

Oversight of the *Public Interest Disclosures Act 1994*

Annual Report 2018–19

19 December 2019

Any correspondence about this annual report should be sent to:

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone: 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
National Relay Service: 133 677

Website: www.ombo.nsw.gov.au
Email: pid@ombo.nsw.gov.au

ISBN 978-1-925885-17-0
ISSN 2201-2974

© State of New South Wales, 19 December 2019

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

Oversight of the
Public Interest Disclosures Act 1994

Annual Report 2018–19

19 December 2019

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 also meets the requirements under s 6B(1)(e)-(f) that I monitor, audit and report on the exercise of functions under and compliance with the legislation by public authorities.

I draw your attention to the provisions of s 6B of the *Public Interest Disclosures Act 1994* and those of s 31AA of the *Ombudsman Act 1974* in relation to the tabling of the *Public Interest Disclosures Oversight Annual Report 2018–19* and request that you make it public forthwith.

Yours sincerely

A handwritten signature in black ink, appearing to read "Michael Barnes". The signature is fluid and cursive, written on a white background.

Michael Barnes
Ombudsman

19 December 2019

Foreword

This report is made pursuant to section 6B of the *Public Interest Disclosures Act 1994* (PID Act). It reports on how public authorities are discharging their responsibilities under that Act and the activities of this office to support those authorities and persons who make public interest disclosures (PIDs).

This year saw the highest number of PIDs received by public authorities since the requirement to report on these statistics commenced in 2012. In total, public authorities received 422 PIDs – a 30 per cent increase from the 324 received in 2017–18.

As in previous years, complaints made to my office about how PIDs have been handled by public authorities continue to involve a range of workplace issues in addition to allegations of serious public interest wrongdoing. These issues can complicate the handling of the PID.

To better understand these complex reports of wrongdoing and how they are handled, my office undertook research as part of the project *Whistling While They Work 2*. A key finding from the evidence is that when organisations assess the risks of problems arising as soon as a report is made, and proactively intervene to mitigate risks, reporters fare better.

I look forward to a future statutory framework that embeds risk management as a required response when serious wrongdoing is reported, as recommended by the Joint Parliamentary Committee on the Ombudsman, Law Enforcement Conduct Commission and the Crime Commission. The aim should be to prevent harm to public officials who speak up, rather than remedy detriment after the fact.

As Chair of the PID Steering Committee, I continue to work with the NSW Government to implement this and other recommendations of the Parliamentary Committee following their 2017 statutory review of the PID Act.

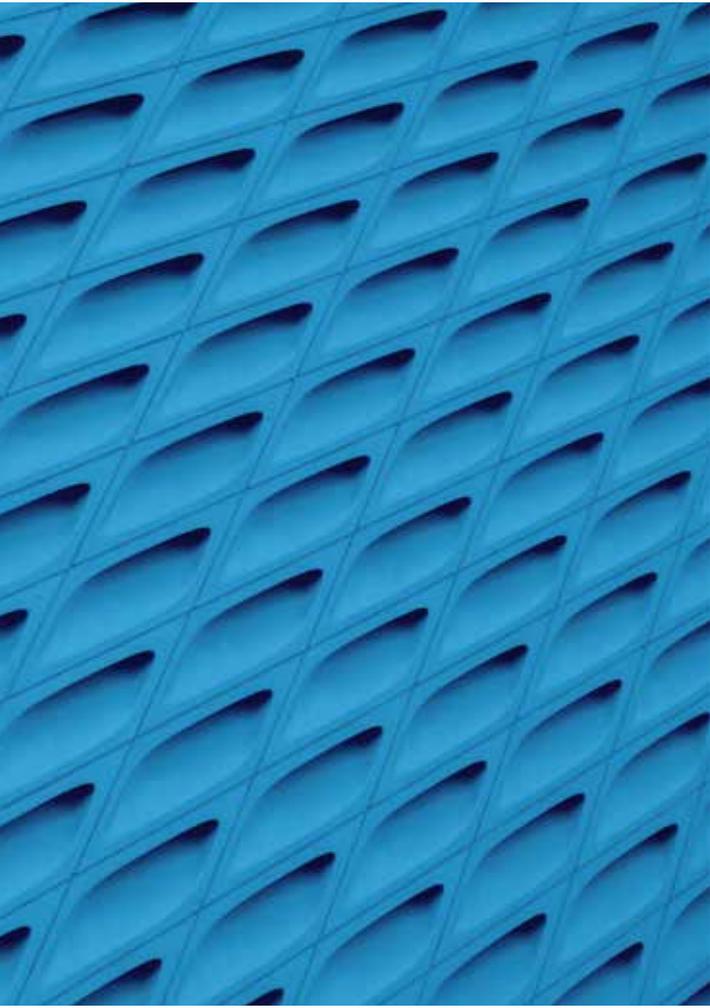


Michael Barnes
Ombudsman

19 December 2019

Contents

Foreword.....	v
Part 1. The PID system	1
1.1. The PID Act	2
The role of public authorities.....	2
1.2. Investigating authorities.....	4
1.3. Our role in the system.....	4
Our objectives.....	5
Part 2. The PID landscape	7
2.1. PIDs in 2018–19: Key statistics	8
2.2. PID Act reporting requirements	9
2.3. PIDs reported by public authorities	10
Type of public authority.....	12
Subject matter of the PIDs.....	13
Circumstances under which public officials make PIDs.....	14
2.4. Internal reporting policies and staff awareness.....	15
2.5. PIDs handled by investigating authorities	17
Part 3. Performing our functions	19
Our performance in 2018–19	20
3.1. Supporting the PID Steering Committee	21
3.2. Handling complaints	23
3.3. Raising awareness and providing training	23
Learning online	26
Attending conferences and events	26
3.4. Conducting research and informing policy	27
Whistling While They Work 2 research project	27
Australian and international standards on whistleblowing	27
Commonwealth Integrity Commission	28
National Integrity System assessment.....	28
3.5. Building capacity	28
Holding PID practitioner forums	28
Distributing the PID e-News.....	30
Corruption Prevention Network of NSW.....	30
Whistling Wiki.....	30
3.6. Providing advice and information	31
Our PID publications and webpages	32
3.7. Auditing systems.....	33
Part 4. Complexities and risks in handling PIDs.....	35
4.1. Complaints about the handling of PIDs.....	36
4.2. Challenges echoed by PID practitioners	38
Part 5. Whistling While They Work 2 research project.....	41
5.1. Understanding the mixed wrongdoing challenge	42
5.2. The value of risk assessment and proactive management	44
Identifying high-risk cases	46
Taking steps to mitigate risk.....	47



Part 1:

The PID system

The PID Act sets in place a system to encourage insiders to report serious wrongdoing in the NSW public sector by providing certain legal protections.

1.1. The PID Act

The *Public Interest Disclosures Act 1994* (PID Act) encourages public officials to report serious wrongdoing by other public officials or public authorities, and provides them with certain legal protections if they do so. The term 'public official' refers to public sector staff, contractors of public authorities, and people performing statutory functions (such as volunteers).

The PID Act requires public authorities to establish systems to deal with such reports, called public interest disclosures (PID). It also deters detrimental action being taken against a person in reprisal for making a PID, by providing that such action is a criminal offence, grounds for disciplinary action, and grounds for seeking compensation for damages.

A public authority includes state government departments and agencies, local government councils, universities, state owned corporations, local Aboriginal land councils and other statutory authorities.

The role of public authorities

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

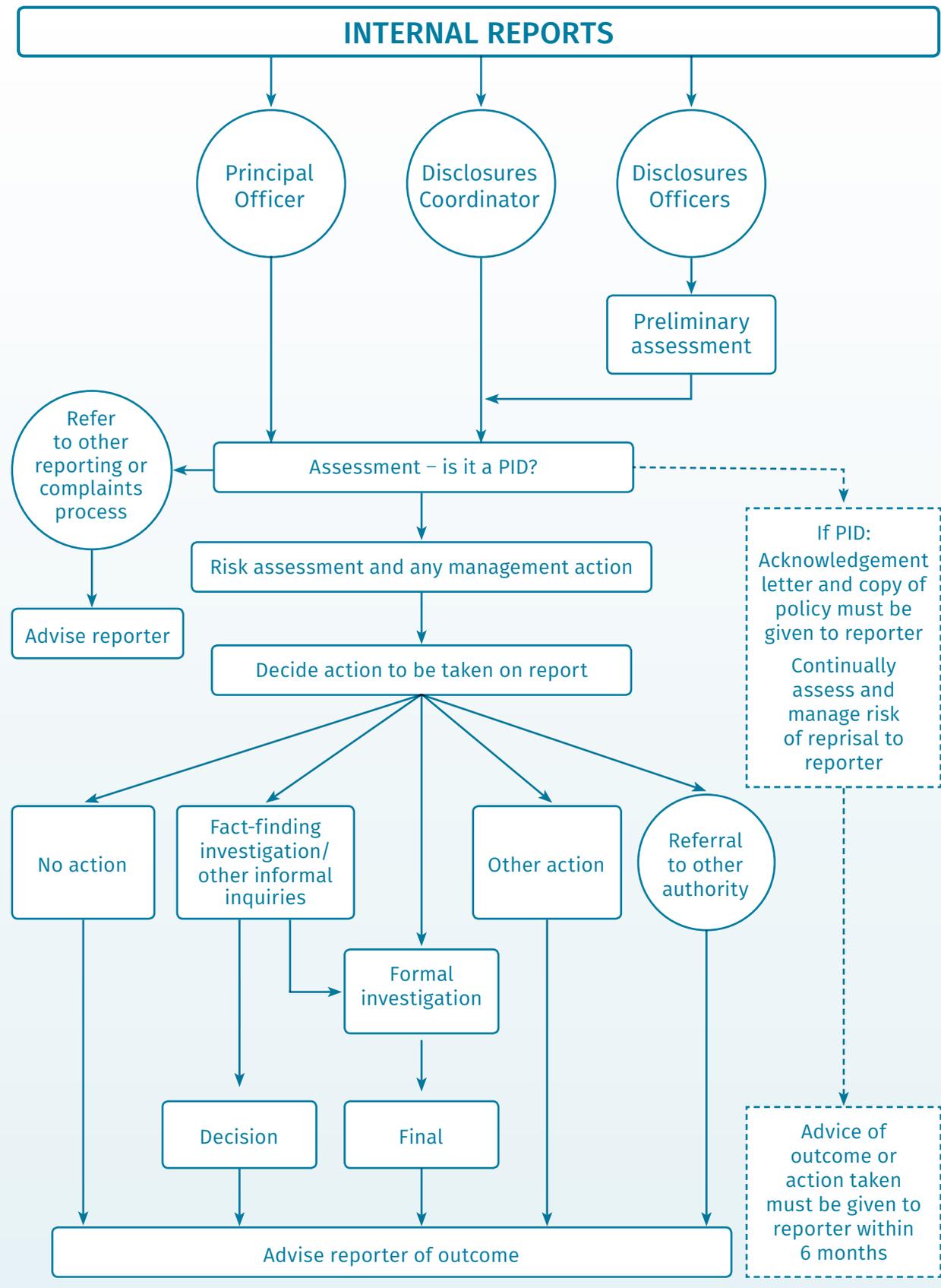
- The public authority has a policy that provides for its procedures for receiving, assessing and dealing with PIDs. This policy must have regard to guidelines developed by our office.
- The staff of the public authority are aware of the policy and the protections under the Act.
- The public authority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

Typically, a PID coordinator is appointed to ensure the 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.

At all stages throughout the reporting process, communicating with and supporting the reporter through an unknown and possibly stressful situation is essential.

In focus 1: The internal reporting process



1.2. Investigating authorities

Outside their own organisation, public officials can make PIDs directly to eight investigating authorities:

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

These investigating authorities deal with PIDs in accordance with their operating legislation.

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, the Premier and Special Minister of State. This committee comprises the heads of investigating authorities in the PID Act, as well as the Department of Premier and Cabinet, the Public Service Commissioner and the NSW Police Force.

A separate *PID Steering Committee Annual Report 2018–19* detailing these and other activities has been tabled in Parliament by the Premier.

1.3. Our role in the system

The Ombudsman oversees the PID Act and how it operates within public authorities. Our functions under the legislation 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
- audit and monitor the exercise of functions under, and compliance with, the Act by public authorities
- provide reports and recommendations about proposals for legislative and administrative changes to further the objectives of the Act

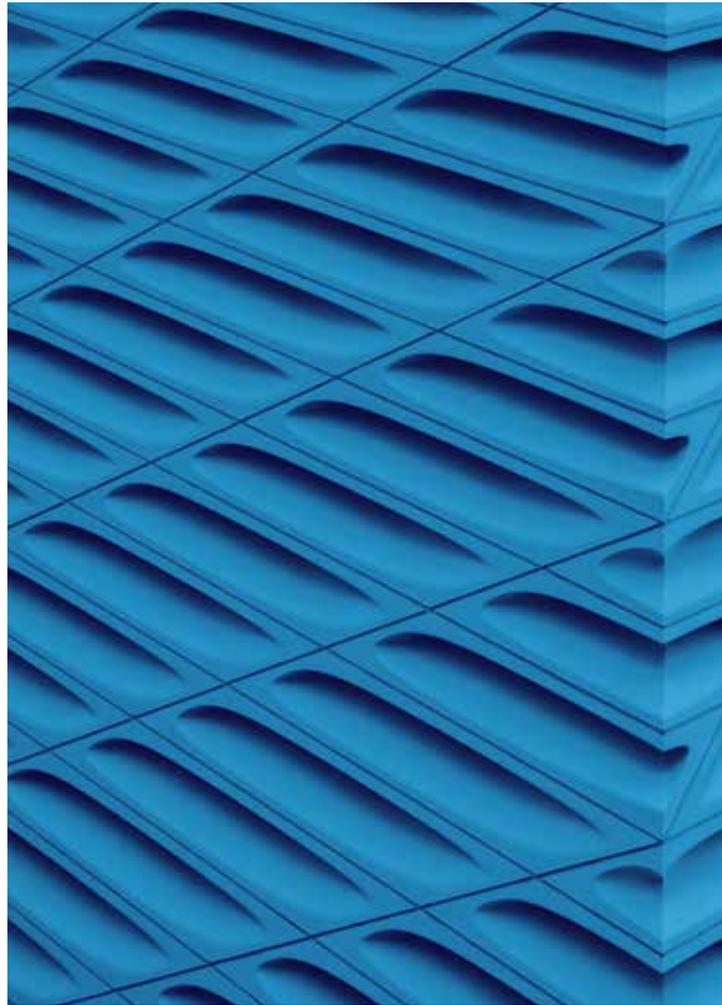
- act as secretariat for the PID Steering Committee (which the Ombudsman chairs)
- receive, investigate and otherwise deal with PIDs made to our office about maladministration.

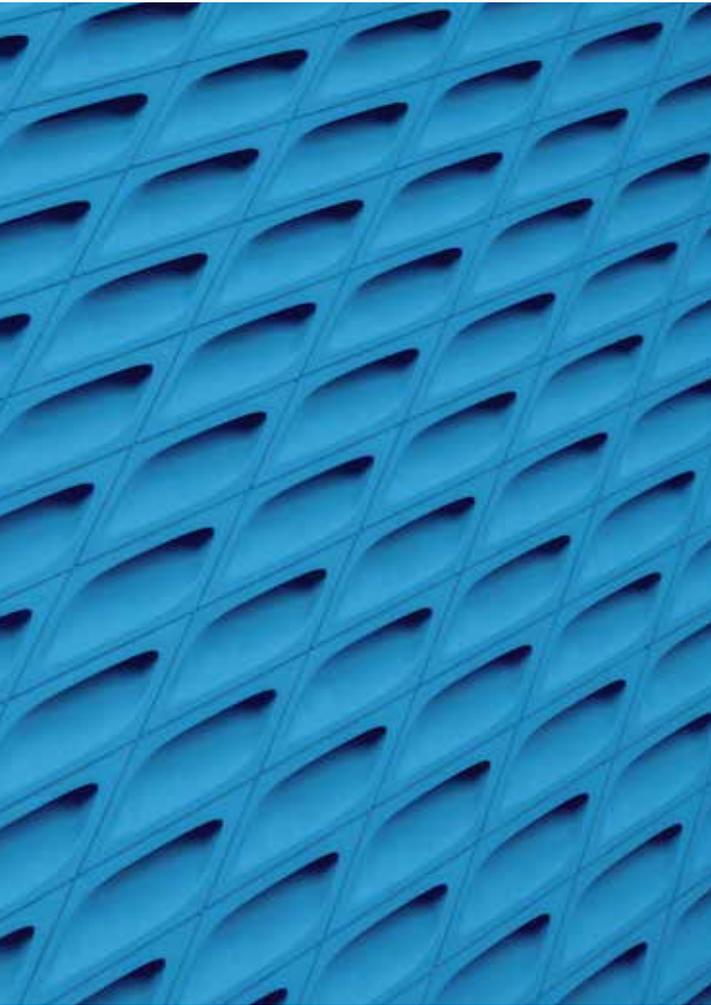
Our objectives

In performing these functions, we have four objectives:

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

Section 3 provides further detail about how we perform our functions.

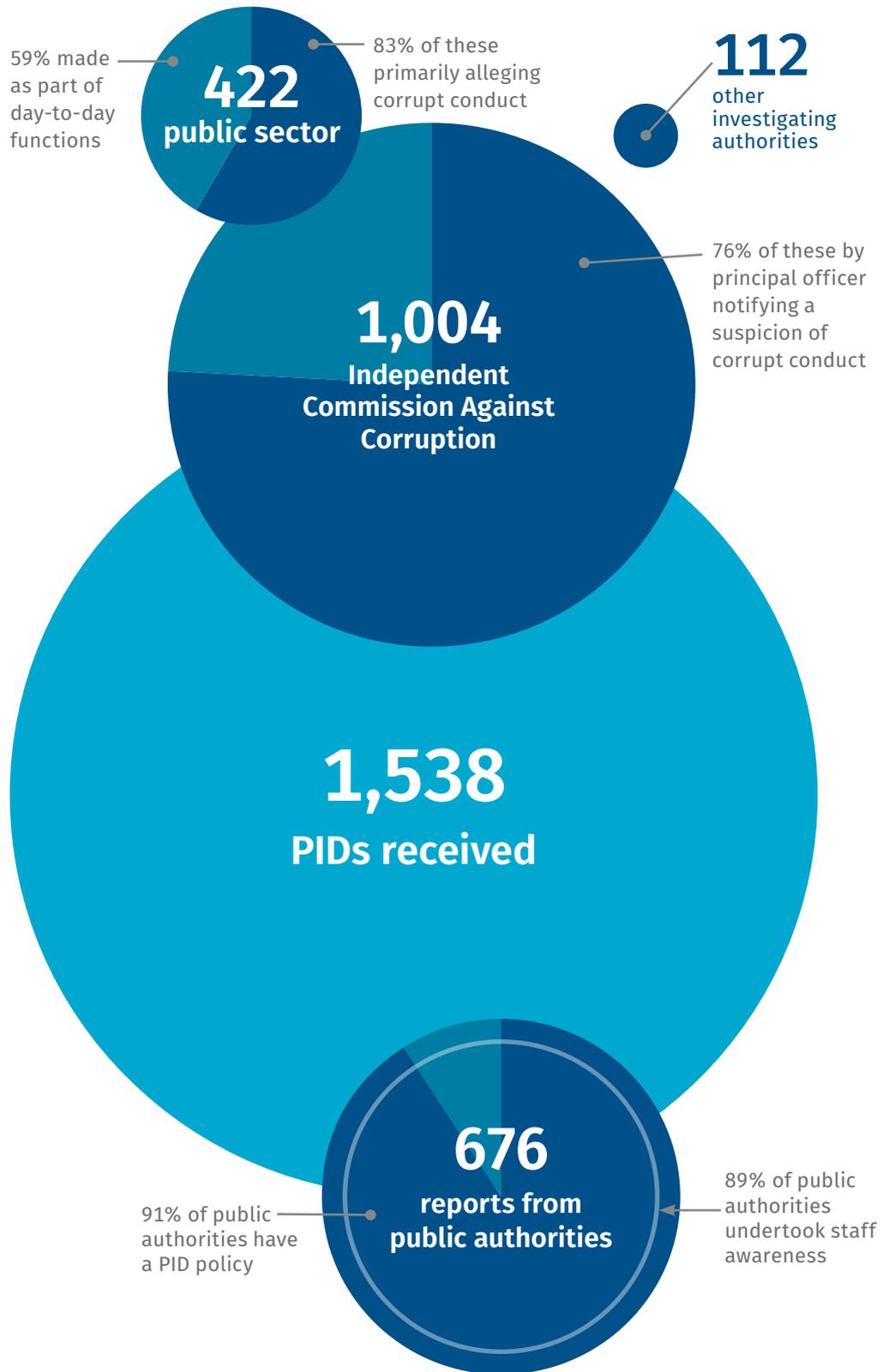




Part 2: The PID landscape

This part reports on the 1,538 PIDs made internally to public authorities or externally to investigating authorities in 2018–19.

2.1. PIDs in 2018–19: Key statistics



Note that PIDs to investigating authorities may have first been PIDs to the public authority. Similarly, PIDs to investigating authorities may be referred to the public authority to deal with.

2.2. PID Act reporting requirements

Since 1 January 2012, the PID Act has required public authorities to report certain statistical information about their activities under the Act directly to our office every six months (s 6CA), as well as in their own annual report (s 31). These statistical reports are sent securely to our office via the PID online reporting tool. We use the information provided to inform and appropriately target our future awareness and auditing activities.

Table 1 shows the number of statistical reports provided to our office for the two relevant six monthly periods, as at 28 October 2019. PID practitioners in all public authorities were reminded of their reporting obligation before the due date, and received a further email if they failed to provide a report by the due date. It is disappointing that 21 per cent of identified public authorities nevertheless have not submitted a report to our office in the most recent period¹. We will continue to follow up with individual authorities about non-compliance with section 6CA.

Table 1. Statistical reports provided by public authorities to our office

Reporting period	Number of statistical reports provided	Proportion of identified authorities
July–December 2018	351	86%
January–June 2019	325	79%

In 2018–19, we also received 57 reports from public authorities that related to previous reporting periods.

In focus 2: Does non-compliance with reporting requirements signal broader cultural problems?

A public authority failed to lodge its six-monthly reports with our office for over a two-year period. We had previously audited the authority and made recommendations about meeting its reporting requirements. We followed up with the PID coordinator by phone and email on a number of occasions.

In August 2018, we wrote to the principal officer of the authority, noting that the authority had failed to meet its legislative reporting requirements. We also noted that, in our experience, this could be indicative of non-compliance with the PID Act requirements generally and demonstrate a lack of commitment to the appropriate handling of reports of wrongdoing.

1. The PID Act defines a public authority as any public authority whose conduct or activities may be investigated by an investigating authority. It specifically includes public service agencies, state owned corporations and their subsidiaries, and local government authorities. However, given the broad scope of the definition, it is difficult to comprehensively identify the exact number of other entities such as statutory authorities with responsibilities under the PID Act.

The principal officer met with us to discuss our concerns. Following that, he personally conducted a thorough review of the authority's PID policy and nominated disclosures officers, training for these officers, induction material for new staff, record keeping and tracking system.

The principal officer identified improvements to the authority's PID regime, including assigning their communications team to run an internal awareness raising effort and to make easy to understand and find introductory material available on their intranet system, as well as discussing the importance of protecting reporters with the Executive Leadership Team.

In focus 3: An explanation on counting

The Public Interest Disclosures Regulation 2011 outlines the information a public authority must provide in their report to our office. Clause 4(2)(b) states this should include the number of PIDs received by the authority.

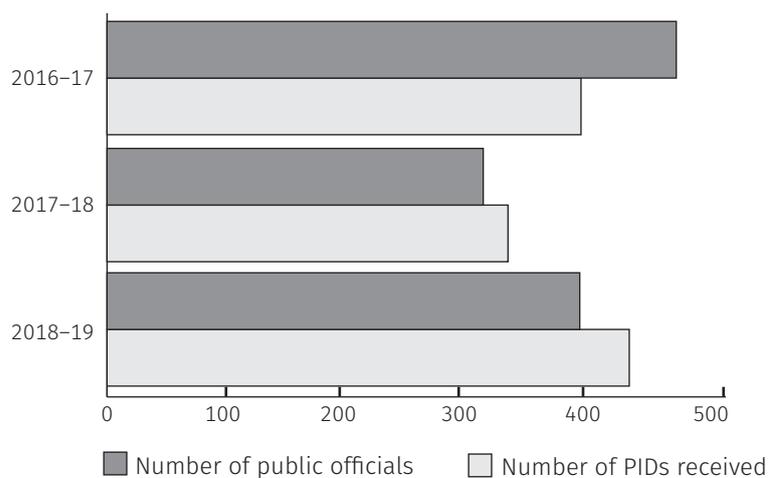
We told public authorities that the number they reported to us should include all PIDs the authority took responsibility for handling, regardless of whether they were made directly to the authority or referred by another public or investigating authority under s 25 or s 26 of the PID Act. They should not include PIDs made directly to the authority and subsequently referred for handling by another authority under the PID Act.

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

2.3. PIDs reported by public authorities

Figure 1 shows the change in the number of public officials who made PIDs directly to public authorities and the number of PIDs received by authorities over the last three years. This year saw a reversal of the trend that the number of PIDs received by public authorities was declining. In 2018–19, public authorities reported receiving 422 PIDs – a 30 per cent increase from the 324 received in 2017–18. In fact, this is the highest number of PIDs received by public authorities in any financial year since the reporting requirements commenced in 2012. Below we discuss possible reasons for this increase, including that public officials may be more willing to report wrongdoing or public authorities are improving at identifying reports as PIDs.

Figure 1. Number of public officials who made PIDs directly to, and number of PIDs received by, public authorities since 2016–17²

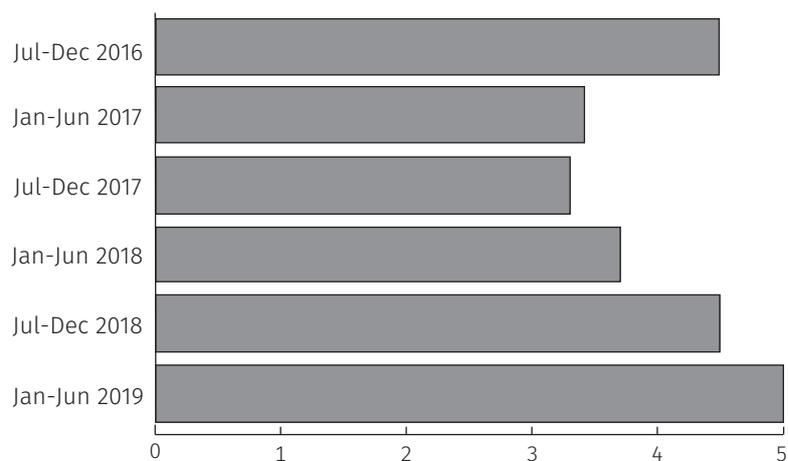


The number of public officials who made PIDs directly to a public authority may differ to the number of PIDs by an authority. The two main reasons are that:

- Multiple public officials may make one PID. In 2016–17, for example, one authority reported that 121 public officials made one PID about serious maladministration.
- PIDs referred to a public authority are likely to be included as PIDs received by that authority but the public officials who made them not included as they did not make the PID directly to that authority.

We also looked at the number of PIDs received on a *per capita* basis using the number of staff public authorities indicate that they have in their reports to us. Since reaching a low in the first half of 2017–18, the rate of PIDs received per 10,000 staff has climbed steadily over the past two years, as shown in Figure 2.

Figure 2. Number of PIDs received per 10,000 staff since 2016–17



2. The high number of public officials who made a PID in 2016–17 is due to one authority reporting that 121 public officials made one PID.

The factors that contribute to the extent of internal reporting within an organisation are complex. The number of PIDs, as defined in legislation, also depends on procedural or systemic factors including:

- wrongdoing being observed and identified as such
- the extent to which public authorities' internal reporting policies provide safe and accessible reporting pathways, particularly in nominating which officers can receive disclosures
- the knowledge and capability of disclosures officers in identifying reports as PIDs
- the experience and judgment of the person who ultimately assesses whether to treat the report as a PID
- interaction with investigating authorities, such as in the following two examples.

Example 1: An audit of a large department in 2017–18 revealed their practice of only considering whether reports by staff were PIDs was if the staff member requested this or raised concerns of reprisal. This practice is not consistent with the PID Act: authorities are required to treat certain reports as PIDs irrespective of the reporter's need for protection. There were also inconsistencies in assessing when witnesses providing information to investigators were making PIDs. We recommended all internal reports that *prima facie* concern one of the categories of conduct in the PID Act are assessed on receipt to determine if they are PIDs. There was a 427 per cent increase in PIDs reported in the 12 months following the audit (n=58) compared with the 12 months prior to the audit (n=11).

Example 2: The number of PIDs made to the Independent Commission Against Corruption (ICAC) may influence the number of PIDs received by public authorities, given the practice of the ICAC to refer matters to public authorities to deal with. This year, the number of PIDs made to the ICAC (see section 2.5) and the number of PIDs made to public authorities that primarily alleged corrupt conduct both increased by 35 per cent (respectively n=260 and n=91). There is a risk that these PIDs are being double counted – initially by the ICAC, and then by the public authority. Any future reporting requirements must therefore include whether the PID was made directly to the authority or received via a referral.

Type of public authority

As Table 2 shows, local health districts receive the fewest number of PIDs per 10,000 staff, followed closely by universities and state government departments.

In comparison, the rates of PIDs for local Aboriginal land councils is high given their low number of staff, even though relatively few PIDs were received (n=9). These figures confirm our experience of a high level of reporting in state owned corporations, perhaps given their emphasis on a safety culture whereby staff readily report concerns and the corruption risks faced when contractors perform public official functions.

Table 2. Number of PIDs received per 10,000 staff by type of public authority in 2018–19

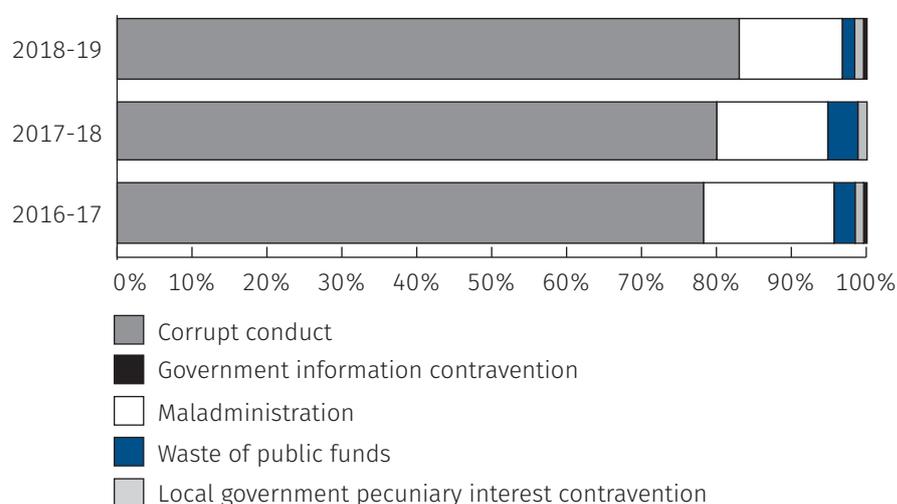
Type of public authority	Number of PIDs received per 10,000 staff	Change from 2017-18
Aboriginal land council	83.3	↑
State owned corporation	51.5	↑
Other	14.2	↑
Independent/parliamentary agency	8.7	↑
Local government authority	6.5	↓
State government agency	5.1	↓
State government department	3.4	–
University	2.6	↓
Local health district	2.4	↓

Subject matter of the PIDs

If a PID contains multiple allegations that could fit into more than one category of wrongdoing in the PID Act, we ask public authorities to only report the primary category of wrongdoing alleged – that is, the most significant or serious breach. Therefore, we do not know how many PIDs primarily about corrupt conduct also contained allegations of maladministration or other categories of wrongdoing as this is limited by the information required under the PID Regulation.

Consistent with previous years, Figure 3 shows that the large majority of PIDs people made to public authorities in 2018–19 continue to primarily allege corrupt conduct (83%, n=350). The number of PIDs received by authorities alleging a government information contravention increased to five (from zero), while the number of PIDs alleging a waste of public funds or a local government pecuniary interest declined.

Figure 3. Most serious allegation of wrongdoing in PIDs received by public authorities since 2016–17



Circumstances under which public officials make PIDs

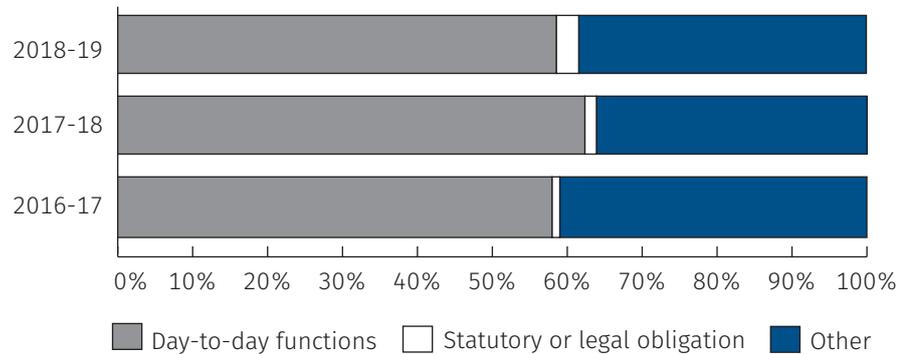
PIDs can be made by:

- public officials performing their day-to-day functions (such as managers, internal auditors, corruption prevention staff and investigators)
- public officials required to report wrongdoing under a statutory or other legal obligation
- public officials outside of these roles.

As long as a report is made by a public official and it meets the other requirements of the Act, it may be a PID. Since 1 January 2014, public authorities have been required by the PID Regulation to provide our office with information about the circumstances under which public officials make PIDs.

Figure 4 shows that more than half (59%, n=247) of all PIDs received by authorities over the year were reportedly made in the performance of a public official’s day-to-day responsibilities. While only 13 PIDs were reported as being made under a statutory or other legal obligation, this was a 160 per cent increase, reflecting the increase in the number of section 11 notifications to ICAC that were assessed as PIDs.

Figure 4. Role of public officials making PIDs (PIDs received by public authorities in 2018–19)



However, the lack of clarity and understanding of this information by public authorities raises some questions about the reliability of this data. For example, many public authorities report all PIDs received as being made by public officials as part of their day-to-day function, which does not reflect our experience based on auditing public authorities.

2.4. Internal reporting policies and staff awareness

An internal reporting policy is a critical starting point for public authorities to clearly demonstrate their commitment to supporting the reporting of wrongdoing by staff and properly handling such matters. Under section 6D of the PID Act, all authorities must have a policy that provides their procedures for receiving, assessing and dealing with PIDs.

The six monthly reports we receive from public authorities show there has been an increase in the proportion indicating they have an internal reporting policy – from 75 per cent in the first reporting period (January to June 2012) to 91 per cent in the January to June 2018 period. The majority of public authorities without an internal reporting policy are Local Aboriginal Land Councils (63%, n=22) and we continue to promote our model internal reporting policy designed specifically for Local Aboriginal Land Councils to them.

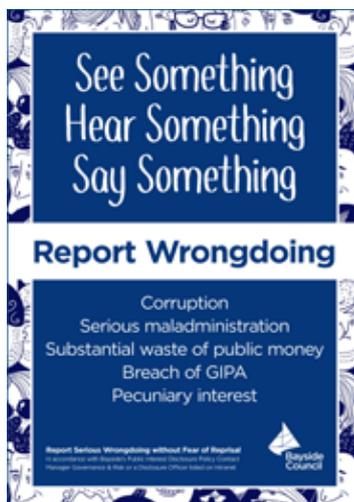
The heads of public authorities are responsible under section 6E(1)(b) of the PID Act for ensuring their staff are aware of the contents of the authority's internal reporting policy and the protections provided under the Act. Again, there has been an improvement over time in the proportion of authorities that report the head of the authority has taken action to meet their staff awareness obligations – up from 75 per cent in the January to June 2012 period to 89 per cent most recently.

Many public authorities draw on their policy and staff awareness activities to create a positive reporting culture.

Good practice 1: Policies and staff awareness

- **Lithgow City Council's** internal reporting policy outlines 10 principles to which they are committed. One principle is 'a culture where employees are encouraged to report errors or mistakes, with a focus on learning and improvement rather than blame'.
- **TAFE NSW** customised our PID e-learning modules to suit their context and processes. The modules provide scenarios, case studies and quizzes to engage learners. In total, 14,758 TAFE employees have participated in the online training. This supported training of over 200 nominated disclosures officers (NDOs) by our office face-to-face or via Skype. The Managing Director of TAFE highlighted the importance of creating a positive reporting environment in her weekly newsletter to staff.
- **Bayside Council** worked with us to provide mandatory PID training for all staff. They also developed a PID training workbook for staff in frontline services (eg libraries, children's services and customer service) to complete to demonstrate compliance. The key message for staff, including in a news item and on posters, was 'See something, hear something, say something!' The General Manager briefed all NDOs on their role as champions of internal reporting, supporting council's values and a culture of openness.

- **Mid North Coast Local Health District’s** email signatures promote ‘speak up’ and include a link to their ethics and organisational integrity intranet page.
- The Internal Ombudsman Shared Service worked with the HR Directors of **Inner West, Cumberland** and **City of Parramatta Councils** to develop a ‘Speak Up’ culture in each of the councils, including in relation to PIDs. This included engagement with leaders and senior management, and empowering staff with the knowledge and confidence to speak up to about particular issues and to know where their concerns can most appropriately be dealt with.
- **Federation Council** set up an internet page to advise the public on how they handle PIDs.
- **Narrandera Shire Council** raises awareness of PIDs through social media.
- The **Greater Sydney Commission** reminded staff of their obligations and reporting processes in a CEO staff briefing, with cascade briefings provided in individual team meetings.



2.5. PIDs handled by investigating authorities

Investigating authorities are not required under the PID Act to provide statistical reports to our office in their capacity as investigating authorities. However, we coordinate the sharing of statistical information between investigating authorities about the PIDs they have handled in their capacity as investigating authorities to obtain a full picture of PIDs in NSW.

Table 3 shows the number of PIDs received by investigating authorities over the past two years. In total, investigating authorities received 1,116 PIDs in 2018–19, more than the number received in the previous year (n=842). Only two years are included, given the change in assessing and counting mandatory reports by principal officers as PIDs by the Independent Commission Against Corruption (ICAC) at that point. Under section 11 of the *Independent Commission Against Corruption Act 1988* (ICAC Act), principal officers have a duty to report to the ICAC any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.

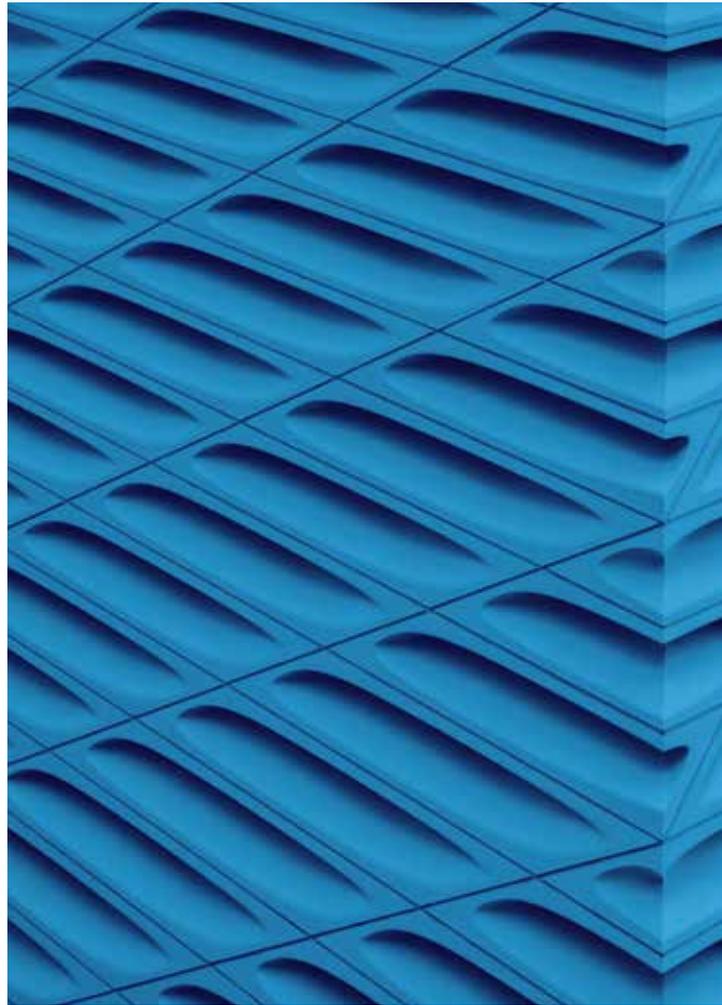
All investigating authorities other than the Audit Office received more PIDs in 2018–19 than in 2017–18. The ICAC received 260 more PIDs in 2018–19 than in 2017–18. Of the 1,004 PIDs received by the ICAC, 763 (76%) comprised notifications from principal officers of authorities under s 11 of the ICAC Act.

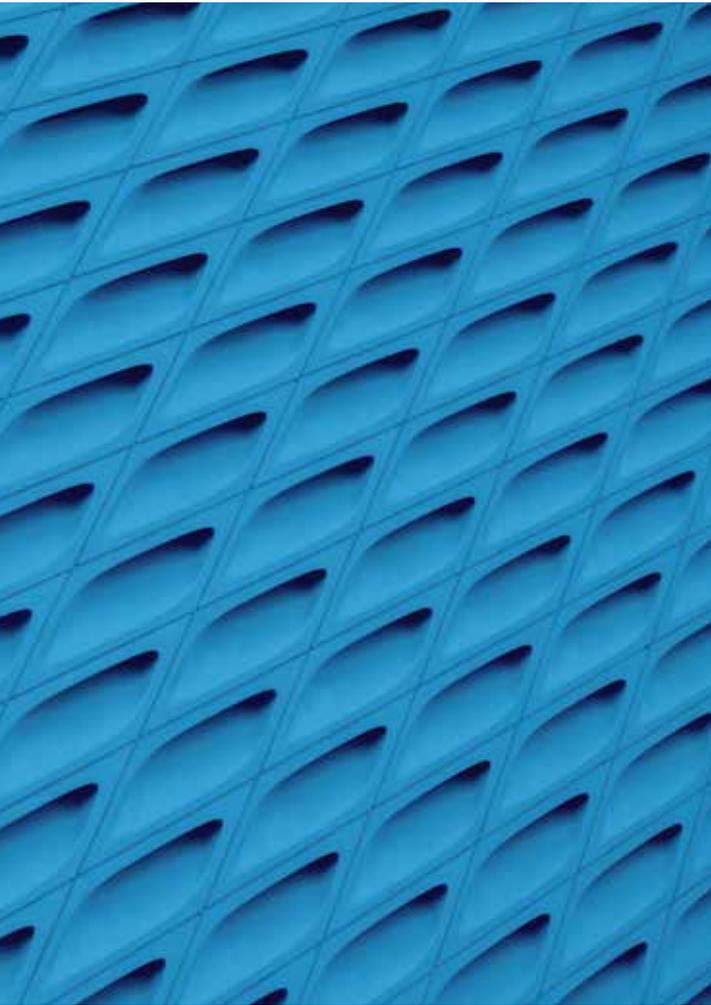
Table 3. Number of PIDs received by investigating authorities in 2017–18 and 2018–19

	2017–18		2018–19	
Audit Office	17		11	
ICAC	512	232	763	241
Information Commissioner	0		2	
Inspector of ICAC	0		0	
Inspector of LECC	0		3	
OLG	21		30	
Ombudsman	20		22	
LECC	40		44	

■ s11 notifications ■ all others

This means that the number of PIDs is unlikely to reflect the number of instances of wrongdoing. There may be two PIDs relating to the same wrongdoing incident – the first disclosure by a staff member internally and the second being when the principal officer discloses the corrupt conduct to the ICAC. Alternatively, the corrupt conduct notified to the ICAC may have become known via other sources, including internal audit, management or complaints from members of the public.





Part 3: Performing our functions

Our work includes supporting the PID Steering Committee, handling complaints, auditing public authorities, raising awareness and providing training, building capacity, providing advice and information, conducting research and informing policy.

Our performance in 2018–19

Public awareness and engagement	
What did we want to achieve?	What did we achieve?
<p>Engage with stakeholders.</p> <p>Raise awareness of PIDs across the public sector.</p> <p>Support PID coordinators.</p> <p>Distribute PID guidance material.</p> <p>Provide advice to public authorities and public officials.</p>	<p>Trained 2,203 public officials at 71 PID awareness sessions and 51 PID management sessions across metropolitan and rural NSW — rated positively by 98 per cent of participants.</p> <p>Distributed two issues of the PID e-News to 1,579 subscribers.</p> <p>Facilitated two PID practitioner forums — rated positively by all attendees.</p> <p>Hosted information stands at two conferences and spoke at 15 events.</p> <p>Updated two fact sheets.</p> <p>Provided advice and assistance in response to 140 requests.</p> <p>Managed an online community, the Whistling Wiki.</p> <p>Supported the Corruption Prevention Network of NSW.</p>
Monitoring and reviewing	
What did we want to achieve?	What did we achieve?
<p>Audit compliance with the PID Act.</p> <p>Facilitate the provision of six monthly statistical reports by public authorities.</p> <p>Assist the PID Steering Committee.</p> <p>Make recommendations for reform.</p> <p>Contribute to PID-related research and policy development.</p>	<p>Conducted one face-to-face PID audit, involving reviewing 56 files.</p> <p>Received 676 PID statistical reports from public authorities for two reporting periods.</p> <p>Held three PID Steering Committee meetings.</p> <p>Prepared a discussion paper on the application of the PID Act to external providers.</p> <p>Supported the <i>Whistling While They Work 2</i> research project as a partner organisation.</p> <p>Contributed to the development of an international and Australian standard on whistleblowing.</p>
Complaint handling and investigation	
What did we want to achieve?	What did we achieve?
<p>Ensure timely and efficient handling of complaints.</p> <p>Identify problems and deficiencies to improve the handling of PIDs.</p>	<p>Received 22 PIDs, 16 complaints purporting to be PIDs that we did not assess as meeting the criteria set out in the legislation, 13 complaints about the handling of PIDs and 55 complaints requiring further information.</p> <p>Commenced an investigation into four PIDs.</p>

3.1. Supporting the PID Steering Committee

The NSW Ombudsman chairs the Public Interest Disclosures Steering Committee. This committee comprises the heads of the investigating authorities listed in the PID Act, as well as the Department of Premier and Cabinet, the Public Service Commissioner and the NSW Police Force. One of the committee's key functions is to provide advice to the Premier on the operation of the PID Act and make recommendations for reform. It met twice during the year, with another meeting held on the papers.

A focus for the PID Steering Committee this year arose from the 2017 report of the Joint Parliamentary Committee on the Ombudsman, Law Enforcement Conduct Commission and the Crime Commission (JPC) on their statutory review of the PID Act. The government formally requested that the PID Steering Committee examine in detail the implementation issues arising from the JPC's recommendations. We look forward to this consultation continuing in 2019–20.

As secretariat for the PID Steering Committee, we undertook research into the JPC recommendation that the PID Act be amended to allow a person to be deemed a public official for the purposes of protecting them when they make a report of wrongdoing that would otherwise be a PID, for example, sub-contractors or not-for-profit employees providing government functions. This research included surveying PID practitioners, gauging the number of providers who this change may affect and comparing the approaches taken in other Australian jurisdictions. This research informed the committee recommendation that NSW adopt the Commonwealth deeming model as part of the review of the PID Act.

In focus 4: Research into external providers and the PID Act

We surveyed PID practitioners (n=37) on the contractors they engage, and how they have handled PIDs from or about external providers, including any benefits or difficulties encountered. Findings of note were:

- More than 80% of respondents use external providers.
- Amending the definition of 'public official' to include external providers is not seen as posing a challenge because respondents:
 - will treat PIDs from internal staff and external providers in much the same way
 - did 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.

We also considered the way other Australian jurisdictions have dealt with this issue:

- Four jurisdictions³ 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’.⁴
- Six jurisdictions⁵ 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’⁶. 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)’⁷.
- 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.

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.

A separate PID Steering Committee annual report 2018–19 detailing these and other activities has been tabled in Parliament by the Premier.

3. *Independent Commissioner Against Corruption Act 2017* (NT), *Protected Disclosure Act 2012* (Vic), *Public Interest Disclosure Act 2003* (WA), *Public Interest Disclosure Act 2012* (ACT).

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

5. *Independent Commissioner Against Corruption Act 2017* (NT), *Protected Disclosure Act 2012* (Vic), *Public Interest Disclosure Act 2010* (Qld), *Public Interest Disclosure Act 2003* (WA), *Public Interest Disclosures Act 2002* (Tas), *Public Interest Disclosure Act 2013* (Cth).

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

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

3.2. Handling complaints

Contacts received by our office are categorised as complaints if they are a complaint under section 12 of the *Ombudsman Act 1974* about the conduct of a public authority that is not excluded contact. Schedule 1 of the Act describes excluded contact. They may be verbal or in writing.

In 2018–19, we received 101 complaints related to public interest disclosures (PID). Of these:

- 22 complaints were assessed as meeting the criteria to be a PID. We are formally investigating two matters, have referred three to a more appropriate investigating authority under section 25 of the PID Act, and made inquiries about the remaining complaints (17).
- 13 complaints were about the handling of a PID by an agency. In most cases (11), we made inquiries. However, we have commenced an investigation into two related matters.
- 11 complaints were assessed as not meeting at least one of the mandatory criteria set out in the PID Act. In addition to complaints, we received five matters purporting to be PIDs that were determined to relate to the employment of the reporter, and were therefore outside our office’s jurisdiction.
- For the remaining 55 complaints from public officials about the conduct of a public authority, we provided advice to the reporter about internally reporting the matter to their public authority, how to provide further information to our office or to contact another investigating authority under the PID Act.

A number of our office’s ongoing investigations have arisen from PIDs, often because of the insight disclosures gave us into the conduct of agencies. This demonstrates the value of the PID Act in providing protections for public officials and the quality of the information they provide as a result.

“I feel a lot more confident having this first-hand knowledge from the Office of the Ombudsman.”

3.3. Raising awareness and providing training

We have a statutory obligation to provide PID training to public authorities in NSW.

As well as providing open workshops that anyone may attend, we provide free training sessions to public authorities for groups of ten or more. These training sessions help public authorities to promote staff awareness of the importance of PIDs, encourage a positive reporting environment, comply with the requirements of the PID Act and manage PIDs effectively. We also hold workshops in conjunction with the ICAC’s regional outreach events.

“Very important topic and valuable training.”

“Full overview of everything involved in the role as a PID officer and good activities to make you really ‘assess’ and think about what is involved.”

“Very serious content delivered in a manner that made it interesting and not overwhelming.”

“Very well done and one of the best advice walkthroughs I have had.”

“Excellent training. Came away with the confidence to report maladministration and corrupt behaviour.”

“It was a good insight into my responsibilities and helpful to know who the ‘go to’ person is for help. Case studies help to make it real.”

“This is a worthwhile course and has helped me a lot.”

PID training participants

We offer two types of training:

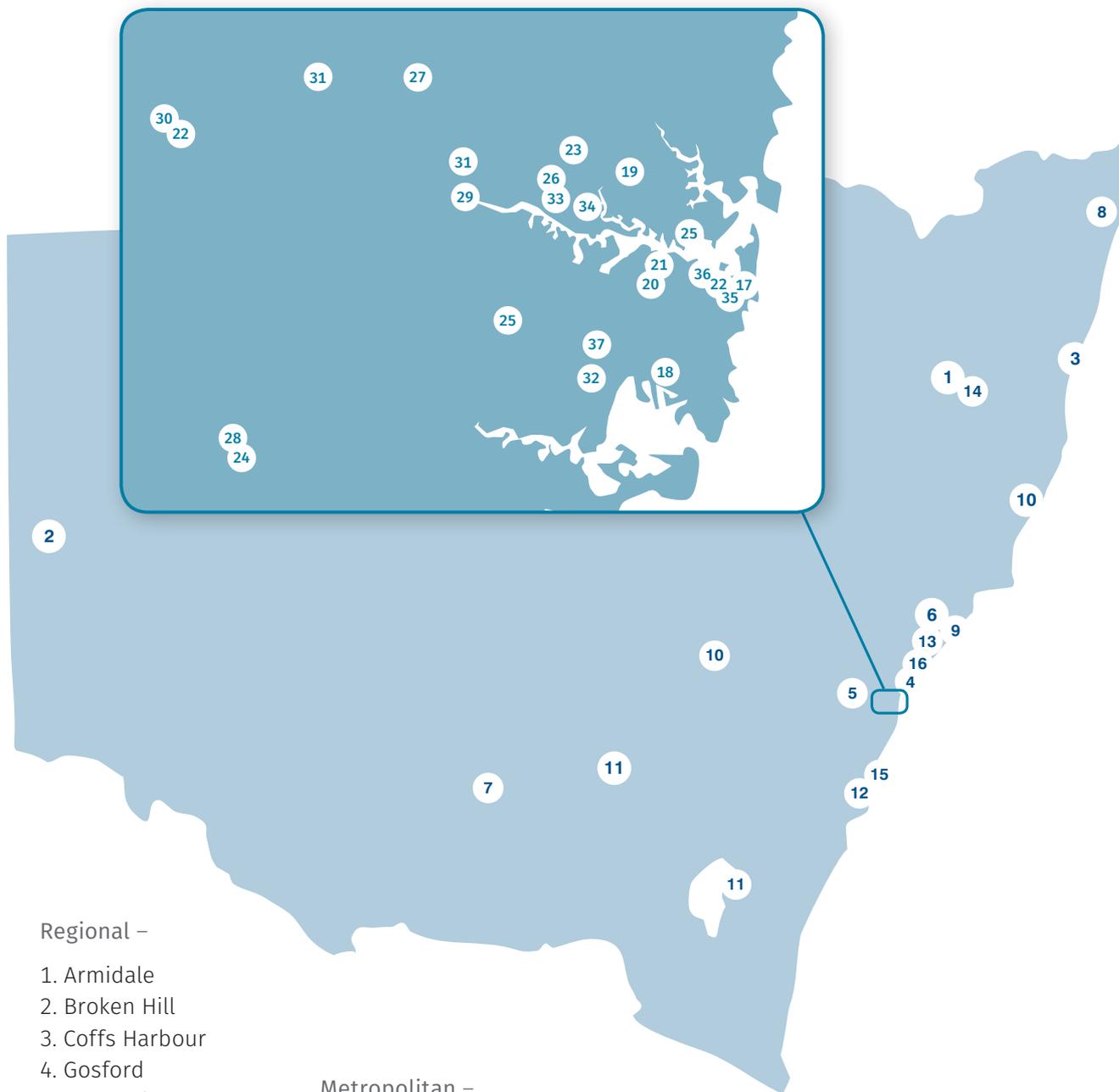
- PID general awareness information sessions – one-hour session suitable for all staff.
- PID management training – three-hour session suitable for senior staff, supervisors and officers nominated to receive disclosures.



- training provided for 181 public authorities
- trained 46% more public officials than in 2017-18: 2,203
- 1,490 at PID awareness sessions
- 713 at PID management sessions
- facilitated 54% more sessions than in 2017-18: 122
- 71 PID awareness sessions
- 51 PID management sessions
- 970 views of e-learning modules

Our commitment to ensuring our PID training meets participants’ expectations means we value their feedback about how we are performing. Overall, the satisfaction rating of participants was

Locations



Regional –

- 1. Armidale
- 2. Broken Hill
- 3. Coffs Harbour
- 4. Gosford
- 5. Katoomba
- 6. Kurri Kurri
- 7. Leeton
- 8. Lismore
- 9. Newcastle
- 10. Orange
- 11. Queanbeyan
- 12. Shellharbour
- 13. Speers Point
- 14. Uralla
- 15. Wollongong
- 16. Wyong

Metropolitan –

- 17. Bondi Junction
- 18. Botany
- 19. Chatswood
- 20. Chippendale
- 21. Haymarket
- 22. Kingswood
- 23. Macquarie Park
- 24. Narellan
- 25. Neutral Bay
- 26. North Ryde
- 27. Norwest
- 28. Oran Park
- 29. Parramatta
- 30. Penrith
- 31. Quakers Hill
- 32. Rockdale
- 33. Ryde
- 35. Surry Hills
- 35. Sydney
- 36. Ultimo
- 37. Wollri Creek

99 per cent for PID management sessions and 98 per cent for PID awareness sessions. This feedback has reinforced that our training is useful and relevant.

Learning online

We have four e-learning modules on our website that provide a convenient training alternative. They are targeted at 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 so that they can track which staff have completed the training.

Attending conferences and events

Attending government conferences and events is one way we make ourselves available to connect with and raise awareness of PIDs among public officials. During the year, we hosted information stalls at the Corruption Prevention Network Forum in September and the National Investigations Symposium in November.

We spoke at a range of events, both internally within public authorities and at conferences and seminars, including:

- At the National Investigations Symposium, inaugural Whistleblowing Symposium, National Integrity Systems Symposium, Local Government Professionals Conference, Public Sector Fraud and Corruption Prevention Forum, Corruption Prevention Network of NSW lunchtime seminars and SOCAP leadership breakfasts.
- To Regional Leadership Executives, the Risk Management Institute of Australia, Health PID coordinators, local government professionals at an intensive course and the Office of Environment and Heritage Audit and Risk Committee. The organiser of one of these events provided feedback to us that:

“We are grateful for the time and effort you took to share your expertise with the audience on a very interesting topic. We all agreed that your presentation was excellent and enjoyed by all! Thanks again for a memorable presentation”.

We convened a plenary session at the biennial National Investigations Symposium in November 2018 on exploring new ways to better protect whistleblowers, with Australian academic, Professor AJ Brown from Griffith University, and international whistleblowing expert, Dr Wim Vandekerckhove, Reader in Business Ethics at the University of Greenwich.

3.4. Conducting research and informing policy

We regularly contribute to research and the development of whistleblowing policy beyond the jurisdiction of NSW. Some examples of our collaborative work include the following.

Whistling While They Work 2 research project

Our partnership with researchers and 22 other integrity and governance organisations continues with the Australian Research Council project *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*, led by Griffith University.

During the year, we co-authored a working paper on preventing detrimental whistleblowing outcomes through risk assessment and proactive management. This formed part of the project report *Whistleblowing: New rules, new policies, new vision*, released in November 2018.

The report 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.

Section 5 (page 41) outlines the analysis we contributed towards the project.

Australian and international standards on whistleblowing

We are members of a Standards Australia technical committee on organisational governance (QR-017) that is responsible for a number of governance standards. Of particular interest to our office is the Australian standard for whistleblowing programs in organisations. It is currently withdrawn because it has not been updated since 2004.

The intention is for the Australian standard to be duplicated so as to mirror the first international management system standard in this field, currently being drafted by a working group of the International Standards Organisation Technical Committee 309. Our Senior Research and Policy Officer received funding from Standards Australia and Griffith University to provide expertise during a four-day working group meeting in Paris in March. We also participated in an editorial task group following the meeting, leading to the release of a consultation draft, *Whistleblowing management systems – Guidelines*.

Commonwealth Integrity Commission

We made submissions to the Commonwealth Attorney General's Department on their National Integrity Commission consultation paper and to the Commonwealth Senate Legal and Constitutional Affairs Legislation Committee on the National Integrity Commission Bill 2018, National Integrity (Parliamentary Standards) Bill 2018, and National Integrity Commission Bill 2018 (No. 2). We also appeared at a hearing of the Committee.

We supported the creation of an Integrity Commission at the federal level and outlined the principles that underpin an effective model. We also believed the joint public-private sector whistleblower protection oversight model proposed broke new ground.

These Bills were not passed.

National Integrity System assessment

We were a partner organisation to the Australian Research Council project *Strengthening Australia's National Integrity Systems – Priorities for reform*, led by Griffith University. During the year, this project published a discussion paper, *A National Integrity Commission – Options for Australia*, and the draft report on Australia's sector national integrity system assessment, *Governing for Integrity: A blueprint for reform*.

3.5. Building capacity

Engaging with PID practitioners within public authorities is an important part of the work we do. Developing and maintaining good professional relationships with practitioners enables us to promote awareness of the PID Act, provide support and guidance, identify any problems and respond appropriately.

Holding PID practitioner forums

Our PID practitioner forums focus on the practical application of the PID Act – working through operational difficulties faced by authorities and using examples of good practice to find better ways of achieving the public interest objectives of the legislation. They also allow participants to raise issues with us and ask questions about better managing PIDs.

We held two PID practitioner forums at our office in December and May, which all attendees rated as good or excellent. Feedback helps us to identify areas of interest for PID practitioners, which we use to inform future forums.

“Group discussion highlights experiences are not unique—we share challenges and solutions.”

“Very informative and great networking across government with councils and other corporate entities across government represented.”

“Excellent and very valuable. Some great take home examples.”

“I found the insights into psychology and emotional aspects of reporting most useful.”

Participants at PID forums

December 2018 – Taking a behavioural insights approach to managing reports of wrongdoing

In our *Oversight of the PID Act Annual Report 2017–18*, we identified 25 behavioural economics principles that can inadvertently or unintentionally lead managers to take action that is detrimental to a reporter, fail to realistically consider the risks to a reporter, or fail to take adequate steps to protect a reporter.

At the December PID practitioner forum, practitioners in small groups focused on principles grouped into eight themes:

1. There's nothing wrong – managers' preconceptions of reporters, subjects of allegations, processes and practice can influence whether they see conduct as wrong
2. That can't be right – managers can respond emotionally to reports of wrongdoing depending on how close they are to reporters and subjects of allegations
3. What's the big deal? – if managers only have experience with the grievance process, for example, they may treat all reports from staff in the same way
4. It's all too hard – managers may do nothing in response to a report if processes are difficult to understand and require significant effort
5. What do I do now? – managers can feel overwhelmed if they are faced with an overwhelming number of policies and procedures to follow
6. What if I get it wrong? – managers may sometimes fail to take action because they fear responding inappropriately – without realising this can lead to far worse outcomes in the long run
7. I'll deal with this tomorrow – managers may have a tendency to delay dealing with conflict or having difficult conversations with staff
8. That's what we do around here – cultural and social norms influence what action managers take in response to reports.

Practitioners then brainstormed practical ideas they could implement in their authority to minimise the impact of cognitive and motivational biases on management. Some of the ideas were:

- improved training and development of managers that is relevant to their day-to-day role (eg. by using less serious examples of wrongdoing reports that help to identify problems and improve systems and processes)
- making processes and forms simple, easy-to-use and accessible
- providing managers with a reliable point of contact that they can contact for advice about wrongdoing reports
- demonstrating to staff that reports are taken seriously by creating a feedback loop – that is, telling staff what action is taken in response to reports and what organisational changes have been made as a result

- after an audit or investigation, assigning 'follow-up' activities to managers. Link their achievement of these, and integrity and ethical behaviour more generally, to performance management rewards and recognition
- distance decision-making from those who may respond emotionally to a report, for example by establishing assessment panels to determine what action to take
- as investigators, seeking advice from an independent/external person to minimise evidentiary bias.

For further detail, see issue 37 of our PID e-News.

Distributing the PID e-News

Our regular electronic newsletter is an effective and efficient way to disseminate information to the community of PID practitioners and other interested stakeholders. Past issues can be accessed from the NSW Ombudsman website.

During 2018–19, we distributed two issues of the PID eNews to 1,579 subscribers, a 22 per cent increase in subscribers from the previous year. The articles covered topics such as:

- insights into psychology, emotions and biases
- strategies to mitigate the risk of biases in decision-making
- a plenary session at the National Investigations Symposium in November 2018 titled *Exploring new ways to better protect whistleblowers*
- comment on the National Integrity Commission Bill 2018
- findings from the *Whistling While They Work 2* research
- comment on new Commonwealth whistleblower laws that commenced on 1 July 2019 with potentially serious implications for some State entities.

Corruption Prevention Network of NSW

Along with the ICAC, our office is an active supporter of the Corruption Prevention Network of NSW (CPN). The CPN is a not-for-profit organisation committed to providing learning opportunities to individuals involved in corruption prevention and fraud control. We assist the CPN in organising their biennial forum and program of monthly lunchtime seminars.

Whistling Wiki

The Whistling Wiki is a closed online community hosted in govdex, a website managed by the Commonwealth Department of Finance. We work with our colleagues at the Queensland Ombudsman and the Commonwealth Ombudsman's offices to support the community of practitioners across Australia. It provides a repository of resources, media articles and other information.

3.6. Providing advice and information

We regularly speak to public authorities to help them respond to individual PIDs, interpret the PID Act and develop internal reporting systems. We review and provide feedback on internal reporting policies and other documents on request.

We also provide advice to public officials who are thinking about reporting wrongdoing or who have made a disclosure and have questions about the process. This advice covers issues such as:

- the protections available under the Act
- the information they should provide when making a report
- how to make a report in a way that minimises risks
- the appropriate investigating authority to make a report to
- the normal procedures we follow when we receive such a report.

We received 140 requests for advice and assistance during 2018–19. In addition, we responded to approximately 315 enquiries from public authorities about the administrative processes around submitting a PID report to our office or in maintaining our register of PID coordinators across NSW public authorities.

Case study 1: What makes a good nominated disclosures officer?

During a review of their PID policy and procedures, City of Ryde Council invited staff to express their interest in becoming nominated to receive PIDs. They sought our advice on the capabilities they should be looking for and questions to ask applicants.

We noted that this was a positive way to engage with staff about the internal reporting system and find ethical champions from all areas of the organisation. However, we also noted the importance of ensuring management and other key positions are nominated to receive PIDs, and that there be at least one officer at every work site.

We suggested that disclosures officers should be easily accessible to staff, capable of handling inquiries discreetly and be able to communicate effectively, particularly in relation to difficult or sensitive matters. Ideas for questions included:

- Describe an occasion where you have had a difficult conversation in the workplace. How did you handle it?
- To be an effective PID officer, other staff must trust you. Provide an example where you have been approached by a colleague to help resolve a problem they were facing.
- If a fellow staff member approached you with concerns about wrongdoing:
 - What questions would you have for them?

“Many thanks for your extremely helpful response.”

“Thank you – really appreciate your time and input into this. We will be reviewing and making the required changes.”

Staff who sought our advice

- What else would you want to know?
- What steps would you then take?

The EOI process resulted in eight new officers being nominated to receive PIDs.

Case study 2: Do PID Act protections ever cease?

We were approached by a manager of a public authority seeking advice about a PID he was dealing with. The allegations raised were investigated externally and resulted in two officers having their employment terminated. However, the reporter continues to raise the issues in public forums such as staff meetings and makes derogatory comments about their team leader for allowing the conduct. This behaviour was placing the team leader under considerable stress.

The manager asked at what point the protections under the PID Act ceased. While we advised that they do not cease, we did provide the following advice about managing the situation:

- Be clear with the reporter about what the PID Act protects them from – that is, reprisal for making their original disclosure. The PID Act does not protect reporters for their subsequent conduct, such as breaching confidentiality in relation to the investigation or the subjects of the allegations, or making defamatory comments in a public forum.
- If the reporter wishes to make further allegations, remind them that the appropriate manner to do so is in accordance with the authority's internal reporting policy to an appropriate officer. If they remain dissatisfied with the action taken by the authority to date, they are welcome to make a complaint to our office or another external investigating authority.
- Warn the reporter that certain conduct may be considered a breach of the code of conduct and that, if it continues, formal performance management or disciplinary action may be commenced.
- Document any conversations with the reporter, as well as any decisions (and the reasons for those decisions) in relation to performance management.

Our PID publications and webpages

We have a statutory function to issue guidelines and other publications for the assistance of public officials, public authorities and investigating authorities. To this end, we have developed three model internal reporting policies, 25 guidelines, nine fact sheets and eight templates.

All of our publications are available on the NSW Ombudsman website. Our PID webpages are a useful way for public authorities and public officials to access practical guidance and procedures for making PIDs at a time and place that suits them. There were over 13,000 unique page views of our PID publications and webpages in 2018–19 as shown in Table 4.

Table 4. Online access (unique page views)⁸ to PID resources in 2018–19

PID fact sheets	3,481
PID guidelines and templates	4,191
PID training and e-learning	970
Other PID webpages	4,410
Total	13,052

During the year, we updated the following fact sheets:

- Am I dealing with a public interest disclosure?
- Thinking about reporting serious wrongdoing?

3.7. Auditing systems

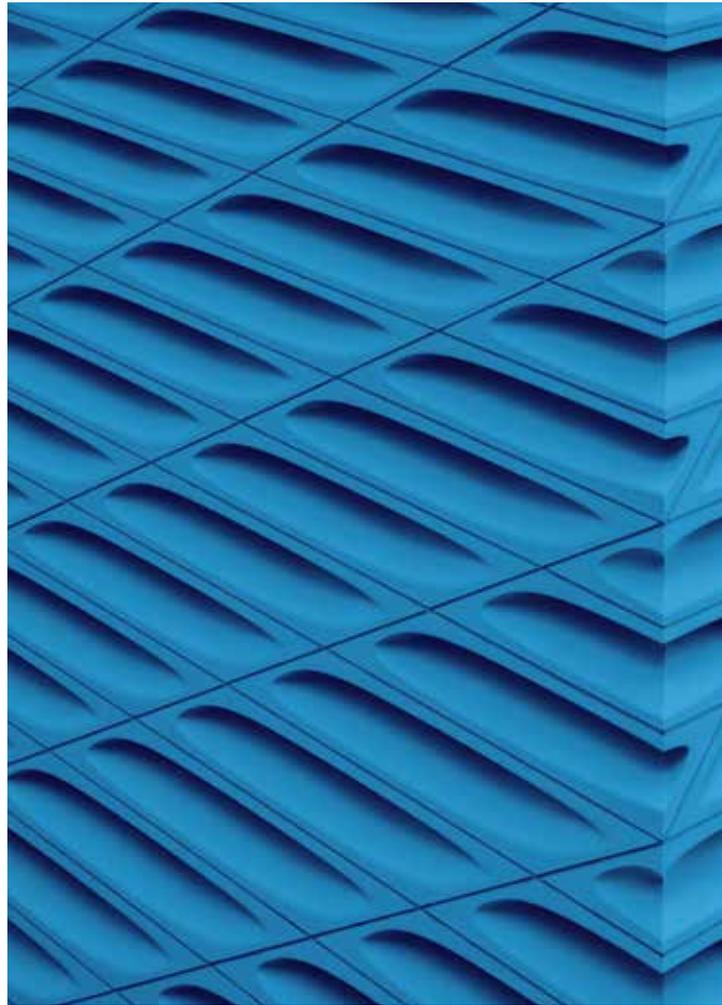
We have a statutory function to audit the exercise of functions under and compliance with the PID Act by public authorities. In 2018–19, we conducted a face-to-face audit of the handling of PIDs at one state government agency, which involved reviewing 56 files – 20 PIDs and 36 internal reports.

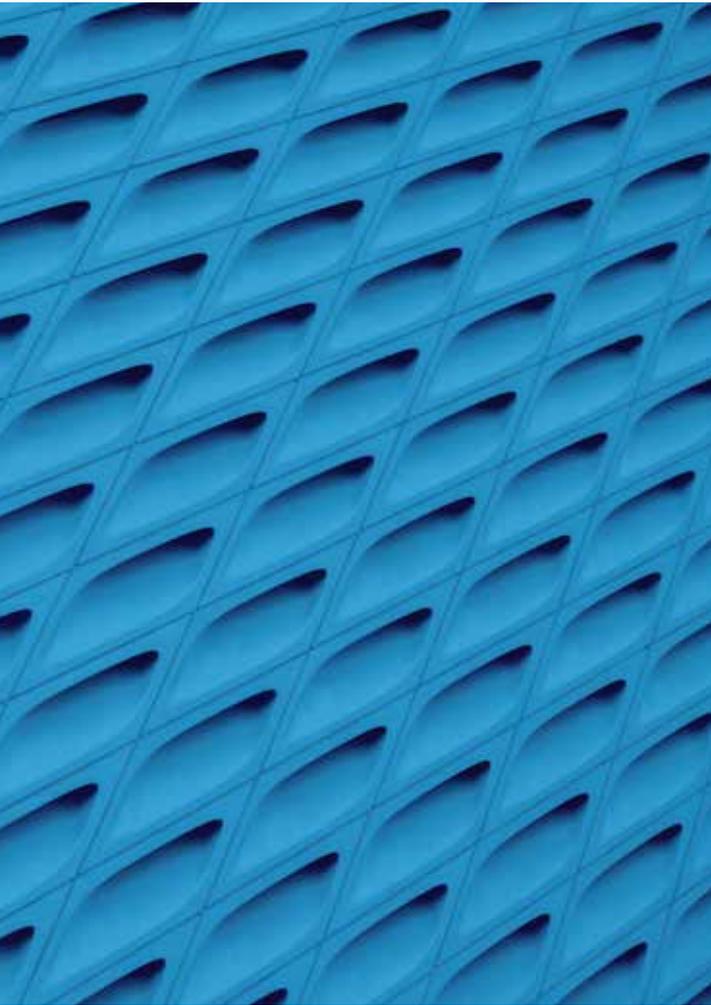
We wrote to 13 public authorities we audited previously to request information about their implementation of our audit recommendations, any barriers to implementation, significant outcomes achieved and to identify best practices in relation to the handling of PIDs. We also took the opportunity to seek feedback from these authorities to assist us continuously improve our audit activities.

We will report on the findings of these audits in the next financial year.

We did not formally exercise our monitoring power under section 6B(1) of the PID Act during the year.

8. This is the number of visits during which the specific page was viewed at least once. Where a person views the same webpage from the same computer more than once, this will only be counted as one unique page view.





Part 4: Complexities and risks in handling PIDs

This part describes complaints about the handling of PIDs received by our office and the views of public authorities on complications that can arise in handling PIDs.

4.1. Complaints about the handling of PIDs

In organisations with a positive, open culture, reporting wrongdoing is not only encouraged, but expected. Normalising the raising of concerns – whether minor or serious – means that staff will come forward about possible wrongdoing early, before it is allowed to continue or escalates. It also ensures that staff report for the right reasons.

In many cases, however, the reporter has had suspicions about the wrongdoing for quite some time – as have others in the workplace who have failed to speak up. Research shows that employees were more likely to report wrongdoing if they had a history of conflict in the workplace (with colleagues, managers or even the organisation itself) or if the wrongdoing was directed at them⁹. This highlights that workplace issues are common triggers for employees to come forward with information they may have otherwise kept quiet.

Many complaints made to our office about the handling of a PID also involve ongoing workplace issues that may or may not relate to the report of wrongdoing itself. These include:

- relationship difficulties with managers and colleagues
- ongoing workplace conflict
- allegations of bullying
- grievances and complaints against the reporter
- alleged poor work performance of the reporter and disagreement about performance management
- general dissatisfaction with the immediate workplace environment.

Subsequent managerial action taken to address workplace issues may lead a reporter to suspect that they are being subject to reprisal action. Although not necessarily caused by the making of a PID, these issues can complicate the handling of the PID. Often reporters in these situations require further support and information about how management is addressing any parallel issues. We have also seen cases that demonstrate poor coordination, for example:

- miscommunication between different areas of the organisation
- inconsistent advice being provided to the reporter
- poor timing – for example, a reporter being given a notice to show cause as to why they should not face disciplinary action immediately after making a PID
- allegations slipping ‘between the cracks’ and not being dealt with.

The following case studies of complaints we handled in 2018–19 show how reporters can link workplace issues and events to their PID and perceive that detrimental action has occurred in reprisal for their disclosure.

9. R Wortley, P Cassematis & M Donkin (2008) Who blows the whistle, who doesn't and why?. In A J Brown (ed) *Whistleblowing in the Australian public sector*, pp 53-82. ANU E-Press: Canberra.

Case study 3: A heads up on wrongdoing and an unforeseen let down

A public official wrote to our office about the handling of a PID they made while employed at a public authority. The reporter's PID concerned issues including procurement and the payment of invoices and corruption in relation to security contracts. The PID also covered issues of a grievance nature including the behaviour of the reporter's manager and an inappropriate relationship between the manager and another staff member, who was involved in the PID. The authority retained an independent contractor to conduct an investigation into the matter.

After making the PID, the reporter received notice that they were the subject of complaints and was stood down pending an investigation. The person that was the subject of the allegations in the PID made the complaints and the reporter maintained that the allegations made against them were in reprisal for the PID.

We made enquiries with the authority and established the complaints made about the reporter predated the making of the PID. In addition, it was clear that there was a history of conflict between the reporter and the complainant well before the PID was made. We also established that the authority had treated the PID confidentially and it was unlikely the complainant was aware that the reporter had made a PID. A number of other individuals, who had no involvement in the PID, had also lodged complaints against the reporter.

We wrote to the reporter and advised that, in our view, there was no evidence of reprisal and that it was reasonable for the authority to investigate grievances or complaints lodged by staff.

Case study 4: The tip of the iceberg

We received a complaint from a public official about bullying and harassment by their manager following their report to an executive officer that the manager had acted fraudulently. The reporter advised they made a PID when they became aware that the scope of the initial investigation by the public authority did not include the allegations of fraud. The reporter was concerned the authority was not taking adequate steps to investigate their allegations and queried whether protection from reprisal applied in relation to the manager's bullying behaviour toward them.

Investigations by the public authority found that the manager had breached the code of conduct in relation to the bullying allegations. Although the fraud allegations were not sustained, widespread breaches of policy and procedures by the manager and other staff within the workplace were identified. The public authority acknowledged a number of cultural factors and systemic failings within the agency contributed to the manager's conduct and the ongoing policy breaches by staff.

After reviewing the action taken by the public authority, we were satisfied adequate measures were in place to address the staff conduct and systemic issues that arose during their investigation.

“I really liked the emphasis on saying ‘thank you’ to the reporter. I think this gives practical assistance to people receiving reports at the point of time, which is really important. At another organisation someone reported wrongdoing and was met with a response ‘that’s not fraud’... although I could understand that opinion, it made me think that the only right response is ‘thank you for bringing it to my attention. I will look into it.’”

PID training participant

We also considered the bullying behaviour by the manager toward the reporter did not constitute reprisal as it occurred prior to the making of the PID.

Throughout this matter, we maintained ongoing contact with the reporter who sincerely thanked us for listening and appreciated that we heard their concerns and took action.

Public authorities should thank reporters for coming forward to report wrongdoing and for raising their concerns about possible reprisals against them. It is important that reporters feel valued, receive the support they require and any allegations of reprisal are taken seriously.

4.2. Challenges echoed by PID practitioners

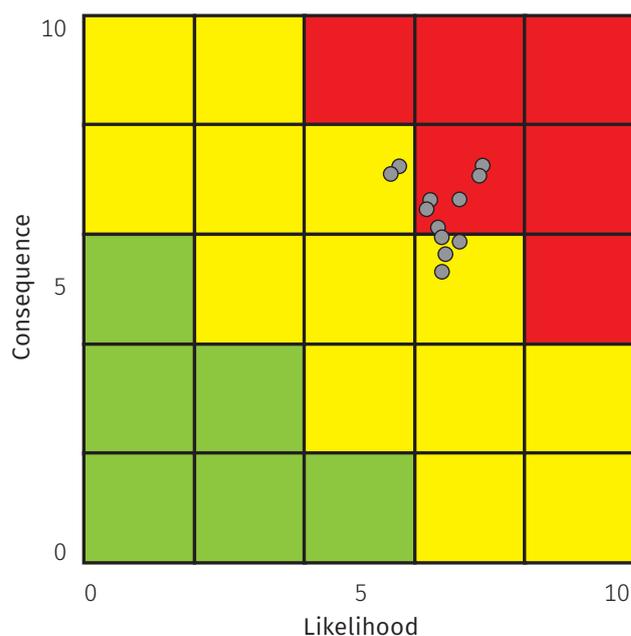
The focus of our May 2019 PID practitioner forum (see section 3.5, page 28) was on complications that commonly arise in the management of internal disclosures and the protection of reporters. We canvassed 12 common complications that can make handling a report of wrongdoing difficult. This included legislation-related, management-related and reporter-related complications.

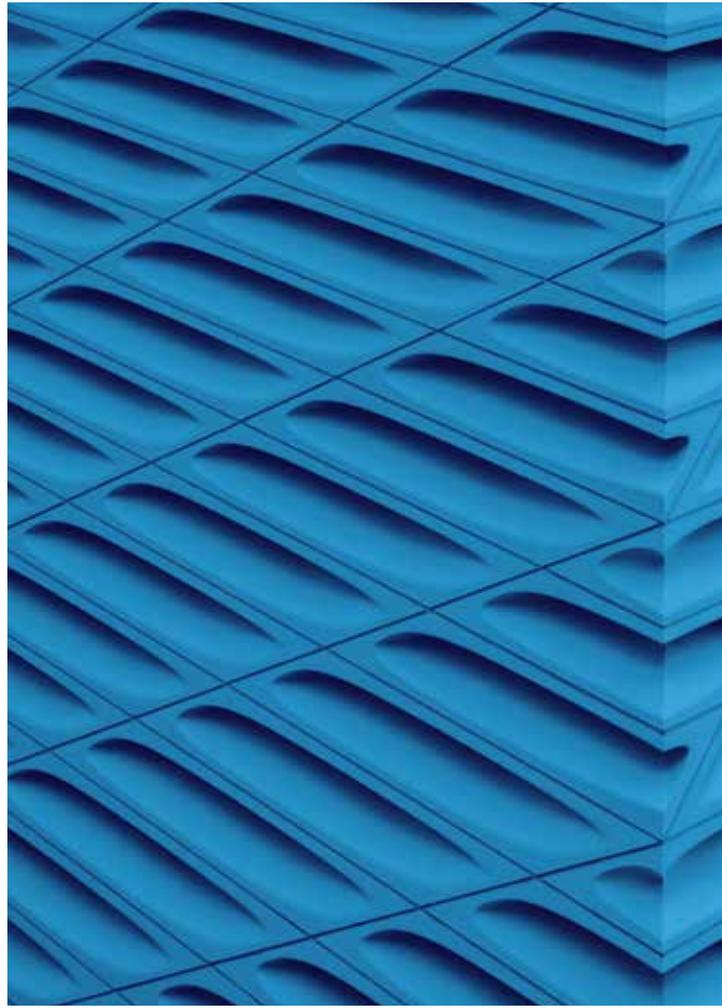
We asked practitioners to think of each complication as a risk, and rate the likelihood and consequence of each occurring. Table 5 sets out the mean likelihood and consequence rating given by practitioners to each risk, on a scale of 1 to 10. The risk with the highest consequence and likelihood was a lack of understanding of complex or ill-defined legislative provisions, highlighting the importance of a well-drafted and clear statutory framework.

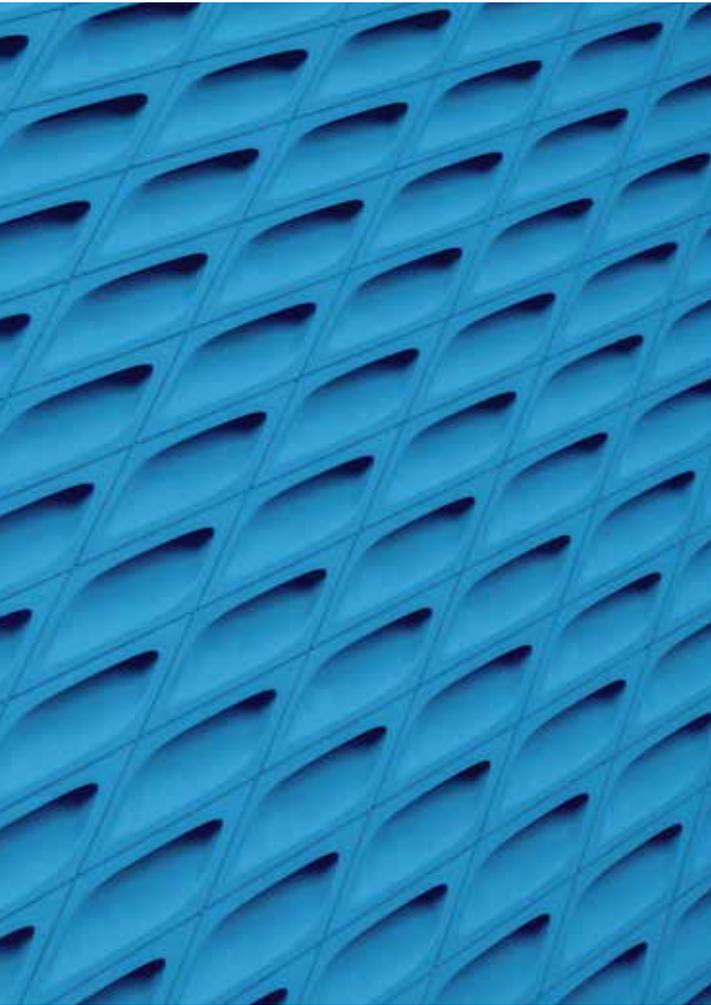
Table 5. Risk rating of common complications

Risk	Related to	Consequence	Likelihood
Lack of understanding of complex or ill-defined legal provisions	Legislation	7.3	7.2
Failure to address workplace conflict	Management	7.3	6.9
Unworkable confidentiality obligations	Legislation	6.8	6.5
Unrealistic expectations about confidentiality	Reporter	6.3	6.6
Mismanagement of mixed content disclosures	Management	6.3	6.4
Failure to identify a disclosure is protected	Management	6.5	6.1
Inadequate assessment of risks and failure to prevent reprisal	Management	7.0	5.7
Inappropriate motivations of some reporters	Reporter	5.6	7.1
Management 'blind spots' arising out of biases	Management	6.7	5.9
Exaggerated perceptions about seriousness	Reporter	5.3	7.0
Unreasonable conduct by some reporters	Reporter	6.6	5.5
Inappropriate selection of investigator	Management	6.5	5.0

Figure 5 plots the consequence and likelihood ratings on a risk matrix. As can be seen, practitioners rated all risks as high. Many of the risks relate to those complex matters most requiring active management – where there is co-existing workplace conflict or other grievance concerns, where maintaining the confidentiality of the reporter's identity is simply not possible, or there is inadequate action to assess the risk of and prevent reprisal.

Figure 5. Common complications risk matrix





Part 5: Whistling While They Work 2 research project

This part describes our analysis of the prevalence and effect of reports that raise both public interest and grievance concerns, and the importance of risk assessment.

5.1. Understanding the mixed wrongdoing challenge

During the year, we undertook research as part of the Australian Research Council project *Whistling While They Work 2* (WWTW2) led by Griffith University (see section 3.4). Our office’s focus was on better understanding complex reports of wrongdoing to identify how they can be dealt with better¹⁰.

We found that two-thirds of public interest wrongdoing reports are ‘mixed wrongdoing reports’ that involve public interest wrongdoing *and* some element of personal or workplace grievance or issue. This was from the perspective of both reporters (n=5,017), and managers and governance professionals who dealt with reports (‘managed cases’, n=3,502). As shown in Figure 6, almost half of all wrongdoing reports were of mixed wrongdoing.

Figure 6. Type of wrongdoing reports



Source: *Whistling While They Work 2 survey 1 dataset*.

Unlike previous studies, respondents were not limited to choosing only one wrongdoing type as the main descriptor of the most serious situation about which they were then asked. Rather, they were first asked to think of the most serious situation, and then to select all wrongdoing types involved in that situation. For the first time, we have clear evidence of the extent to which these wrongdoing types are indeed often mixed together.

Recognising mixed wrongdoing reports seems key to achieving better reporter outcomes given that these reporters face worse outcomes. According to managers and governance professionals (n=1,613), 54

10. Professor A J Brown from Griffith University was a co-contributor to these findings. For methodology and detailed results, see: Brown, A J et al (2019) *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Brisbane: Griffith University.

per cent of mixed wrongdoing reporters were treated badly by either management or colleagues, compared to 25 per cent of reporters of public interest wrongdoing only.

Reports that involve both public interest and personal grievance elements are more likely to have other characteristics that make them inherently more complex than reports purely alleging public interest wrongdoing. For example, mixed reports are rated more seriously, are more widely known, involve significantly more wrongdoers, and these wrongdoers are more likely to be managers. Mixed wrongdoing reporters, meanwhile, are less likely to be managers themselves.

The nature of mixed wrongdoing reports means that these are the very matters organisations need to be alert to, so that efforts can be made early on to minimise the likelihood of poor outcomes. However, the data suggest that the management response to these risky and complex situations is often one of avoidance. For example, in comparison to public interest wrongdoing, managers said that:

- Mixed reports were less competently investigated; were handled in a less procedurally fair way; and took longer to resolve.
- Mixed wrongdoing reporters were less likely to receive advice and information, support from their immediate manager, and official thanks or acknowledgement for speaking up.
- The risks of any problems or negative impacts mixed wrongdoing reporters might experience were less likely to be assessed, and significantly fewer proactive steps were taken to deal with the risks that they faced compared.

There have been valid reasons for distinguishing public interest wrongdoing reports and grievance matters previously, including that:

- The methodology for dealing with each type of issue is often different: an investigation into a public interest or other serious allegation will most probably be formal, whereas that is not the ideal way to address a workplace conflict/grievance.
- It is preferable, and in some circumstances may be possible, to effectively address allegations of public interest wrongdoing without identifying the reporter, whereas in most cases a grievance cannot be effectively addressed without identifying the aggrieved party.
- The possible and appropriate outcomes of each process will be different.

In practice, though, it is unlikely that workplace issues and 'public interest' wrongdoing can be completely separated and dealt with concurrently or consecutively. From the reporter's perspective, the concerns raised in their report are inextricably entwined. Often, the nature of the allegations or the conduct of those involved will hamper attempts to maintain confidentiality.

Rather than dealing with issues separately, public authorities need to take a different approach to meet the challenge of triaging mixed reports. Processes must not be siloed but well-coordinated. This may require, for example, the formation of a joint assessment and case management panel comprised of representatives from different functional areas such as human resources, internal audit or investigations.

In focus 5: Triaging mixed wrongdoing reports

Public authorities should consider:

- What processes and training need to be implemented to ensure mixed wrongdoing reports are identified at the outset?
 - Who is sufficiently independent and skilled to assess, investigate and oversight the range of reports received, particularly if the wrongdoing implicates senior management?
 - Who will assess the right investigation path in mixed wrongdoing cases?
 - How will processes are coordinated, including communicating with, supporting and managing the expectations of the reporter?
-

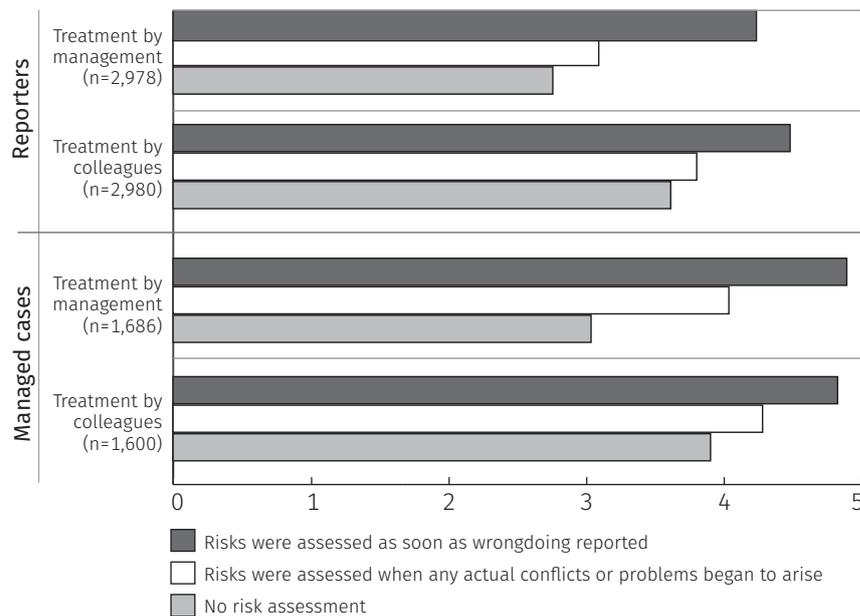
5.2. The value of risk assessment and proactive management

Our second focus for WWTW2 was on how detrimental outcomes for reporters could be prevented¹¹. Figures 7 and 8 below show there is indeed a direct, and strong relationship between whether and when risks were assessed, and both reporter treatment and repercussions.

According to both reporters and managers and governance professionals, if risk assessment occurred, then reporters were significantly better treated by management – on average, approaching or exceeding the ‘quite well’ threshold, as opposed to ‘quite badly’ for those for whom no risk assessment ever occurred.

11. Professor A J Brown from Griffith University was a co-contributor to these findings. For detailed results, see: Olsen, J & Brown, A J (2018). Preventing detrimental whistleblowing outcomes: The value of risk assessment and proactive management. In *Whistleblowing: New rules, new policies, new vision*. Brisbane: Griffith University.

Figure 7. Reporter treatment by managements and colleagues, by risk assessment

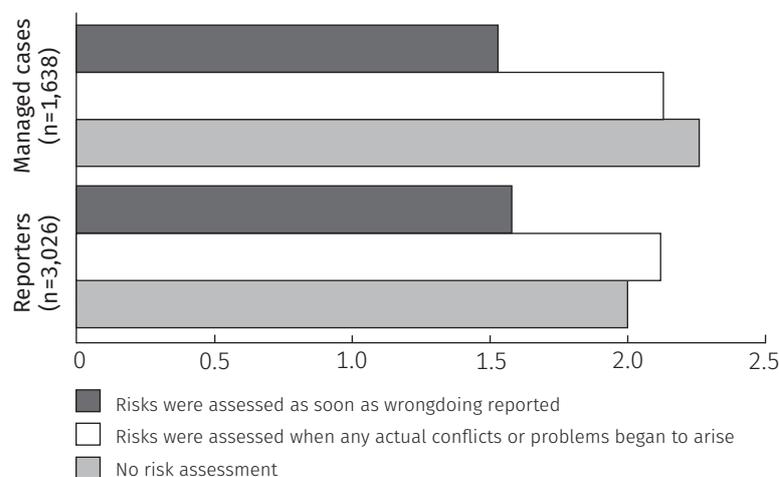


Note: 1 = Very badly, 2 = Quite badly, 3 = Neither well nor badly, 4 = Quite well, 5 = Very well
 Source: Whistling While They Work 2 survey 1 dataset.

Even if it cannot prevent repercussions, when organisations turn their minds to preventing further escalation when conflicts or problems arise, reporters at least also feel they have been better treated by management. However, in all cases, while risk assessment was better late than never, the benefit of immediate risk assessment is also reinforced.

Even more importantly, risk assessment was also strongly associated with reduced repercussions. As shown in Figure 8, when organisations assess risk early, reporters face fewer repercussions – on average, half as much. Again, this was most noticeably the case if the risk assessment was made at the outset, rather than only in response to problems arising.

Figure 8. Extent of reporter repercussions, by risk assessment



Note: 1 = None at all, 2 = A little, 3 = Some, 4 = Quite a lot, 5 = A great deal
 Source: Whistling While They Work 2 survey 1 dataset.

Managers and governance professionals may provide a more impartial perspective. However reporters perceived that repercussions were slightly greater in those cases than where no assessment was done. This stands to reason, given that these are cases where problems are definitely known to have arisen. However, it also confirms that by that stage, with damage already underway, assessing the risks was not just late, but too late. This further reinforces the importance of prevention before detriment occurs.

However, risk assessment may be far less frequent than many organisations claim. Less than 10 per cent of reporters indicated that any risk assessment took place, either when they first reported or later when conflicts or problems arose. This is consistent with our office's previous audit of allegations of reprisal arising from the making of a PID. In more than half of cases, the reporter's identity could not be kept confidential, and a risk assessment would have assisted the agency to identify risks to the reporter and prevent reprisals occurring; but in few cases did such risk assessment actually occur¹².

Identifying high-risk cases

The key question for public authorities is: which cases are most at risk of leading to poor treatment and repercussions for reporters, with their associated costs and impacts for organisations? Important factors that indicate higher risk of repercussions for reporters and management mistreatment include circumstances where:

- the alleged wrongdoer(s) has greater seniority
- more people knew who raised the concern (lack of confidentiality)
- the allegations concern a mix of public interest-type wrongdoing and personal or workplace grievances, as opposed to purely public interest allegations
- the wrongdoing is perceived as more serious
- more people are involved in the alleged wrongdoing.

According to reporters, a factor that reduces the risk of poor treatment by management is if more people reported the wrongdoing, highlighting that there may be 'safety in numbers'.

12. NSW Ombudsman (2017). *Oversight of the Public Interest Disclosures Act 1994: Annual report 2015–16*. Sydney.

Taking steps to mitigate risk

Where risks are assessed, appropriate mitigation strategies must also be identified. For example, during our audit of a public authority in 2018–19, we found that all three risk assessments conducted were deficient in that:

- The risk assessments identified that the reporter's identity was likely to become known during the investigation but suggested that maintaining confidentiality was the best way to manage any risks to the reporter.
- The risk rating assigned to the potential impact to the reporter was low but it was not clear how this was derived.

When it does occur, proactive intervention is associated with better outcomes for reporters. The more steps that were taken to deal with risks, the better managers perceived that reporters were treated by both management and colleagues – and the same pattern was true for reporters, even though the associations were weaker.

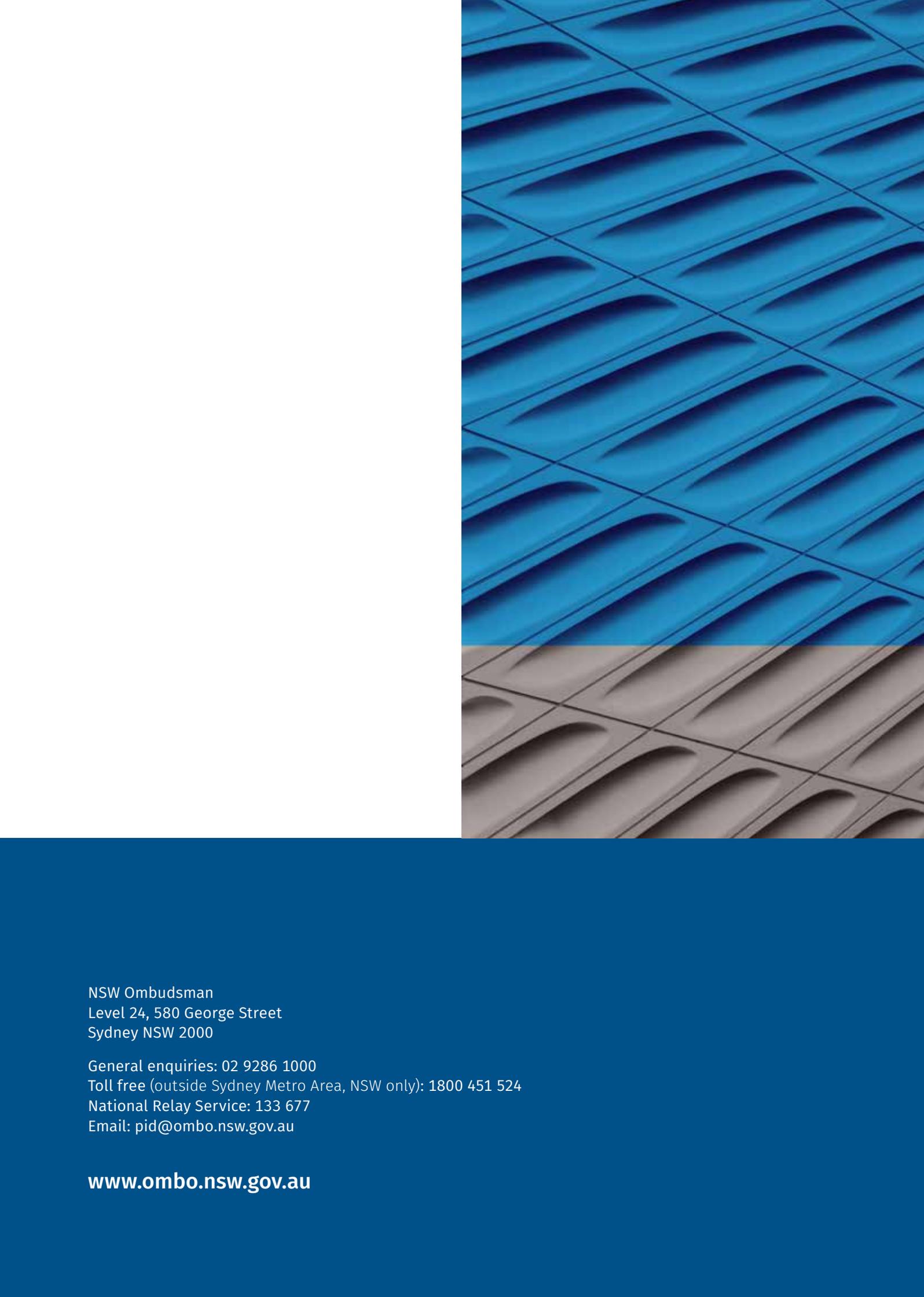
Good practice 2: Proactive management strategies

In our audits of public authorities, some of the proactive management strategies used to mitigate risk included:

- removing the reporter from the workplace when it was likely that they would be identified
- taking measures to ensure that the reporter's identity would be kept confidential
- sending letters of direction to the subject officer/s of allegations advising them not to engage in certain sorts of behaviours or to take reprisal action
- moving the subject officer to an alternative location/duties
- conducting interviews of witnesses in a covert manner
- having senior staff monitor the subject officer.

These results show the opportunity available to public authorities to address and reduce poor outcomes. Rather than over-relying on confidentiality, by directly intervening and supporting reporters, there is strong evidence that more organisations can achieve far better outcomes.

This page is intentionally blank.



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