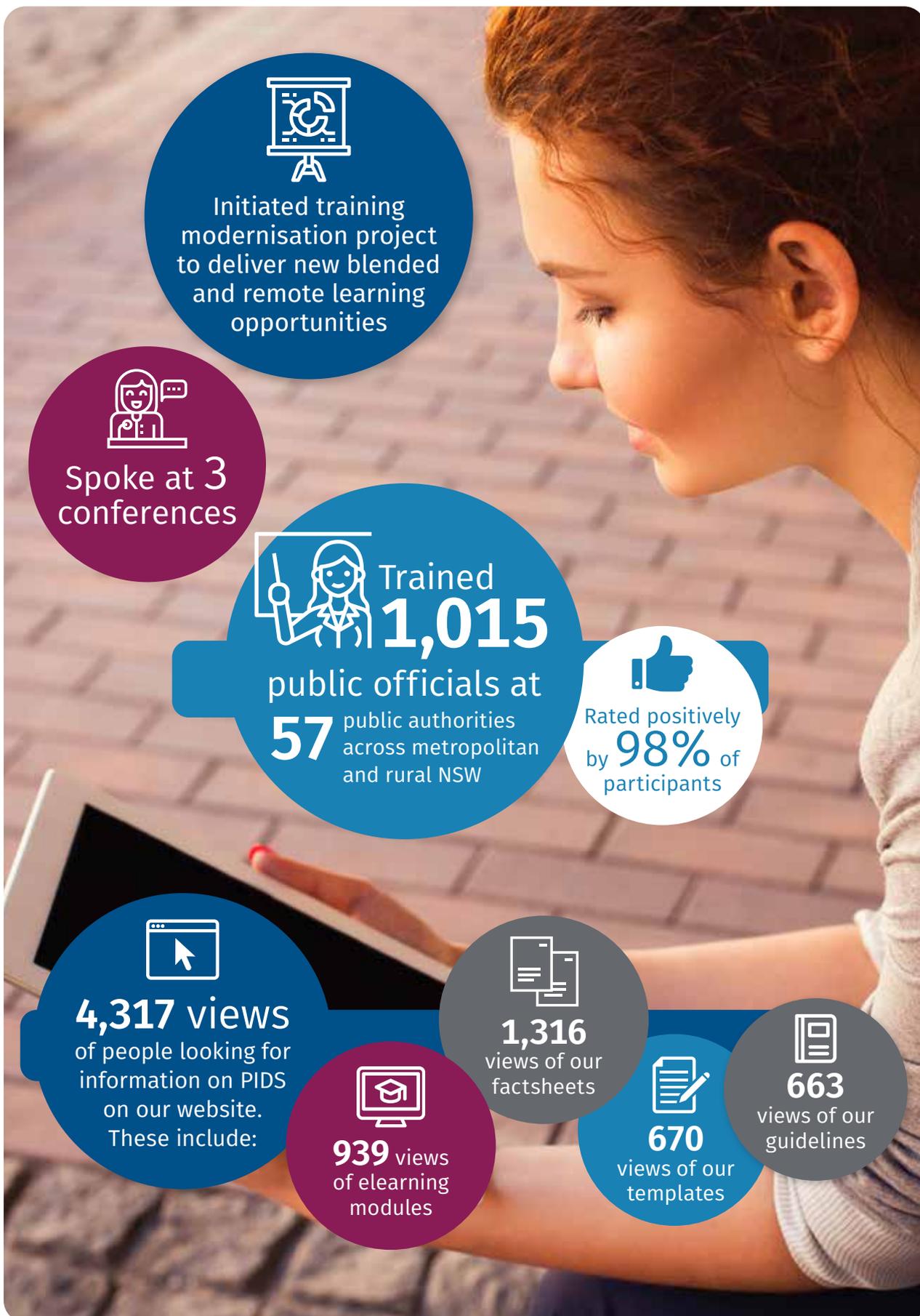
- **PID Awareness.** This training is focused on raising awareness among public officials about the PID Act and how to report wrongdoing. In 2019-20 we ran 16 PID Awareness sessions that were attended by a total of 457 public officials.
- **PID Management.** This workshop-based training is aimed at disclosures coordinators, disclosures officers and managers, with a focus on effective PID management. We ran 28 management sessions involving 522 public officials.
- **PID Briefing.** This is a short briefing for executive leaders and boards on their obligations under the PID Act. We ran two executive briefings to 36 executives.

Our training is designed to build PID management capabilities across the public sector, and covers key aspects of the PID system, including:

- the value of reporting wrongdoing
- creating a positive culture receptive to dealing with PIDs
- how to comply with the PID Act, and
- strategies to protect and support those involved in the PID process.

We are committed to producing high-quality training that will contribute to building understanding of PIDs across the public sector. Our training continues to receive very positive feedback, with 99% of attendees at PID management sessions, and 96% of attendees at PID Awareness sessions rating the training favourably.

In March 2020, all face-to-face training workshops were cancelled as a result of the COVID-19 pandemic. Since that time, our focus has shifted to developing the technological and delivery capability to provide training in a virtual environment. We look forward to commencing online PID training next year.



Comments on training

‘Lots of great examples and presenter energy.’

‘Engaging and clear presentation. Presenter able to respond knowledgeably to all questions.’

‘Scenarios were interesting to explain the process and potential issues.’

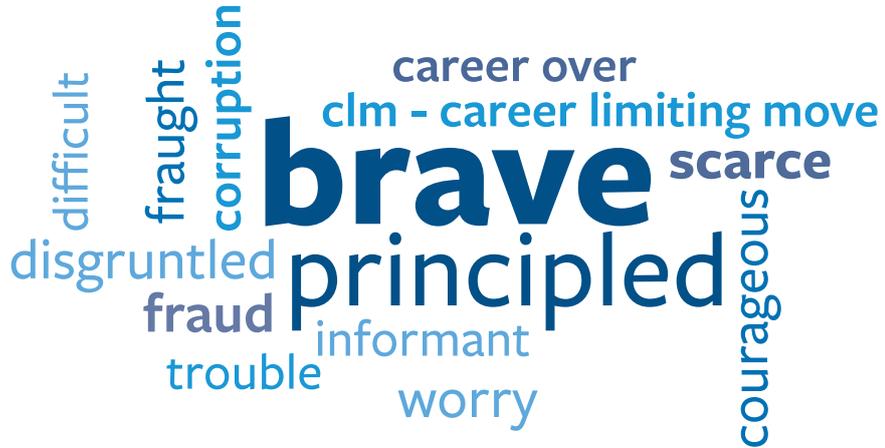
‘Better understanding about the PID Act and how/where/when to use it. I feel confident in applying it.’

‘Clear understanding of my role as nominated officer and of the categories of conduct in the PID Act.’

‘Great training course.’

‘One of the best training that I have been involved in.’

What one word comes to mind when you hear the term ‘whistleblower’?



3.1.1. Learning online

We now have four e-learning modules on our website that provide an alternative to attending face-to-face training. The modules target different audiences:

- *PID awareness* — an overview of the PID Act for all public officials
- *PID reporting* — advice to staff thinking about making a PID
- *PID management* — for those staff who receive or deal with PIDs
- *PID executive* — explanation of leadership and management obligations.

Many public authorities have uploaded the e-learning modules to their own learning management systems in order to track staff completion of the training.

3.2. Forums, conferences and other engagement

3.2.1. PID practitioner forum

The PID practitioner forum comprises PID practitioners from public authorities who periodically gather to network, learn from subject matter experts and share their experiences managing public interest disclosures.

In December 2019, we hosted a PID practitioner forum, with the theme *Improving Managerial Responses to Whistleblowing*.

Our guest speakers were Professor AJ Brown and Dr Sandra Lawrence of Griffith University, both of whom shared insights from the *Whistling While They Work 2* research project (discussed below). Topics for discussion included:

- the value of managers and supervisors proactively identifying wrongdoing and encouraging a ‘speak up’ culture

- the collateral impacts reporters may suffer when reporting wrongdoing
- the importance of providing effective support, and
- strategies to effectively assess and manage reprisal risks.

The forum also canvassed different options for structuring PID processes and building PID capability in public authorities, and other issues in contemporary whistleblowing research.

3.2.2. Other forums and conferences

We continue to engage with PID practitioners and researchers through attending conferences and events. During 2019-20, we attended:

- Whistleblowing Symposium, held in Brisbane in August
- Annual PID Oversight Roundtable, a conference hosted by the Queensland Ombudsman for all Australian jurisdictions, held in Brisbane in August
- Corruption Prevention Network event, held in Sydney in September
- Australian Public Sector Anti-Corruption Conference, held in Melbourne in October
- Implementing & Managing a Successful Whistleblowing Program Conference, held in Sydney in December.

We spoke at a range of events, both internally within public authorities and at conferences and seminars, including at the Local Government Finance Professionals Conference and the South Western Sydney Local Health District Funded Non-Government Organisations Forum, both in November, and the Whistleblowing Program Conference in December.

3.2.3. Whistling Wiki

The Whistling Wiki online community was established in 2014 to provide a forum for those with a professional interest in PIDs research and policy to share and discuss information. During the first part of this reporting period, in conjunction with the Queensland Ombudsman and Commonwealth Ombudsman's offices, we continued to administer the Whistling Wiki. The platform was then decommissioned and an alternative platform has not yet been identified. We are not currently involved with this project and will continue to seek ways to collaborate with PID oversight bodies from other jurisdictions.

3.2.4. Providing advice

We provide advice to public authorities about the interpretation and application of the PID Act. During 2019-20 we responded to 124 requests for such advice. Public authorities commonly sought advice about:

- assessing and managing PIDs
- conducting risk assessments
- dealing with allegations of reprisal

- developing plans to prevent reprisal, and
- reviews of PID policies and procedures.

Our website provides guidance material to assist public authorities to understand and meet their obligations under the PID Act. During 2019-20 we updated three model internal reporting policies, aimed at state government agencies, local government entities and Local Aboriginal Land Councils. We also distributed Issue 39 of our PID newsletter, PID e-News to 1,456 subscribers.

We also publish guidance on our website for public officials who are considering making a report.

In the context of the anticipated new PID Act (see part 4), we expect that our guidance will require significant revision in 2020-21.

3.3. Whistling While They Work 2 research project

We draw on contemporary research to inform our policy advice. In that context, we were pleased to have partnered with researchers and integrity and governance organisations in the *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations* project. Led by Griffith University's Professor AJ Brown, the research project was one of the world's largest studies into the management of whistleblowing across business and government. This project sought to identify factors which enable positive managerial responses to whistleblowing and inform better procedures, systems and policy-making.

We were also pleased to have contributed to the publication *Clean as a Whistle – a five step guide to better whistleblowing policy and practice in business and government*, which details the results of this project. This guide has been developed as a practical handbook for practitioners, with the research helping to pinpoint key actions which will make a difference for the successful management of PIDs. We look forward to further integrating the findings from the research into our resources for public authorities.

A specific issue about protections under the PID Act for disclosures to the media and members of Parliament in NSW is considered below.

3.4. Discussion focus: whistleblowing and the media

Whistleblowing and the media: protecting officials who disclose wrongdoing to journalists

Public officials who disclose wrongdoing to journalists will be protected by the PID Act in limited circumstances. In this part of our report, we identify those circumstances and note a recent proposal for reform.

3.4.1. Whistleblowers in the media

The issue of media whistleblowing, and the associated protections that are (or should be) accorded to both whistleblower and journalist⁵ continued to be a hot topic of debate throughout the reporting year. The issue has been particularly topical at the Commonwealth level.

- In June 2019, Australian Federal Police (AFP) raided the home of Newscorp journalist Annika Smethurst following the publication of a plan to allow the Australian Signals Directorate, which tracks electronic transmissions from overseas, to target the communications of Australians.
- A second AFP raid followed the following day, this time at the Sydney headquarters of the Australian Broadcasting Commission (ABC), in relation to material given to the ABC alleging serious misconduct by Australian troops in Afghanistan. David McBride, a former Australian Defence Force lawyer, was charged in September 2018 with the theft of this material, which was Commonwealth property, breaching the *Defence Act 1903* (Commonwealth) and secrecy provisions in the *Crimes Act 1914* (Commonwealth).⁶
- In a third high-profile case, Richard Boyle was charged with 66 offences including the recording of conversations without the consent of all parties, making a record of protected information, and in some cases passing that information to a third party. This followed his provision of information to the media about the Australian Taxation Office's use of garnishee notices, after an internal disclosure failed to trigger an investigation. He faces up to 161 years imprisonment if convicted.⁷

In taking note of these Commonwealth cases, it is worth also noting that the situation in the Commonwealth is different to NSW in a number of relevant respects.

First, at the Commonwealth level, there is a blanket prohibition on public servants making any unauthorised disclosure to anyone, including the media, and to do so always constitutes a criminal offence: section 70 *Crimes Act 1914* (Cth); see also Public Service Regulation 2.1. NSW legislation does not contain a corresponding blanket criminal offence provision. However, that difference may not be as significant as it first appears, given that it is common for NSW Acts to contain provisions that make it an offence to disclose without authority information obtained in administering that particular Act; further, even if an unauthorised disclosure is not a criminal offence, it will generally provide grounds for a finding of misconduct (and

5. Shield laws are also a subject of ongoing debate but are not the focus of this report and are not discussed further here.

6. Michaela Whitbourn, 'The ex-Defence whistleblower at the centre of ABC raids', *Sydney Morning Herald*, 5 June 2019.

7. Adele Ferguson, 'ATO whistleblower faces six life sentences, roughly the same as Ivan Milat', *Sydney Morning Herald*, 27 February 2019.

potentially grounds for dismissal) on the basis that it constitutes a breach of an employee's duties and a contravention of the relevant agency's code of conduct.

A second difference is that, although the *Public Interest Disclosures Act* (Commonwealth) (2013) does provide protections for certain 'emergency disclosures' to third parties such as journalists, the disclosure of 'intelligence information' to a journalist is never protected under Commonwealth PID legislation. Intelligence information is defined broadly to include any "information that has originated with, or has been received from, an intelligence agency" as well as "sensitive law enforcement information". The NSW PID Act contains no similar exclusions for intelligence or other sensitive information (although, as discussed further below, there are other significant hurdles before a disclosure to a journalist will be protected in NSW).

Finally, and perhaps most importantly, for every category of wrongdoing that may be disclosed in NSW under the PID Act, there is at least one identified external investigating authority to whom that disclosure may be made. This means there will always be an external oversight body to which the whistleblower can turn if they do not wish to make the disclosure internally to the relevant agency, or if they have done so but are dissatisfied with the response. That includes, in respect of suspected corrupt conduct, the ICAC, which has the power to report those allegations publicly and to conduct public hearings in respect of them. The presence of a comprehensive and robust system of independent integrity offices that can receive, investigate and publicly report on wrongdoing may reduce the need for direct public whistleblowing in New South Wales.

It is also worth observing that, although media whistleblowing attracts significant attention, the overwhelming majority of public sector whistleblowing occurs within agencies and through other official channels. This is borne out again this year by the statistics reported in this annual report. It is also confirmed by the recent *Whistling While They Work 2* research project: disclosure to journalists is relatively rare in Australia.⁸ However, although public reporting is rare and usually represents the avenue of last resort,⁹ high-profile cases such as those outlined above continue to raise questions about when such disclosures are or should be protected.

8. Brown, A.J. et al. (2019) *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Griffith University: Brisbane.

9. M Donkin, R Smith and AJ Brown, 'How do officials report? Internal and external whistleblowing', in AJ Brown (ed), in *Whistleblowing in the Australian public sector*, ANU E Press, Canberra, 2008.

Police raids and prosecution of whistleblower David McBride spark global condemnation

MICHAEL WEST
MEDIA,
27 June 2019

What hope for whistleblowers in the government's war on scrutiny?

Crikey
14 June 2019

Australia becoming 'police state' amid efforts to silence whistleblowers

A CURRENT AFFAIR
13 August 2019

This country's treatment of whistleblowers has strong echoes of Orwell

The Sydney Morning Herald
11 June 2019

3.4.2. When are whistleblowers protected for making disclosures to journalists¹⁰ in NSW?

The NSW PID Act¹¹ was the first and, for many years the only, Australian law to expressly recognise third party (in effect, public) whistleblowing as a valid disclosure avenue, by including MPs and journalists among the persons to whom a public interest disclosure could be made.

As a result, NSW has a three-tiered model of whistleblowing (1) internal, (2) independent investigatory authority and (3) public (that is, MPs and journalists).¹²

This tiered approach to whistleblowing protection is now recognised as international best practice,¹³ and has since been adopted in seven of Australia's nine public sector whistleblowing laws as well as in respect of the private sector under the recently amended *Corporations Act 2001* (Cth).¹⁴

10. 'Journalist' is defined to mean 'a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media' (s 4 of the PID Act.)

11. Formerly the *Protected Disclosures Act 1994* (NSW).

12. AJ Brown, 'Flying foxes, WikiLeaks and freedom of speech', *International Whistleblowing Research Network Conference*, London, 23-24 June 2011.

13. Vandekerckhove, W. (2010). 'European whistleblower protection: Tiers or tears?' in D. Lewis (ed.) *A global approach to public interest disclosure* (pp. 15-35), Cheltenham: Edward Elgar Publishing.

14. Brown, A.J. et al. (2019) *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Griffith University: Brisbane.

A whistleblower in NSW can elect to make a disclosure directly to an investigating authority (tier (2)) without first having disclosed internally (tier (1)). However, they can only proceed to tier (3), and gain the protections of the PID Act for a disclosure to a journalist or MP, if:

- (1) the disclosure meets the usual requirements of being a ‘public interest disclosure’, including that there are reasonable grounds for believing that the disclosure shows or tends to show a relevant category of wrongdoing (such as corrupt conduct, serious maladministration, or a serious and substantial waste of public monies)¹⁵
- (2) substantially the same public interest disclosure was first made (as a public interest disclosure) to either the relevant public authority or an investigating authority
- (3) that authority:
 - (a) decided not to investigate, or
 - (b) failed to complete an investigation within six months, or
 - (c) investigated the matter but decided not to take any action, or
 - (d) failed to notify the reporter within six months, whether or not the disclosure was to be investigated,¹⁶
- (4) the whistleblower has reasonable grounds for believing the disclosure is substantially true, and the disclosure is substantially true.¹⁷

There are, in other words, a number of hoops – both procedural and substantive – that the whistleblower must jump through in order to gain the protections of the PID Act when making a disclosure to a journalist.

Case study: Termination for unauthorised disclosure of information

A public official received a termination notice after the agency they worked for discovered they had provided information to the media using their work email account. The information concerned the agency’s plans to move office premises, a decision the public official disagreed with and believed raised cost and work health and safety concerns.

The public official had previously raised their concerns internally, and then waited six months before approaching the media. They thought that they were entitled to speak to the media under the PID Act, as their agency had not undertaken an ‘investigation’ into their concerns within six months.

However, although the public official had previously raised their concerns internally, they had not done so in accordance with the agency’s public interest disclosures policy because they did not

15. PID Act, ss 10-14. The person must also have honestly held this belief, but this will be presumed in the absence of any evidence to the contrary: (s 9A).

16. PID Act s 19.

17. PID Act s 19(4)-(5).

make the disclosure to one of the agency's nominated PID officers. If the internal disclosure was not a PID under the PID Act, then any subsequent disclosure to the media could also not be a PID.

There were also doubts as to whether there were reasonable grounds to believe that the information disclosed showed or tended to show any of the categories of conduct provided for in the PID Act. If it did not, then it was not a PID and the public official was not protected by the PID Act.

The above case study shows that there can be serious consequences for making an unauthorised disclosure in the absence of PID protections. It highlights that failing to follow the disclosure pathways precisely as set out in the PID Act, or making allegations about conduct that would, even if proven, not amount to corrupt conduct or one of the other specific categories of serious wrongdoing covered by the PID Act, will mean that the protections of the PID Act will not apply.

3.4.3. The requirement that disclosures to journalists be 'substantially true'

The most significant substantive hurdle to public officials gaining whistleblower protections when making disclosures to journalists, and the one that has attracted most discussion, is the requirement that the disclosure be 'substantially true'.

This threshold applies only to 'third tier' disclosures (to journalists and MPs) and does not apply to internal disclosures or disclosures to investigating authorities such as the Ombudsman. For those other PIDs, the person making the disclosure need only have an honest belief on reasonable grounds.

A whistleblower who honestly believes, and has reasonable grounds for believing, that wrongdoing has occurred, who properly reports their concerns through official channels, but whose reports are not investigated or addressed for more than 6 months, is able to report to a journalist or MP. However, if it turns out to be the case, for whatever reason, that the alleged wrongdoing did not in fact occur, then the PID Act will afford them no protection. It does not matter that they were honest, reasonable and otherwise did everything right under the Act. Unless their allegation can be proven to be substantially true, they are not protected.

There is no case law in New South Wales on what 'substantially true' means and how the threshold is to be applied in this context. Consider the following hypothetical example:

Public official (A) witnesses another public official (B) taking cash from an office petty cash tin late at night when the office is otherwise empty. A knows that B is not one of the agency's authorised petty

cash officers. A suspects theft, which is a form of corrupt conduct. A is reluctant to approach B or to make an internal report for fear of reprisal, knowing that B is a highly respected and well-liked member of the office. In accordance with the PID Act, A makes a disclosure to an investigating authority of what they witnessed. However, they hear nothing back. Six months later, they make the same disclosure to a journalist.

A honestly believes that B has committed theft and it can be assumed for the sake of this example that, given what A witnessed, they had reasonable grounds for believing this.

However, what A does not know, and could not have known, is that the head of the agency had authorised B to take that money from petty cash for an urgent and legitimate office purpose, and in fact no wrongdoing had occurred.

Is A's disclosure to the journalist protected?

On one view, in the absence of actual corrupt conduct, there can be no protection: A's allegation that B had engaged in corrupt conduct is not 'substantially true'. Irrespective of the fact that A acted honestly, reasonably and in good faith, and that she followed the procedural steps under the PID Act by first reporting the matter over 6 months previously to an investigating authority, she will not be protected by the PID Act.

However, what if A did not disclose to the journalist that "B engaged in theft/corrupt conduct" and instead merely reported to the journalist what was seen? For example, what if A said to the journalist: "I witnessed B take money from the petty cash tin" or "I witnessed B take money from the petty cash tin, B is not the agency's petty cash officer, and I believe that B took the cash without authorisation"? These two statements by A would be 'substantially true'. Does that affect whether A gains the protection for their disclosure to the journalist?

That is, *what* is 'the disclosure' that must be substantially true for the PID Act protections to apply? Is it:

- (1) the facts the person actually reports to the journalist (being those facts which they believe show or tend to show corrupt conduct, serious maladministration or one of the other prescribed categories of serious wrongdoing)?

Or is it:

- (2) that there has, in fact, been corrupt conduct, serious maladministration or one of the other prescribed categories of serious wrongdoing has occurred?

If it were merely (1), then the 'substantially true' criteria would not be nearly as problematic for would-be whistleblowers and journalists as recent discussions have assumed.

Indeed, on that interpretation, the requirement for a disclosure to be substantially true could be easily met by whistleblowers – they would just need to ensure that, when reporting to journalists, they only state as objective *fact* that which they have directly witnessed and know with certainty to be true, and otherwise only express any *opinion* they might hold (such as whether those facts appear to amount to theft or other corrupt conduct) as merely being their own belief or suspicion, rather than fact.

We sought advice from the Crown Solicitor.

3.4.4. The Crown Solicitor’s advice on the ‘substantially true’ requirement

The Crown Solicitor advised us that it is the alleged wrongdoing (express or implied) that must be substantially true, not just the literal content of the disclosure. That is, it not enough that (1) above be true – it is (2) above to which the ‘substantially true’ test must be applied.

The Crown Solicitor says that this is because, to constitute a PID, a disclosure must show (or tend to show) relevant wrongdoing, such as corrupt conduct, serious maladministration or serious and substantial waste. Thus, a subsequent disclosure to a journalist must also show such conduct. The Crown Solicitor’s advice it is that the Act requires the conduct that constitutes such serious wrongdoing to be ‘substantially true’:

“the disclosure” is the information which is disclosed by the disclosure, and the requirements of s. 19(4) and (5) cannot be avoided by the public official casting the allegations contained in the disclosure in subjective, rather than objective, terms.

This advice means that, in the hypothetical example posed above, the disclosure to the journalist that money was taken from the petty cash tin would not be protected. While it was true that money was taken, and while it was true that the public official *believed*, honestly and on reasonable grounds, that this amounted to corrupt conduct, it was not substantially true that the conduct amounted to corrupt conduct in the circumstances. The Crown Solicitor advised:

“In this hypothetical, the facts giving rise to the accusation of wrongdoing are that (i) “B” took public monies, and (ii) “B” did not have authorisation to do so. It is those facts which must be substantially true for “A” to receive protection under s. 19. It will not be possible for “A” to receive the benefit of protection under s. 19 by using subjective terminology (“I believe ‘B’ took cash without authorisation”) or by referring only to the facts witnessed (“I saw ‘B’ take the cash”). It is not the literal words used by “A” in making the disclosure that must be substantially true, it is the facts giving rise to the accusation of wrongdoing. That is the information that is disclosed, explicitly or implicitly, by the disclosure and which is protected under the Act if

the requirements of s. 19 are met. In this hypothetical, the disclosure by “A” to the journalist is not protected pursuant to s. 19 as the facts giving rise to the accusation of wrongdoing are not substantially true.”

The Crown Solicitor noted that this interpretation is supported by the historical development of the legislation. Many of the provisions now included in the PID Act were originally found in the Whistleblower’s Protection Bill (No 2) 1992 (NSW) (the Whistleblower’s Protection Bill). The Legislative Committee scrutinising that Bill questioned whether disclosures made to journalists and MPs should attract the protections in the Act at all. The majority recommended that ‘last resort disclosures to the media not be given protection under the Bill’¹⁸ due to a concern that extending the protection in this way could inflict “serious harm” on the person implicated in a disclosure that turned out to be baseless. The majority considered that there was a risk of abuse ‘even if the test of last resort contained a condition requiring the disclosure to be true’.¹⁹

However, a minority took a different view. They agreed that a more stringent standard of truth was appropriate for external disclosures, but that such disclosures should be protected as a last resort in recognition of the fact that institutional failure can occur, and that there is no other effective means of ensuring that allegations are investigated. They therefore proposed that disclosures to the media be protected where a disclosure had not been resolved through official channels, and ‘(i) that the whistleblower had reasonable grounds for believing that the report made was true; (ii) that the allegation is true in all material respects.’²⁰

When the Whistleblower’s Protection Bill was replaced by the Protected Disclosures Bill 1994 (NSW), the latter did not make provision for disclosure to the journalists. However, during its passage through Parliament an amendment was made authorising such disclosures, but only when the person making the disclosure had reasonable grounds for believing that the disclosure was true and that the disclosure was true in all material respects. These provisions are now reflected in the requirement of the PID Act that disclosures to journalists be ‘substantially true’ before the protections will apply.

3.4.5. JPC Recommendation

In the JPC PID Act Review, the JPC on the Ombudsman, Law Enforcement Conduct Commission and Crime Commission has recommended that the additional requirement that disclosures to journalists and MPs be substantially true be omitted from the PID Act.

18. Report of the Legislation Committee on the Whistleblowers Protection Bill (No 2) 1992 (June 1993) (“Legislation Committee Report. (See at [2.4.1]-[2.4.34]).

19. Report of the Legislation Committee on the Whistleblowers Protection Bill (No 2) 1992 (June 1993) (“Legislation Committee Report. (See at 2.4.28).

20. Report of the Legislation Committee on the Whistleblowers Protection Bill (No 2) 1992 (June 1993) (“Legislation Committee Report. (See at 2.4.34).

The JPC recommended that this “substantially true” requirement for disclosures to journalists and MPs be removed from the Act. It noted that the requirement for external disclosures to be substantially true creates a risk for public officials, that may dissuade them from reporting wrongdoing.²¹ The JPC noted that the requirement is ‘higher than those for disclosures to public authorities or investigating authorities, which can be based on the reporter’s honest belief on reasonable grounds that they show or tend to show wrongdoing’ and that ‘these requirements are the highest in any Australian jurisdiction, and that no other Australian jurisdiction has different standards for external disclosures and internal disclosures’.²²

The Committee recommended aligning the substantive threshold for external disclosures with the threshold for internal disclosures, by removing the requirement that the disclosure also be substantially true.

The Government has not responded directly to each of the JPC’s recommendations. In its written response to Parliament, the Government stated in more general terms the following:

The Government supports making it simpler for public officials to make public interest disclosures, and improving protections and remedies for those who suffer detrimental action. In doing so, it will be important to continue to protect the reputation of individuals against defamation and discourage public disclosure of confidential information.

*The Government will prepare a Bill to reform the public interest disclosures system in accordance with these principles and the Committee’s recommendations.*²³

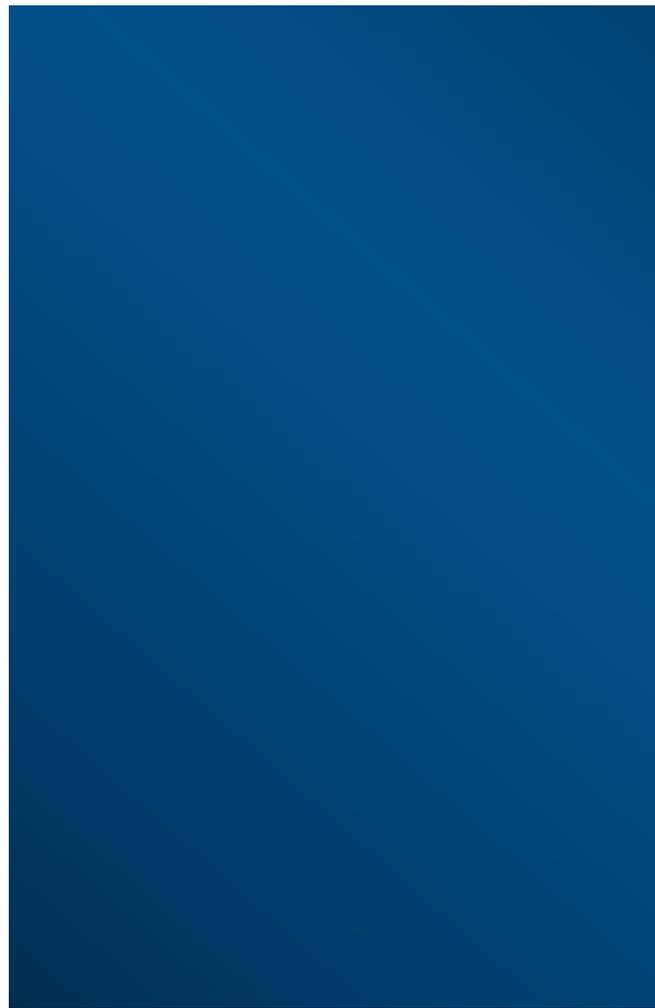
The work being done to prepare this new Public Interest Disclosures Bill is discussed in Part 4 of this report.

Once the new Bill is finalised and introduced, the Ombudsman will prepare a special report for Parliament that assesses the Bill against each of the JPC’s recommendations.

21. Joint Parliamentary Committee, Parliament of New South Wales, *Review of the Public Interest Disclosures Act 1994*, 2017, 1.74.

22. Joint Parliamentary Committee, Parliament of New South Wales, *Review of the Public Interest Disclosures Act 1994*, 2017, 1.72-3.

23. <https://www.parliament.nsw.gov.au/ladocs/inquiries/2401/Government%20response%20to%20the%20Committee%20report.pdf>.





Part 4.

Legislative and
administrative
advice

As part of our oversight role, we consider and advise the Minister about proposals for legislative and administrative change.²⁴ This policy role is generally performed through our work chairing and supporting the PID Steering Committee.

4.1. The PID Steering Committee

The major activity of the PID Steering Committee this year was advising government in response to its proposed reform of the PID Act.

4.1.1. The PID Bill

In October 2017, the review of the PID Act by the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission made a series of recommendations about changes to the Act. Proposed changes included:

- simplifying the disclosure process
- improving remedies for detrimental action
- refining reporting requirements, and
- providing clarification to the PID Act.

In 2018, in response to the Joint Parliamentary Committee's report, the NSW Government announced that it would '*prepare a Bill to reform the public interest disclosures system in accordance with ... the Committee's recommendations*'. The Government response also said that the PID Steering Committee would be '*asked to examine, in detail, the implementation issues arising from the Committee's recommendations and to consider the draft Bill prepared in response to the Committee's report*'.²⁵

The current PID Act was drafted over 25 years ago and has been the subject of a range of amendments. However, the Act is complex and remains difficult to navigate and apply.

We appreciate that the drafting of the Bill is complex. We are also aware that progress on the draft Bill has been impacted by the COVID-19 pandemic. However, it is important the Bill be finalised as soon as possible. I look forward to new legislation that better supports a culture where public officials are encouraged to report serious wrongdoing with full confidence that they will be protected if they do so.

Our office – and the agencies and public authorities subject to the new legislation – will also need to undertake a considerable amount of preparation, before the Bill is enacted. For our office, this will include the preparation of new public guidelines, reporting tools and templates, and revision of all training and educational material.

24. Public Interest Disclosures Act, s 6B(1)(g).

25. Report of the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994*, Report 3/56, October 2017: Government Response.

A key focus for our office next year will be to work with government to ensure resources are available to agencies with a sufficient lead time for them to be ready for commencement of a new Act.

4.1.2. Commonwealth whistleblower legislation

The PID Steering Committee also provided advice to government during the year about new whistleblower amendments made to the *Corporations Act 2001* (Cth) in 2019.

The amendments apply not only to any company, but also to “a corporation to which paragraph 51(xx) of the Constitution applies”. This means that any NSW entity that is a trading or financial corporation to which paragraph 51(xx) of the Constitution applies are subject to the new regime. The scope of paragraph 51(xx) of the Constitution is not entirely clear, but 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 *Corporations Act 2001* provisions should 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 NSW entity that is covered by the PID Act will continue to be required to comply with the PID Act, even if the entity is also subject to the Commonwealth regime. There may, however, be the potential for direct inconsistency between the Commonwealth Act and the PID Act or some other NSW law in some respects.

We have encouraged agencies that may be subject to the concurrent operation of both Acts to seek legal advice on their obligations, and to make any required changes to internal policies to minimise the risk of inadvertent non-compliance.





Part 5.

PID Audits

Under section 6B(1)(f) of the PID Act, we are required to audit and provide reports on the exercise of functions, and compliance with the PID Act, by public authorities. Audits aim to assess how public authorities are complying with their obligations under the PID Act.

As a result of limited resourcing, we were only able to conduct two minor desk-top based audits this year:

- An audit which looked at the extent to which 14 previously audited public authorities had implemented our recommendations (the **PID Implementation Audit**).
- An audit which looked at the publication of PID policies on select public authority websites, and the extent to which those public authorities were adopting our guidance (the **PID Policy Visibility Audit**).

5.1.1. PID Implementation Audit

Our first audit looked at the extent to which previously audited public authorities had implemented our recommendations. We focused on 14 audits conducted in the three years June 2014 to July 2017.

Our implementation audit sought information from the principal officer of each public authority about:

- their implementation of our audit recommendations
- any barriers they had encountered whilst implementing our recommendations, and
- any systemic improvements that had occurred following our audit.

We also took the opportunity to seek feedback from these public authorities about how we could improve our audit activities.

We received responses from all 14 public authorities. These responses included the public authority's self-assessed progress towards implementing each of our recommendations, with most authorities providing evidence in support of their statements.

What we found

We made 112 recommendations across the 14 audits.

One-third of our recommendations were about PID Assessments (33% of total recommendations to 93% of audited authorities). For example, our recommendations reflected the need to conduct a written assessment of disclosures received against criteria in the PID Act. Other recommendations focused on:

- improving PID policies (15%)
- improving record keeping practices (14%)
- increasing the number of disclosure officers in the agency (11%)
- ensuring adequate staff training (9%), and
- addressing issues relating to PID risk assessment (8%).

Overall, our implementation audit found that public authorities accepted the majority (93%) of our recommendations, and that most audited public authorities had taken steps to implement our recommendations:

- 80% of accepted recommendations were reported to have been implemented in full.
- Other recommendations were either ‘in progress’ or a small number (4%) were not supported by the relevant public authority.
- All but one of the 14 audited public authorities had implemented at least one of our recommendations in full.

Audited public authorities reported positive impacts resulting from implementation of our recommendations, including enhanced processes for identifying and assessing PIDs, improved record-keeping, and improvement to organisational culture.

Feedback about our audit processes

Feedback about our audit program was largely positive. Examples of positive feedback included that the audit:

- was a welcome opportunity to review their PID management practices
- was an opportunity to obtain independent feedback, leading to identification of areas of risk, and reviews to policy and processes, and
- led to enhanced support to staff, increased understanding of the PID Act and improved legislative compliance.

Some concerns were raised about aspects of the audit process. These concerns primarily related to delays, along with concerns that we had not discussed the timeframe within which we expected our recommendations to be implemented. We also received requests to publish further information regarding PID trends across the public sector, to assist public authorities benchmark their performance against their peers.

We are considering this feedback as a part of our broader review of our audit function.

5.1.2. PID Policy Visibility Audit

Our second audit reviewed the visibility of PID policies on public authority websites.

In this audit, we sought to understand:

- whether public authorities are publishing PID policies on their websites
- whether information about PIDs is easily accessible on websites, and
- to what extent public authorities are incorporating our guidance when developing their PID policies.

The audit considered 152 local government entities (128 local councils, 11 county councils and 13 joint organisations), 115 LALCs and 10 universities.

We measured accessibility in a number of different ways, including looking at policy naming conventions, keyword search terms and the number of clicks taken to find information on PIDs.

Understanding how to make a PID is particularly important because the PID Act requires that disclosures be made to nominated disclosures officers. If that requirement is not met, the complaint is not classified as a PID and PID protections do not apply.

While public authorities may be relying on intranet sites to promote PIDs, our **Guideline A2 – Internal reporting policy and procedures** recommends that all public authorities publish their PID policy on both their internet and intranet sites. This is because PIDs may be made by public officials about *any* public authority and not just the authority they work for or to which they belong. In addition, potential reporters may feel more secure and confident seeking information about making a PID if they can do so at any time on any device, rather than only when logged in as an identified staff member on an office device.

What we found

Accessibility

The PID policies of the majority (75.6%) of local government entities were published on their websites. However, the policies were often difficult to locate. This included difficulty navigating to locations, keyword search terms that did not locate the policy, and inconsistencies in PID policy naming conventions.

All 10 universities have published a PID policy on their website. In general, university PID policies were able to be located easily through keyword search terms, though they required additional clicks to locate them. Universities are also more likely to include information on reporting wrongdoing outside of their PID policy.

The majority of LALCs (95, 81.7%) do not have an external website at all. Of the remaining 19 LALCs that have a website, only two had a published PID policy. As noted above, our intention is to work more closely with LALCs over the next year to assist these authorities in connection with their responsibilities under the PID Act.

PID policy content

A review of the content of PID policies that were available on websites identified a number of key elements of the PID scheme that were not consistently included in published policies, including:

- the need for the reporter to honestly believe on reasonable grounds that their report shows or tends to show one of the categories of conduct
- information on what feedback will be given to reporters

- an explanation of process for making a report to an MP or journalist
- advice on whether reports need to be made in writing and whether staff need to identify themselves
- details about external reporting options.
- advice on where staff can seek further information
- information on how risks to the reporters will be assessed/ managed
- an adequate description of all categories of serious wrongdoing, and
- a list of who staff can report wrongdoing to.

5.1.3. Future audit program

Our office's strategic plan prioritises a review of our PID audit function. In an environment highly constrained by limited resources, we recognise the importance of strategic focus in where and how we conduct our audits. In addition to refreshing our audit approach, our aim is to seek further input from stakeholders about audit priorities, and how our audit program can add most value to the PID system in NSW.

This page is intentionally blank



Any correspondence about this annual report
should be sent to:

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

General enquiries: 02 9286 1000
Toll free (outside Sydney Metro Area, NSW only): 1800 451 524
National Relay Service: 133 677

Email: pid@ombo.nsw.gov.au

www.ombo.nsw.gov.au