

Public Interest Disclosures Steering Committee

Annual Report 2011 - 2012

This is the first annual report from the Public Interest Disclosure Steering Committee. The Steering Committee was established under section 6A of the *Public Interest Disclosure Act 1994* (PID Act). 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 Premier.

The PID Act sets out the system which protects people working within the NSW Public Sector who make reports about the functioning of the public sector from the risk of reprisal. Public officials can make public interest disclosures about corrupt conduct, serious maladministration, serious and substantial waste, a failure to properly fulfil the functions under the *Government Information (Public Access) Act 2009* (GIPA Act) and a pecuniary interest contravention under the *Local Government Act 1993*.

The *Protected Disclosures Act 1994* was reviewed in the light of the major recommendations from the 2009 report from the Joint Parliamentary Committee on the Independent Commission Against Corruption. Amendments to the Act, contained in the *Protected Disclosure Amendment (Public Interest Disclosures) Act 2010* and the *Public Interest Disclosures Amendment Act 2011* were passed by Parliament in October 2010 and September 2011 respectively.

The amendments included the renaming of the legislation to the *Public Interest Disclosures Act 1994* and the establishment of a Public Interest Disclosure Steering Committee.

A specialist Public Interest Disclosures Unit (PID Unit) was established to support the coordination and oversight role of the expanded functions of the NSW Ombudsman that resulted from the amendments to the Act. A separate annual report of the PID Unit for this reporting year, *Oversight of Public Interest Disclosures Act*, was tabled in November 2012.

Further information about the PID Act and the PID Unit can be obtained from the NSW Ombudsman's website.

Functions

The functions of the Public Interest Disclosure Steering Committee are set out in sections 6A, 31B and 32 of the PID Act, and 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 Minister on any reports from the Ombudsman in relation to the Ombudsman's functions under the PID Act.
- Review any Commonwealth legislation that is introduced in response to the 2009 report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* of the House of Representatives Standing Committee on Legal and Constitutional Affairs.
- Consult with and provide advice to the Parliamentary Committee on the Independent Commission Against Corruption to inform their review of the PID Act.

Terms of Reference

The Steering Committee agreed to its terms of reference at its inaugural meeting. The terms outline the responsibilities of the Committee, its membership, meeting schedule and the secretariat support that is to be provided by the Public Interest Disclosures Unit of the NSW Ombudsman.

Membership

The Steering Committee is chaired by the NSW Ombudsman and includes representatives of the Department of Premier and Cabinet, the Auditor-General, the Independent Commission Against Corruption, the Police Commissioner, the Police Integrity Commission, the Information Commissioner and the Division of Local Government.

Meetings

During the reporting year the Committee met in August 2011, November 2011, April 2012 and a meeting on the papers in September 2012, which was conducted electronically.

Reporting from public authorities

The PID Act requires public authorities to report on the PIDs they receive to the Ombudsman every six months, as well as in their own annual report.

Following feedback obtained from public authorities in response to a consultation paper distributed by the NSW Ombudsman, the Committee considered and confirmed the information to be reported as required under the PID Act before being provided to the Premier for inclusion in the Public Interest Disclosure Regulation 2011.

The Committee agreed to adopt a staged approach to reporting, with the first stage based on the categories identified by the Parliamentary Committee. For the period from 1 January 2012 to 30 June 2012, public authorities reported on:

1. The number of disclosures made in the past 12 months.
2. How many disclosures were about:
 - Corrupt conduct
 - Maladministration
 - Serious and substantial waste
 - Government information contravention
 - Local government pecuniary interest contravention.
3. Whether the public authority had internal reporting policies and procedures in place?
4. Whether the public authority had public interest disclosures staff awareness mechanisms in place?
5. What staff awareness mechanisms the public authority had in place?

The NSW Ombudsman provided an electronic template that organisations used to submit this information.

The second stage of reporting will require public authorities to report more comprehensively on their public interest disclosures. To give public authorities as much time as possible to establish their own data collection and reporting systems, information collection commenced from 1 July 2012. The next period of reporting ends on 30 December 2012 and is due to be submitted to the Ombudsman by 14 February 2013.

Amendments to the PID Act

In June 2012, the Steering Committee provided a submission to the Premier recommending amendments to the PID Act. The Committee made these recommendations after considering issues that had been raised through the work of the Public Interest Disclosure Unit and its interaction with public authorities.

The Steering Committee considered that the amendments would assist in furthering the objects of the PID Act by clarifying the protections and support available to those who report wrongdoing in the public sector. The Government has advised that it supports the proposed amendments in principle, and a Bill to implement them is now being prepared with a view to introduction into Parliament in the first half of 2013.

The proposed amendments are as follows:

Clarifying the definition of a public official

The changes to the PID Act in the last year expanded the definition of a “public official” to extend the operation of the PID Act and its protections to certain persons who are not public sector employees but who are involved in the provision of public sector services as a volunteer or under contract.

There were, however, some doubts as to the precise coverage of the new definition, and the Steering Committee sought advice from the Solicitor General.

Having received that advice, the Steering Committee has recommended that the definition be clarified to more unambiguously state those who are covered by it, in accordance with the Solicitor General’s advice.

Removal of the voluntary requirement

Section 9 of the PID Act provides that, in order to be protected by the PID Act, a person who makes the relevant disclosure must do so “voluntarily”. While a number of amendments have been made to this section since the PID Act was introduced, such as to clarify that reports by Police and Correctional officers are still protected even if done non-voluntarily in the sense of under a general duty to report wrong-doing, this section continues to create confusion. Further, it is unclear why those who make public interests disclosure non-voluntarily – for example, in accordance with a statutory obligation - should not also enjoy statutory protections from reprisals.

In implementing this recommendation, however, consideration should be given to whether non-voluntary disclosures made under statutory obligations, whilst being treated as a public interest disclosure for the purposes of attracting the PID Act protections, should nevertheless continue to be excluded from the other procedural and reporting requirements that apply to other voluntary disclosures.

Extension of time for instituting proceedings

Section 20 of the PID Act states that the taking of detrimental action against another person substantially in reprisal for the other person making a public interest disclosure constitutes an offence. Proceedings for such an offence must be instituted within 2 years after the offence is alleged to have been committed.

The ICAC has advised that this provision may limit the effectiveness of the offence provision. Allegations of detrimental action can arise well after the detrimental action is alleged to have taken place, often through the involvement of an investigating authority. To ensure proceedings can be instituted when appropriate, the ICAC recommended, and the Committee agreed, that the period of time within which proceedings may be taken should be extended from 2 years to 4 years.

Following further consultation between the Department of Premier and Cabinet and the ICAC, the ICAC agreed that an extension to 3 rather than 4 years was appropriate.

Clarity around those with reporting responsibilities

There are some staff within the public sector whose day to day responsibilities include reporting wrongdoing. This can include internal auditors, corruption prevention staff, investigators and others. If the requirement for a disclosure to be 'voluntary' referred to above is removed from the Act as recommended by the Committee, then the PID Act would otherwise not distinguish between these reports and those made by other public officials outside of their usual roles and responsibilities.

To assist agencies in reducing the administrative requirements flowing from these reports, the Committee recommended a further consequential amendment to provide that the policies of public authorities can state that staff who report wrongdoing as part of their core responsibilities do not have to be provided with an acknowledgement and a copy of the agency policy.

The Committee recognises that these matters are often very different from other public interest disclosures with which the PID Act is primarily concerned. To allow agencies to demonstrate this distinction in their six monthly and annual reports, the Committee also recommended consideration of a change to provide for separate reporting of public interest disclosures that are made as part of a staff member's core responsibilities. It is noted that this change may be able to be implemented through the *Public Interest Disclosures Regulation 2011*.

Inclusion of Public Service Commissioner

The Committee has recommended that the Public Service Commissioner, who has been charged with promoting and maintaining the highest levels of integrity, impartiality, accountability and leadership across the public sector, be included as a member of the PID Steering Committee.

Future consideration of other possible legislative amendments

The Steering Committee will continue to consider other possible legislative amendments, and will nominate those items which can be considered for immediate attention as well as those that might be considered as part of the broader review of the Act.

Pursuant to s31B of the PID Act, the Steering Committee is also required to review any legislation of the Commonwealth that is enacted 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. The review is to be conducted within 6 months after the enactment of the Commonwealth legislation and the Committee is to provide the Minister with a report on the outcome of the review and any recommendations for reform of this Act arising from the review.