

Oversight of the
*Public Interest
Disclosures Act 1994*

Annual Report 2013–2014

May 2015

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Disclosures Act 1994***

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Foreword

I am pleased to introduce my office's third report on the oversight of the *Public Interest Disclosures Act 1994* (PID Act).

It is three years since amendments to the PID Act gave my office its oversight role. It is therefore timely to provide a picture of the challenges and opportunities public authorities have faced implementing the PID legislation.

This annual report showcases good practice by public authorities and demonstrates my office's active engagement with PID practitioners through the PID practitioner forum, statewide training, consultation and an inaugural survey of disclosures co-ordinators in authorities. We have consolidated and developed our knowledge from our PID audit program, PID related complaints and other monitoring activities.

Indicators show that there is growing awareness of the PID Act and the protections it affords for reporters. Despite this, there are challenges and barriers which impede effective internal reporting, which we have explored in this report, such as the management of people involved in the process, and their workplaces, to minimise the disruption and conflict that can result from reporting.

I am pleased with the progress made in raising awareness across the public sector, and in ensuring that public authorities have appropriate and effective systems in place to deal with disclosures.



Bruce Barbour
Ombudsman

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What we do

The *Public Interest Disclosures Act 1994* (PID Act) sets in place a system to encourage public officials to report serious wrongdoing.

The NSW Ombudsman has the following functions under section 6B of the PID Act:

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

The Public Interest Disclosures Unit (PID Unit) coordinates the implementation of the Ombudsman's functions under the PID Act and provides support to public authorities and public officials.

Our objectives

The PID Unit has four objectives:

1. To increase awareness of the procedures for making public interest disclosures (PIDs) and the protections provided by the PID Act.
2. To improve the handling of PIDs and the protection and support for people who make them.
3. To improve the identification and remedying of problems and deficiencies revealed by PIDs.
4. To ensure an effective statutory framework is in place for the making and management of PIDs and the protection and support for people who make them.

Our performance in 2013-2014

What was our statutory function?	What did we want to achieve?	How did we set out to achieve this?	What were our key achievements?
PUBLIC AWARENESS AND ENGAGEMENT			
<p>Promote public awareness and understanding of the PID Act.</p> <p>Provide information, advice, assistance and training.</p> <p>Issue guidelines and other publications.</p>	<p>Engage with stakeholders.</p> <p>Raise awareness of PIDs across the public sector.</p> <p>Support and strengthen the disclosures co-ordinator role.</p> <p>Provide advice to public authorities and public officers.</p>	<ul style="list-style-type: none"> • Deliver training. • Attend relevant conferences. • Issue the PID e-News. • Maintain the PID webpage. • Support a national PID oversight network. • Coordinate a PID practitioner forum. • Review PID guidance material. • Provide advice in response to enquiries. 	<ul style="list-style-type: none"> • 110 public authorities and 1089 public officials trained in metropolitan and rural areas. • Close to 100% of the training participants rated the training positively. • PID e-Learning modules accessed 702 times. • Hosted information stands at two conferences. • Three issues of PID e-News sent to 889 subscribers. • Attended a national oversight network forum. • Organised a PID Practitioner Forum which 95% of attendees rated positively. • Continual update of PID co-ordinator details in a register of public authorities. • Two model internal reporting policies, one guideline, four templates and eight fact sheets updated. • Advice provided in response to 177 PID related enquiries.

What was our statutory function?	What did we want to achieve?	How did we set out to achieve this?	What were our key achievements?
MONITORING AND REVIEWING			
<p>Audit and monitor compliance with the PID Act.</p> <p>Assist the PID Steering Committee.</p> <p>Make recommendations for reform.</p>	<p>Ensure compliance with the Act.</p> <p>Identify emerging trends and areas for future improvement.</p>	<ul style="list-style-type: none"> • Conduct audits of public authorities. • Conduct an audit of all public authorities by way of an electronic survey. • Facilitate the provision of six-monthly reports by public authorities. • Share information with investigating authorities about PIDs. • Provide support to the PID Steering Committee. • Assist with the review of the Commonwealth PID legislation. 	<ul style="list-style-type: none"> • Seven audits conducted. • Monitored two public authorities' compliance with the PID Act. • 208 public authorities responded to PID survey (a response rate of 67%). • 106 internal reporting policies uploaded as part of the PID survey and reviewed. • 628 reports received from public authorities. • Hosted two meetings of investigating authorities and shared information about PIDs handled. • Three PID Steering Committee meetings held. • Recommendations for legislative reform made to the Premier. • Review of the Commonwealth legislation tabled in Parliament.
COMPLAINT HANDLING AND INVESTIGATION			
<p>Receive PIDs about maladministration.</p>	<p>Ensure timely and efficient handling of complaints.</p> <p>Identify problems and deficiencies to improve the handling of PIDs.</p>	<ul style="list-style-type: none"> • Assess and handle PIDs, purported PIDs and complaints about the handling of PIDs by public authorities. 	<ul style="list-style-type: none"> • 31 PIDs, 12 purported PIDs and three complaints about the handling of PIDs received.

Chapter 1. Managing people and workplaces

One of the biggest challenges public authorities face in effectively implementing the PID Act is managing the people and workplaces involved when wrongdoing is reported.

Since we started our work under the PID Act in 2011, we have moved from establishing frameworks, ground rules and procedures alongside public authorities, to now working with them to implement their systems. Our focus is now on the practical application of the 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 Act.

A number of the PID related complaints we receive and deal with are about the way public authorities have handled PIDs or purported PIDs. We also review the management of internal reports and PIDs in our audit program. This work has shown us some common, interrelated and very difficult challenges faced by those managing people and workplaces during the internal reporting process.

It is important to note that many of the internal reports we have reviewed during audits have been resolved without additional issues arising in the workplace. Research suggests that the majority of reporters of wrongdoing in public sector agencies indicate that they are treated either well or the same by management and co-workers after doing so.¹

While many reporters act appropriately and in accordance with the standards set in codes of conduct, some do not. When a matter is escalated to our office or to another investigating authority, it is more likely to involve escalating conflict and either a protracted or no resolution.

A small number of problematic cases may damage the reputation of the entire system for managing PIDs, undermine confidence in the internal reporting system and deter people from reporting wrongdoing.

We have undertaken a project to explore these complex matters further. We did this to identify strategies to prevent such problems arising or to minimise their impact on public authorities as well as the parties involved. This will help us to provide authorities with better advice, guidance and assistance. Some of these challenges are outlined below.

Workplace conflict

Workplace conflict can often be an inherent part of internal reporting, as reports by staff about other staff will often be made alongside a pre-existing workplace conflict.

Reporters may try to have a personal interest matter (a grievance) relating to workplace conflict 'classified' as a PID in order to receive the protections of the PID Act. Even where a report raises public interest issues and meets the criteria set out in the Act, the reporter may be primarily motivated by personal interests in an underlying interpersonal or professional conflict.

The reporter may also seek to misuse the internal reporting process as a tool in the conflict, alleging that actions taken against them in the ongoing conflict constitute detrimental action in reprisal. The person who is the subject of the report may then make counter allegations against the original reporter, causing further complexity. This can make it very difficult to work out if any detrimental action was taken in reprisal or as part of an existing workplace conflict.

The intertwined public and personal interests related to an internal report can be very challenging to manage because public interest issues are necessarily dealt with very differently to grievances (where the aim is to resolve a personal issue of the reporter). For example, while the PID Act requires that the reporter is advised of the action taken on their report within six months, the reporter is not central to the process of investigating or otherwise dealing with the PID, and their involvement may be limited to being interviewed as a witness. An investigation process will therefore often not address the personal interest issues underlying the report and consequently reporters may be dissatisfied by the process.

In Case Study 1, although the report raised a number of public interest issues, the reporter appeared to be primarily motivated by personal interests and the desire for vindication, to the detriment of the subject officer. As such, the reporter behaved in a manner inconsistent with the public interest by withholding evidence from the investigation and breaching confidentiality. This behaviour was very challenging for the public authority to manage while its investigation was underway, causing further delays and impacting unduly on the subject officer.

¹ R Smith and AJ Brown, 'The good, the bad and the ugly: whistleblowing outcomes', in AJ Brown (ed), in *Whistleblowing in the Australian public sector*, ANU E Press, Canberra, 2008, p. 123.

Case Study 1

Questionable motives, escalating conflict and poor conduct

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

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

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

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

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

The reporter had been on extended leave since making the original complaint, but returned to work around the time our office became involved. The authority made considerable adjustments to support the reporter's return to work and protect them from reprisal, including moving the subject officer to a different role.

However, the reporter's failure to maintain confidentiality made it difficult to manage the risk of reprisal. Their behaviour escalated throughout the investigation. After a number of incidents that were disruptive to the workplace, the authority issued warnings and took disciplinary action. The reporter then alleged this action was taken in reprisal for the making of the disclosure.

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

Grievances, workplace conflicts and bullying complaints are difficult to manage. This can become much more complicated where one or both parties have also made, or claims to have made, a PID. We have seen a number of cases where public authorities have delayed taking management action to resolve a conflict or performance issues because they are concerned that such action may constitute a breach of the PID Act.

In fact, not responding can allow factional divisions to grow, leading to a cycle of claims and counter claims and drawing in a wider range of procedures (grievances, stress leave, workers compensation).

Without prompt and effective intervention, these conflicts can become entrenched and impossible to resolve.

Related performance or misconduct issues

Performance and misconduct issues underlie many of the PID-related complaints that come to our office. A number of the most challenging matters involved reporters who had recently had systems put in place to monitor and improve their performance in circumstances where it appeared they had been under-performing for a considerable period without proper management response.

Making a PID does not shield staff from the reasonable consequences of unsatisfactory performance or wrongdoing on their part. Reasonable disciplinary or other employment-related action may still be taken against a person even if they have made a PID. The issue for management is whether they can prove that this action is reasonable in the circumstances.

Guideline D3 *Internal reporters involved in wrongdoing*

People who are under-performing or facing disciplinary action may attempt to use the PID Act to protect themselves by making reports of wrongdoing about their manager. This situation is amplified in local government where a council may vote to terminate the employment contract of the general manager. Case Study 2 outlines one such example which was dealt with by the Office of Local Government (OLG).

Case Study 2

Termination of a general manager's contract

The Chief Executive of the OLG received an email from the general manager of a council purporting to make a PID.

The allegations were a list of grievances about councillors disagreeing with staff, questioning the implementation of decisions, or enthusiastically pursuing policy objectives. There were no supporting documents and these concerns did not amount to serious maladministration. One allegation, however, was about a pecuniary interest contravention and therefore could amount to a PID, requiring further examination. It was apparent that the general manager had known about this issue for two months prior to making the report.

It was also evident that the relationship between the general manager and the councillors had been deteriorating for some time, particularly the crucial relationship between the general manager and the mayor.

On the same day that the PID was made, the mayor lodged two proposed mayoral minutes for the upcoming council meeting – one proposing to terminate the general manager's contract, the other to accept the general manager's resignation.

Given the preliminary assessment that the matter may be a PID, the OLG acted cautiously and issued a letter to all councillors, with the general manager's permission, to bring to their attention that a PID had been made and that councillors should be cautious about making any decisions in relation to the general manager's contract until the PID could be fully assessed.

However, it appeared the general manager knew of the proposed mayoral minutes before making the PID to the Chief Executive. This was confirmed when the OLG spoke to the general manager. The way the PID was made and its timing suggested the PID could have been made for the purpose of avoiding dismissal.

A short time later, the general manager's employment was terminated by agreement between the parties.

Reporters may also allege that performance management or disciplinary action constitutes bullying and harassment in reprisal for having made a PID, as in Case Study 1. When faced with such a situation public authorities may take a risk-averse approach to performance managing or disciplining reporters and may delay or avoid taking the necessary action.

In Case Study 3 the subject officers made a bullying complaint against their manager that significantly delayed any performance management action being taken against them. The allegations of bullying appeared to relate to instances where the manager had attempted to effectively manage the staff members' performance.

Case Study 3

Performance management halted by a PID

We received a complaint that a public authority had not taken appropriate action to deal with an internal report about maladministration. The complainant alleged that the authority had investigated the matter and substantiated the allegations but had not taken any action to rectify the issues identified.

When we made enquiries, the authority advised us that the investigation had identified individual performance issues of the subject officers, as well as inadequate performance management by the manager. These issues appeared to be affecting the administration and service delivery of the team.

The authority confirmed that no action had been taken to address the performance issues identified because the subject officers had subsequently lodged a bullying complaint against the manager. Some of the alleged bullying incidents appeared to relate to the manager's attempts to manage the staff members' performance.

The authority had decided to delay addressing the performance issues until the bullying complaint had been dealt with, but the bullying investigation itself had been delayed. This was partly caused by the non-cooperation of the complainants, some of whom were on sick leave. The manager had also been stood down during the course of the investigation.

The investigation of the bullying complaint was inconclusive, although management deficiencies were again identified. After the investigation was finalised – around two years after the original complaint was made – the authority took action to address the issues identified by way of restructure, during which the roles of a number of the staff members involved in the matter were made redundant.

Perceptions and expectations

There are a number of misconceptions about how the PID Act operates and the nature and extent of the protection provided by the Act. These can be challenging for public authorities in managing the expectations of reporters.

Whether a report is a PID

Staff members raising a concern with management may purport to have made a PID when their report clearly does not meet the criteria in the PID Act. If this is not properly managed, it can lead to unreasonable expectations about how the report will be dealt with and what the rights of the reporter are. A personal interest issue or grievance may become so important and preoccupying for the reporter that they believe the matter involves the public interest.

This can be exacerbated when a public authority does not appropriately assess whether a report is a PID and/or provides the reporter with inconsistent information about the assessment (see Case Studies 1 and 4). We have seen a number of cases (including Case Study 1) where authorities have classified reports as PIDs simply because the reporter claims that the complaint is a PID.

Case Study 4

Lack of cooperation delayed investigations

A reporter complained that a public authority had not properly dealt with their PID. Their complaint was about the way a grievance had been handled by the reporter's line manager. After the matter was escalated to the principal officer, the authority referred both the original grievance and the second complaint about the manager to separate external investigators.

The authority decided to treat the complaint about the manager as a PID, but incorrectly advised the reporter that both matters would be treated as PIDs. The matters appeared to have been finalised, however the reporter complained to us about extensive delay and argued that both matters should have been treated as PIDs. The reporter sought a voluntary redundancy.

The authority told us the original grievance was one of five related grievances made by four staff. The authority had investigated the grievances separately but the investigations had been very difficult and significantly delayed (which in turn caused delays to the PID investigation) because none of the staff had cooperated with the investigator. The staff had either left the authority or taken extended sick leave.

At the time of our enquiries neither the manager nor many of the staff who lodged the grievances were employed by the authority. While the investigations were finalised, the outcomes were very unsatisfactory to all concerned and the process had taken over a year.

Reporters may also not understand the public authority's assessment process. In Case Study 1 the reporter retrospectively requested that their grievance be classified as a PID, seemingly on the misunderstanding that an authority decides whether or not a report is a PID.

Whether a particular report is treated as a PID is based on an assessment of certain statutory criteria by a public authority, and even so, neither the authority nor the Ombudsman can conclusively determine whether a report is a PID. Authorities assess a report against the criteria of the PID Act to make their own decision about whether to treat the report as a PID. We recommend authorities make this clear in their internal reporting policy.

Good Practice: Ministry of Health's public interest disclosure policy directive

The disclosure report will be assessed by either the Principal Officer or the Disclosures Co-ordinator to determine whether it meets the criteria for a PID as stated in the PID Act and defined in this policy. If the report is not a PID, but relates nonetheless to a legitimate workplace grievance or other misconduct complaint, it will be referred for appropriate action.

Loss of perspective in isolation

Reporting wrongdoing in the workplace can make a reporter feel isolated from their colleagues. This becomes more pronounced if the reporter takes sick leave or otherwise leaves the workplace and can cause the reporter to become unreasonably suspicious of their colleagues.

The reporters in Case Studies 1 and 4 both took extended sick leave after making their reports. In isolation they appear to have developed a disproportionate view of the magnitude of the wrongdoing and heightened expectations of what an appropriate resolution might look like. The loss of perspective that can occur in isolation may also cause reporters to misinterpret reasonable management actions as reprisal (as in Case Study 1).

The rights and responsibilities of reporters

Another common misconception among reporters relates to their assumptions about their own rights and responsibilities in the internal reporting process.

Reporters may not understand that they do not 'own' or control a PID. Many reporters expect to be central to the process of dealing with a PID and believe they have a right to detailed information about the process for dealing with and the outcome of their report. This misconception may arise because public interest issues are often entangled with personal interest issues.

Reporters may not know they also have responsibilities in the internal reporting process. While not explicitly stated in the PID Act, reporters have ethical and professional responsibilities, including maintaining confidentiality and cooperating with investigations, as well as generally adhering to their public authority's code of conduct. Lack of cooperation was a significant problem in a number of the case studies highlighted in this report.

Indemnity against disciplinary action

Reporters who seek to use the reporting process either as a tool in a workplace conflict or to avoid reasonable disciplinary or performance management action, may do so because they believe the protections of the PID Act will indemnify them from the consequences of their prior or ongoing actions.

In Case Study 5 an employee made a report within a public authority where there had been a breakdown in effective management. There were inadequate or non-existent processes and controls to manage and monitor workplace performance. This can lead to employees later trying to use the provisions of the PID Act to avoid anything being done about legitimate performance issues. In this case, failing to deal promptly with performance management issues led to protracted investigations and considerable financial costs to the authority.

Case Study 5

Report in the context of disciplinary action

We received a PID from a public official who made allegations about the head of the public authority and other executives. They also claimed to have been bullied and subjected to unfair treatment in the workplace.

Our inquiries showed that the person making the disclosure had previously been the subject of a variety of workplace discipline matters. As part of other ongoing issues at the authority, the person's supervisor had failed to provide adequate supervision.

The situation became even more difficult when the head of the authority who began the disciplinary action was replaced before it was finalised. When the reporter returned to work following the disciplinary investigation, they had been placed under the direct supervision of a person who had been a complainant in the previous workplace grievance matters.

A number of further events led to additional investigations into the reporter. This included counter claims alleging that the reporter had taken detrimental action in reprisal against another person who had made a PID. That allegation was subsequently found to be substantiated and the reporter was dismissed from employment.

From our inquiries we formed the view that, had the reporter been properly supervised and workplace performance issues dealt with in a timely fashion, many of the ensuing months of claims and counter claims and significant costs to the public authority could have been avoided.

A reporter who believes action cannot be taken against them may behave in a manner that is damaging to the public authority, for example:

- disclosing confidential information to the media (as in Case Study 6)
- not complying with reasonable directions
- discussing matters under investigation openly within the workplace
- making unreasonable demands.

The PID Act does not prevent a public authority from taking reasonable management or disciplinary action. However, as authorities are often uncertain of what action they can take against a person who has made a PID, the authority may delay taking action to stop or otherwise deal with the behaviour, contributing to the misperception and exacerbating the situation.

Case Study 6

Leaking confidential information

A public official faced disciplinary action for leaking confidential information to the media. They complained to us that the disciplinary action was in breach of the PID Act because it was reprisal in response to a report that they had made six months earlier. The person believed that they had lawfully disclosed the information under section 19 of the PID Act, which sets out the limited circumstances under which a public official can report wrongdoing to a journalist.

In our opinion, the internal report the person had made was simply a statement of opinion and did not meet the criteria to be a disclosure under the PID Act. Additionally, the information leaked to the media was not substantially the same as the information previously provided internally. We believed that it was appropriate for the public authority to take disciplinary action against the public official for disclosing confidential information without authority.

The impact of these challenges

These case studies were characterised by extensive delay, sick leave, workers compensation claims, absenteeism and non-cooperation. It appeared the process was highly stressful for those staff members involved (both reporters and subject officers) and possibly detrimental to their health.

Reporting wrongdoing can be a difficult process and, if not properly managed, can result in stressful interactions with colleagues and managers. Stress is a legitimate and serious workplace concern and may result in a staff member sustaining a serious injury.

Guideline A1 *Management commitment to internal reporting*

The investigations were prolonged, costly and unsatisfactory. Even where reports raised public interest issues, the costs of dealing with them far outweighed the costs of the wrongdoing reported. Ultimately the matters were only resolved after one or more of the staff involved left the organisation, which was a very unsatisfactory outcome given the expense of the process.

The way forward

We have identified a number of strategies to help public authorities manage these complex challenges better, minimise their impact on the workplace and people involved, and improve the internal reporting process. In the last financial year some of our ideas about good practice PID management have evolved, and as a consequence we have significantly revised some of our resources and the advice we provide to authorities. We intend to continue this revision in the coming year.

We engaged a consultant with experience in resolving workplace conflict to work with us to identify common drivers underlying difficult cases. The report prepared by the consultant confirmed the new approach to PID management we had been developing and the changes to our resources that have been made to date.

Changing perceptions and managing expectations

Reporters have to receive accurate and consistent information from public authorities. Failure to do this can give rise to misperceptions and false expectations. Inconsistent information can cause reporters to quickly lose faith in the system and escalate the matter, as we saw in Case Studies 1 and 4.

Our training and forums are aimed at improving the knowledge and confidence of staff to deal with reports and apply the PID Act (see Chapters 2 and 3). We also regularly provide advice to authorities over the phone and via email about how to handle particular situations.

We have identified the assessment of internal reports by public authorities as an area for improvement. Authorities need to make sound, well-informed PID assessments of all internal reports – not just those where the reporter claims to be making a PID. While it is important that authorities identify PIDs, in the interests of managing reporters' expectations it is equally important that they do not wrongly assess reports as PIDs.

Our advice to public authorities is no longer to 'err on the side of caution' when they are unsure whether a report should be treated as a PID. We are focussing on improving our resources and training to better assist PID practitioners to make sound assessments.

We have recently revised some of our key publications to improve the general understanding of the PID Act and to better manage the expectations of reporters. This has included:

- Significant revision of our model internal reporting policies to make the internal reporting process clearer and set out the responsibilities of reporters and other key roles. These policies provide a template for public authorities when developing or revising their own internal reporting policies.
- Changing the name of our template *Internal report form* (from *Public interest disclosures form*) to use language that is less likely to give rise to unreasonable expectations among public officials that their report will be treated as a PID regardless of whether it meets the criteria under the PID Act.
- Significant revision of our PID assessment templates to provide better guidance to PID practitioners assessing internal reports. Public authorities can modify and use our suite of assessment templates to assess whether or not a report of wrongdoing should be treated as a PID and ensure this decision is appropriately documented.
- Development of an acknowledgment letter template for public authorities to use to ensure PID reporters receive accurate and necessary information. Previously we advised that the recipient of the report explain to the reporter that they have made a PID. We now believe it would be better to provide this information to the reporter in writing after their report has been assessed by the disclosures co-ordinator. This is to avoid the recipient of the report inappropriately raising the person's expectation that they have made a PID when it does not meet the criteria of the PID Act.
- Updating our fact sheets for reporters to include information about the type of complaints or concerns that are not PIDs.

New model internal reporting policies for public authorities

We released updated versions of our two model internal reporting policies – one for state government and one for local government. We drew on the feedback from our survey of public authorities (see Chapter 2), training participants' feedback and our audit program results to inform the development of the policy.

In addition to updating references to legislation, some of the key changes are:

- Including a new section about the roles and responsibilities of reporters and other key roles to set the standards of conduct expected from all parties involved.
- In order to manage reporters' expectations, emphasising that reports of wrongdoing will be assessed by the authority to determine whether they will be treated as PIDs.
- Stating that the public authority has 'ownership' of the report once it is made and will decide how it is dealt with.
- Making clear that there are other options for dealing with a report of wrongdoing apart from a full-scale investigation.
- Including a flow chart of the internal reporting process to make it easier to understand.

In some circumstances – for example where the reporter has a history of non-cooperation with investigations – it may be appropriate to ask the reporter to sign a statement agreeing to cooperate with the investigation. This approach was trialled by the public authority in Case Study 4 to make the reporters aware of their responsibilities at the outset of the process. A reporter may be more inclined to cooperate after signing the statement and the authority can refer to the undertaking in deciding how to respond to a reporter's failure to cooperate.

Clarifying roles and responsibilities

All parties involved in the internal reporting process – reporters, subject officers, their colleagues, management, disclosures officers, the disclosures co-ordinator, investigators and support people – need to be aware of their obligations in relation to reports of wrongdoing.

During the year, we updated Guideline E2 *Role and responsibilities* to set out more clearly the responsibilities of key roles and place greater emphasis on the responsibilities of reporters, including cooperating with investigations.

We are also developing a new fact sheet for public authorities to provide to reporters, outlining their mutual responsibilities in the internal reporting process. These changes to our publications have been carefully considered to ensure that they do not discourage public officials from reporting, which would be inconsistent with the objectives of the PID Act.

It is also imperative that public authorities regularly promote awareness of the PID Act and communicate to staff what their roles and responsibilities are. In their responses to the survey of authorities that we conducted earlier this year (see Chapter 2), training in relation to PIDs was nominated as being important for disclosures co-ordinators, disclosure officers, managers and staff. We will continue to regularly provide information, advice, assistance and training to public officials on PIDs and the PID Act.

Better management of people and workplaces

The management of people and workplaces is key to the success of a public authority's internal reporting system and achieving the public interest objectives of the PID scheme.

Better and more consistent performance management would allow managers to address issues before they become entrenched in the workplace and very difficult or impossible to resolve. It could also reduce the incidence of under-performing staff misusing the internal reporting process to make pre-emptive reports against their managers.

We believe informal, less adversarial approaches to dealing with grievances, including allegations of bullying, may well be more effective in resolving the personal issues that often underlie PIDs and would benefit the internal reporting process overall.

It is well documented that the formal investigation process, while necessary in some cases, is expensive and rarely satisfactory for the parties involved. Investigations can be highly stressful and often irreparably damage the relationship between the parties involved.

Restoring working relationships is a priority in the workplace, and we believe public authorities should look to avenues other than formal investigation to resolve bullying allegations, workplace conflicts, and even allegations of reprisal for the making of a PID. This could include early intervention strategies, mediation and alternate dispute resolution.

Given the impact management of staff can have on the internal reporting process and the effectiveness of the PID Act, we will be working with the Public Service Commissioner to contribute to reforms in this area. We will also continue to look to expand our alternate dispute resolution role for dealing with workplace issues and disputes arising from or related to the making of a PID.

Risk assessment

Early, thorough risk assessments can help public authorities to better manage the risk of internal reports escalating into situations which are very difficult to manage. Although not a legislative requirement in New South Wales (NSW), we recommend authorities carry out risk assessments before taking any action on a PID, looking particularly at the risk of reprisal and/or workplace conflict.

Our audits of public authorities suggest this is not common practice. Our survey of authorities earlier this year (see Chapter 2) showed only half (22 or 51%) of the 43 authorities who indicated that they had handled a PID had conducted a risk assessment in relation to possible reprisal or other workplace conflict.

A thorough risk assessment would consider the risk of reprisal to reporters as well as broader workplace issues (such as absenteeism, workplace conflict, non-cooperation of parties), allowing the authority to better manage those risks as well. It would also help the authority to decide what action to take on a particular report.

We have developed a template checklist for recipients of internal reports to fill out, providing information that is relevant to a holistic risk assessment. This includes information about the relationship between the reporter and subject officer and any performance issues. We are also developing a new risk assessment template that public authorities can use.

More flexibility around confidentiality

A common misunderstanding among PID practitioners (and reporters) is that the PID Act requires public authorities to always keep the reporter's identity confidential. This is not the effect of section 22 of the PID Act, which provides several broad exceptions to maintaining confidentiality.

Public authorities may go to considerable effort to maintain the confidentiality of a PID reporter, often to the exclusion of a broader risk assessment and without much consideration of what might happen if the identity becomes known. Authorities may even insist on confidentiality where the reporter's identity is already known or will become known as more people become aware that a report has been made.

Where possible it is preferable for public authorities to make enquiries into allegations discreetly (for example through an audit), without alerting the subject or the workplace that a report has been made. However if it is known or suspected that a report has been made, attempting to keep the reporter's identity confidential may not be the most effective way to protect them or others in the workplace from reprisal. Such secrecy may in fact be counter-productive, fuelling suspicion and inflaming underlying conflict. In these situations we encourage authorities to consider disclosing the reporter's identity (with the prior consent of the reporter) and use alternative strategies for managing the risk of reprisal.

Maintaining communication with reporters

The PID Act only requires public authorities to contact the reporter twice – firstly to acknowledge the report within 45 days of receipt (section 6D) and secondly to notify the reporter of the action taken or proposed to be taken within six months (section 27).

In practice, we advise public authorities to regularly contact the reporter to update them on the progress of the matter. There will be very little substantive information that can be provided to the reporter (other than the proposed time-frame for completion) during an investigation. It is still important to maintain communication with the reporter to reassure them the matter is being dealt with and to prevent the reporter feeling isolated, particularly where the reporter has left the workplace.

Maintaining contact with the reporter also reduces the potential for conflict with management about whether the report of wrongdoing was appropriately received, assessed and handled. It may also improve the reporter's cooperation with any investigation.

Public authorities should try to maintain a single communication channel to ensure the information provided is accurate and consistent and that the authority has all relevant information. Where there are a number of concurrent processes (for example a PID investigation, a grievance and a worker's compensation claim), a single line of communication may require coordination between different positions in the authority. If this is not possible, a joint management approach should be taken.

Timeliness and proportionality

It is crucial reports in the workplace are dealt with in a timely manner. While delays may be unavoidable or beyond the control of the public authority, they can be partially controlled by ensuring the authority's response to a report is proportional to the seriousness of the allegations. Formally investigating a relatively minor allegation can prolong the matter and exacerbate any underlying problems.

Public authorities do not always have to formally investigate a report once it has been assessed as a PID. In some circumstances it may be appropriate to deal with a PID through an audit or fact finding investigation. We will be revising our guidance material to discuss proportionality and options for dealing with PIDs other than by formal investigation.

Advising the reporter of the outcome

Public authorities need to provide reporters with meaningful information about the outcome of their report. This can be very difficult where the information involves another person's employment, but we believe authorities should still provide as much information as possible.

Meaningful information about the outcome and the reasons for it can help the reporter to accept the outcome, which in turn helps the public authority to finalise the matter. One way to ensure the reporter has realistic expectations is to conduct a facilitated meeting at the outset as well as at the end of any investigation process, particularly when the allegations are not substantiated.

We are concerned that public authorities may be engaging legal practitioners to carry out workplace investigations for the express purpose of claiming legal professional privilege over the investigation report or any information about the outcome of the investigation. In our view this is inconsistent with the objectives of the PID Act and detrimental to the resolution of a workplace conflict or internal report.

We are very aware of the challenges faced by public authorities in managing people and workplaces through the internal reporting process, and our best practice guidance for managing these challenges will continue to evolve as our knowledge and understanding of the issues develop. We want to provide increased support to authorities managing issues such as risk, managing discloser's expectations and changing organisational culture.

We believe the strategies identified here will be useful for authorities to prevent or mitigate these challenges however we hope to continue this discussion and welcome feedback and input from PID practitioners and other stakeholders on the matter.

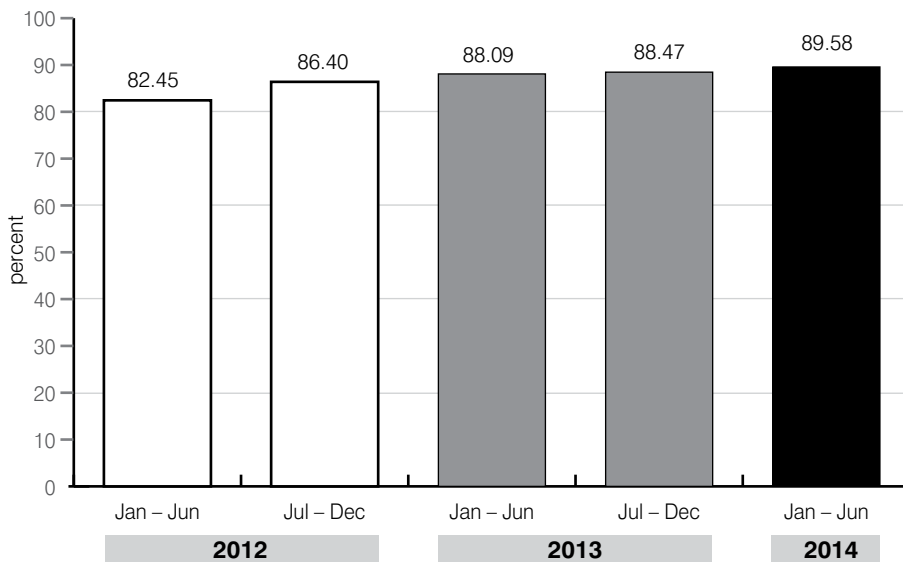
Chapter 2. Increasing awareness of internal reporting

Internal reporting policies

A clear internal reporting policy is a critical starting point for public authorities to raise staff awareness of reporting wrongdoing. Under section 6D of the PID Act, all authorities must have a policy that provides for their procedures for receiving, assessing and dealing with PIDs.

The six-monthly reports provided to our office by public authorities (see Chapter 3) show the proportion who have established internal reporting policies has steadily increased over the past two and a half years – from 82% in the first reporting period (January to June 2012) to almost 90% in the January to June 2014 period (see Figure 1). Most of the public authorities who still do not have a policy are Local Aboriginal Land Councils (LALCs).

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



Our PID survey of public authorities also showed that 98% of authorities have internal reporting processes, policies and systems in place to receive, assess and manage PIDs (see Chapter 5).

106 public authorities uploaded their policies and procedures as part of the survey. We assessed each policy against specific requirements in the PID Act and our model internal reporting policies. We found many examples of good practice in the internal reporting policies and some of these are showcased throughout this annual report.

Under the PID Act, public authorities must have regard to (but are not bound by) our office’s guidelines in formulating an internal reporting policy. The key documents for authorities to consider in this respect are our two model internal reporting policies for state and local government, accessible online from our website. It was pleasing to find that all of the policies uploaded to the survey clearly had regard to our model internal reporting policy.

Where a small number of authorities did not fully comply with the technical requirements of the PID Act, it was generally because they had not revised their policy since amendments were made to the Act in 2011.

Improving compliance by Local Aboriginal Land Councils

Many LALCs only have one paid employee, which means that they do not have the corporate and infrastructure support to ensure they comply with the PID Act.

We have continued to speak to the NSW Aboriginal Land Council (NSWALC) about providing support and training to LALCs to raise awareness of the PID Act reporting requirements as well as the protections available for staff who report wrongdoing. This included a meeting with the CEO of the NSWALC to seek their advice on strategies to ensure that LALCs comply with the requirements under the PID Act. The NSWALC Board has agreed to assist us in promoting training for the LALCs. We are also developing a model internal reporting policy and fact sheet specifically targeted at LALCs.

Raising awareness

The heads of public authorities are responsible under section 6E(1)(b) of the PID Act for ensuring that their staff are aware of the contents of the authority's internal reporting policy and the protections provided under the Act.

The reports provided to our office by public authorities indicate that the vast majority are meeting their obligations to ensure staff awareness. Most authorities who reported stated that the head of the authority had taken action to meet their staff awareness obligations – ranging from 84% in the first reporting period (January to June 2012) to 90% in the 2013–2014 reporting periods (see Figure 2).

Figure 2. Proportion of public authorities that reported raising staff awareness over time

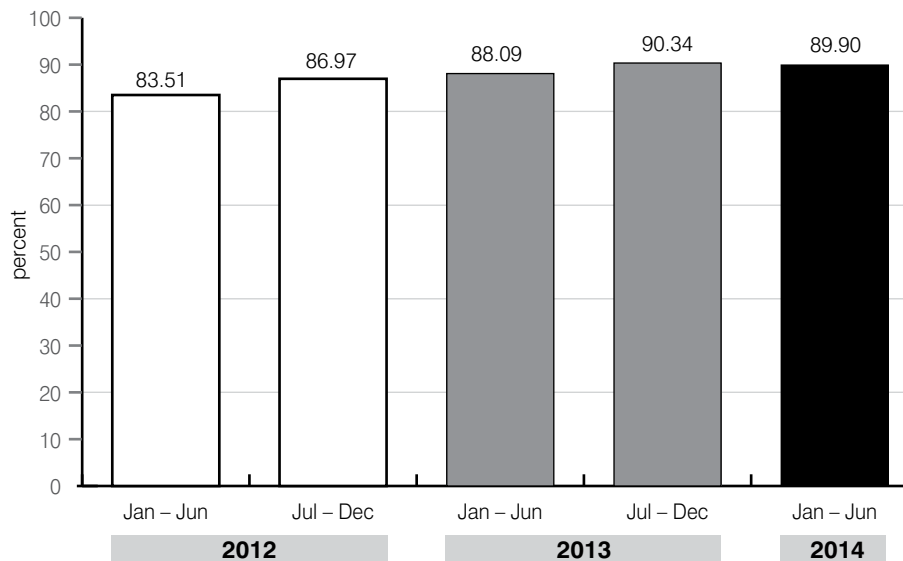
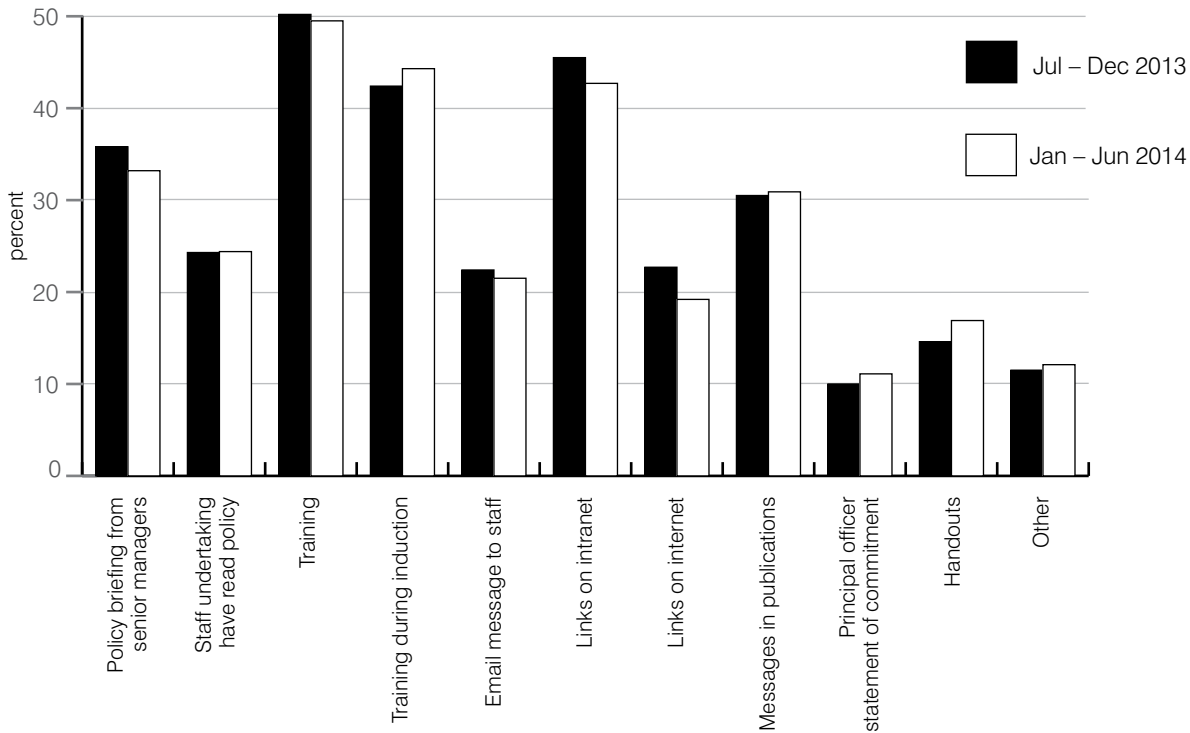


Figure 3 shows the range of actions taken by public authorities to raise staff awareness of the protections provided by the PID Act and of their internal reporting policy. The majority reported adopting a number of strategies, including linking to their internal reporting policy on their intranet, training staff (including during induction) and senior managers providing a policy briefing. These have been the most common strategies over the five reporting periods to date.

Figure 3. Proportion of public authorities that reported adopting each awareness strategy in 2013-2014



In many public authorities, the principal officer demonstrated their commitment to staff making internal reports of wrongdoing:

- The Secretary of the **Department of the Premier and Cabinet** emailed all staff reminding them of the protection offered by the PID Act when making a disclosure and referring them to the policy document on the intranet. The department also issued a procedures manual on how to handle PIDs.
- The Chief Executive of **Roads and Maritime Services** emailed all disclosures officers to remind them of their responsibilities and to send a link to our e-Learning module that was developed for these staff. A link to our awareness e-Learning module was also sent to all staff.
- All staff at **Clarence Valley Council** attended one of a series of road shows held by their General Manager in which he promoted the opportunity to make a PID.
- An email 'all of staff notice' regarding the PID policy and procedures was sent by the Chair and Chief Executive Officer of the **Environment Protection Authority**.
- The **Ballina Shire Council** General Manager and Manager of Risk and Human Resources gave a presentation at staff production meetings on their code of conduct and PID reporting processes.

Good Practice: NSW Safety, Return to Work & Support Division’s internal reporting policy

Managers have a critical role in creating an organisational environment in which employees feel they can safely report improper conduct. This role includes setting a workplace tone that has the effect of discouraging both reprisal action and mischievous reporting. Senior management is committed to ensuring that middle managers are supported and equipped to create this kind of environment through training, mentoring and the development of management skills.

We also saw the effective and innovative ways authorities raise staff awareness and facilitate reporting:

- **NSW Businesslink Pty Ltd** established a confidential, internal telephone line for staff to report alleged wrongdoing. A form for reporting such matters has also been included on the intranet for staff to complete and submit. These forms are directly referred to a PID officer.
- The **Hills Shire Council** requires staff to complete an online tutorial on PIDs each year.
- The **Mid North Coast** and **Northern NSW Local Health Districts** surveyed managers to assess their level of confidence in identifying PIDs and whether they need more PID training.
- **Transport for NSW** incorporated PID training into general induction for new starters, with tailored modules delivered for apprentices and roster clerks.
- **Kiama Municipal Council** sent an information guideline to all staff about making a PID and providing other information to increase awareness.
- **Essential Energy, Ausgrid** and **Endeavour Energy** continued to roll out their 'Make the right choice' ethics program, which involved taking staff through different scenarios that show employees engaging in unethical conduct. As a part of this program, internal reporting processes for disclosures of wrongdoing (including PIDs) is discussed and advertised.
- **Bellingen Shire Council** developed a static webpage containing an extract of their policy, a link to the policy, a link to council's PID guidelines and procedures, and a link to our PID e-News.
- **Camden Council** looked to increase awareness of its PID policy and procedures by placing posters in the workplace, emailing fact sheets, and arranging training for all staff.

Training provided to public authorities

Our office has a statutory function in section 6B(1)(b) of the PID Act to provide training to public authorities, investigating authorities and public officials on any matters relevant to the Act.

Staff awareness is a vital element in a positive reporting environment. People are more likely to report wrongdoing if they know who they should report to, trust that appropriate action will be taken in response and are confident that they will be supported for having raised their concerns. This increased awareness may also deter staff from engaging in wrongdoing.

We provide two types of PID training:

- **General awareness:** This provides staff with information about the why, what, how and who of PIDs. It walks them through the process of making a PID and their role and responsibilities in relation to the internal reporting policy and procedures.
- **Management training:** This provides an overview of public authorities' obligations under the PID Act. It describes the responsibilities of the nominated disclosures officers and managers and practical strategies to manage internal reports of wrongdoing.

We aim to provide participants with up-to-date and accurate knowledge about the PID Act and its protections, the legislative requirements of public authorities and the practical management of PIDs. We use an interactive adult learning style for the training workshops and participants have told us that the case study examples are interesting and informative. The training has a practical focus and every training participant receives a suite of PID assessment templates to help them comply with the requirements of the PID Act.

The training sessions are designed to help public authorities to:

- promote awareness of the importance of PIDs
- promote a positive reporting environment
- reach compliance with the requirements of the PID Act
- manage PIDs effectively.

The training is free and can be customised upon request to suit the needs of the authorities. Contact us at training@ombo.nsw.gov.au to book training.

Our PID training in 2013–2014

- 110 public authorities trained
- 1089 public officials trained
- 485 public officials attended the three hour PID management training sessions
- 604 public officials attended the one hour PID general awareness information sessions
- 34 PID management training sessions
- 27 PID general awareness information sessions
- 9 open workshops
- 4 open workshops in regional locations – Taree, Dubbo, Griffith and Byron Bay
- 87 public authorities represented at the open workshops.



PID training in NSW communities 2013–2014

Regional

- | | |
|---------------|--------------------|
| 1. Byron Bay | 9. Moree |
| 2. Dubbo | 10. Narrandera |
| 3. Glen Innes | 11. Newcastle |
| 4. Gosford | 12. Port Macquarie |
| 5. Grafton | 13. Taree |
| 6. Griffith | 14. Tweed Heads |
| 7. Lismore | 15. Wollongong |
| 8. Maitland | |

Metropolitan

1. Blacktown
2. Chatswood
3. Liverpool
4. North Sydney
5. Penrith
6. Randwick
7. Ryde
8. Sydney CBD (numerous)
9. Willoughby

Feedback about our PID training

Nearly all of the participants who attended our PID training gave a positive rating for the training session, the trainer's presentation style and course content. Almost all of the participants indicated they feel confident that they can implement what they learnt about PIDs in the workplace.

Out of the 305 public officials who completed evaluations of our training workshops this year:

- 99% rated the training session as excellent/good
- 99% rated the presenter as excellent/good
- 98% rated the content as excellent/good
- 96% feel confident that they can implement what they learnt about PIDs in the workplace.

The participants told us that what they found most useful about the training sessions was the opportunity to discuss issues in PID management, have guidance on their own role and the actions they need to take, and the 'real life' case studies.

Participant feedback about training

Very relevant for all government agencies. Essential for all senior managers.

Accurately reflected information I needed in order to have a much improved understanding of the PID requirements.

Provided a valuable and detailed presentation on the PID Act and Director's responsibilities.

I now understand the criteria for a PID and the functions of nominated officers and co-ordinators. The forms and reporting letters were most useful.

I feel much more confident that I understand my role and those of others involved in the PID process. I feel better able to deal with any potential report.

PID e-Learning modules

E-Learning modules are an effective training mode for delivering consistent messages, particularly for large, decentralised authorities which need to reach a large number of staff. We have four modules available for public officials:

- An **awareness** module that outlines the main provisions of the PID Act and its protections for staff who report wrongdoing.
- A module for **reporters** providing further information for public officials who are contemplating making a PID.
- A **management** module aimed at nominated disclosures officers and co-ordinators as well as others involved in the management of disclosures.
- A module aimed at informing **executives** and senior managers about their obligations and responsibilities in relation to PIDs.

During the year, the e-Learning modules on our website were accessed a total of 702 times. Public authorities have also directly integrated the PID e-Learning modules into their induction and mandatory e-training programs.

PID publications

Our office has a statutory function in section 6B(1)(c) of the PID Act to issue guidelines and other publications for the assistance of public officials and public authorities in connection with their functions under the Act.

Alongside our two model internal reporting policies for state and local government public authorities, we have developed 24 guidelines on various aspects of managing PIDs, six templates to assist authorities with the practical implementation of the PID system and eight fact sheets to provide advice on specific topics for particular audiences.

We continue to improve and update our PID publications based on information gathered from our engagement with PID practitioners, training of public officials, handling of complaints and auditing of public authorities.

PID webpage

All of our publications are available online, allowing public authorities and public officials from metropolitan, rural and remote areas to access the information at a time and place that suits them. Our web page PID related material (<http://www.ombo.nsw.gov.au/what-we-do/our-work/public-interest-disclosures/our-public-interest-disclosures-unit>) continues to serve as a useful medium for authorities and public officials seeking access to practical guidance and procedures for making PIDs.

As shown in Table 1, there were 11,865 visits to PID guidelines, fact sheets and templates on our website in 2013–2014, which is a 110% increase in online traffic compared to 2012–2013. There was also a 163% increase in unique visitors to the PID web pages with 7,527 visitors in 2013–2014.

Table 1. Online access of PID resources – guidelines and fact sheets

	2012 - 2013	2013-2014
Page views of PID publications	5,658	11,865
Unique visits to PID publications	2,858	7,527

PID e-News

The PID e-News allows us to regularly provide relevant information about PIDs to practitioners.

We issued the PID e-News in July 2013, November 2013 and February 2014. Articles covered topics such as updates on the PID survey, advice about role reporters, notification of amendments to the Public Interest Disclosures Regulation 2011 (PID Regulation), training and awareness strategies and updates on the audit program.

We currently have 889 subscribers to e-News.

NSW People Matter Survey 2014

We worked with the Public Service Commission on including a number of questions in the 2014 People Matter Survey of state government employees. This will provide us with valuable information to inform our monitoring function under the PID Act, in particular to measure changes over time.

For the first time, respondents were asked about their awareness of the PID Act and their organisation's internal reporting processes. While there is room for improvement, it is pleasing that the majority of respondents know how to report wrongdoing that they observe:

- 63% were aware of the PID Act
- 86% were aware of their organisation's processes for reporting misconduct/wrongdoing.

The results also suggest there has been an improvement in the reporting culture (Table 2). In 2014, 65% of respondents said they were confident they would be protected from reprisal for reporting misconduct/wrongdoing, which is up 7% compared to the 2012 responses. This statement had one of the largest improvements in the 2014 survey results.

Table 2. People Matters Survey results over time

Item	2014	2012
I am confident that I would be protected from reprisal for reporting misconduct/wrongdoing.*	65%	58%
In the last 12 months, I have witnessed misconduct/wrongdoing at work?*	30%	30%
Have you reported the misconduct / wrongdoing you witnessed in the last 12 months?***	62%	23%

* Slight change in wording from improper conduct in 2012 to misconduct/wrongdoing in 2014.

** Change in wording from have you submitted a formal complaint about the conduct in 2012 to have you reported the misconduct/wrongdoing in 2014.

It is concerning that almost one third of respondents (30%) indicated that they had witnessed misconduct/wrongdoing at work in the last year. This is unchanged from 2012, despite the wording of the question changing from 'improper conduct' to 'misconduct/wrongdoing'.

Perceptions of the extent of wrongdoing in NSW are comparable to the results of similar surveys conducted in South Australia (38%) and Western Australia (24–28%). These results are based on the perceptions of respondents, who may not be aware what constitutes misconduct/wrongdoing, or misperceive or misinterpret legitimate conduct. It would also include much broader conduct than the five categories of conduct outlined in the PID Act to be considered serious enough for its disclosure to be in the public interest.

Of the 30% of respondents who reported having witnessed misconduct/wrongdoing at work, 62% said that they reported it. We are unable to draw conclusions about changes in staff behaviour over time as the 2012 survey asked whether employees who had witnessed improper conduct had submitted a formal complaint (only 23% indicated that they had). The more recent survey results are more likely to include employees who have raised their concerns with a supervisor or have had them dealt with informally.

Employees who had witnessed misconduct/wrongdoing may have reasonable explanations for not reporting it – for example, if they had dealt with the matter themselves, someone else had reported it or it had otherwise been resolved. Nevertheless, it is important that public authorities remain committed to ensuring they have effective internal reporting systems in place and their staff are aware of their responsibility to report wrongdoing in order to increase the proportion of staff who do report conduct they believe to be wrong.

Chapter 3. The PID landscape

In 2013–2014, NSW public and investigating authorities reported receiving 769 PIDs. This is based on the assumption that each PID made in NSW will be retained by either a public or investigating authority, and does not include any PIDs made to Members of Parliament or journalists in the limited circumstances provided for in the PID Act.

Reporting by public authorities

Since 1 January 2012, the PID Act has required public authorities to report certain information about their activities under the Act directly to our office every six months (section 6CA), as well as in their own annual report (section 31). The information included in the six monthly and annual reports is outlined in the PID Regulation.

Changes to the reporting requirements

Any public official can make a PID, provided it meets the requirements of the PID Act. The reason why the official makes such a report is irrelevant (except where it is made to avoid dismissal or other disciplinary action – see section 18 of the PID Act), as is whether or not it was made voluntarily or under some form of legal obligation.

Many public sector staff have day-to-day responsibilities that include reporting wrongdoing, such as managers, internal auditors, corruption prevention staff and investigators.

The PID Act does not distinguish between reports made by these ‘role reporters’ and reports made by staff outside of their ordinary responsibilities. As long as a report is made by a public official and it meets the other requirements of the Act, it may be a PID.

An amendment to the PID Act in April 2013 clarified this issue and removed an administrative burden for public authorities. An internal reporting policy may provide that PIDs made by public officials in the performance of their day-to-day functions or under a statutory or other legal obligation do not have to be acknowledged and such reporters need not be provided with a copy of the internal reporting policy (a requirement under section 6D of the PID Act).

To provide a full picture of PIDs, public authorities now have to distinguish between three categories of PIDs in their reporting:

1. those made in the performance of a public official’s day-to-day functions
2. those made under a statutory or other legal obligation, or
3. all other PIDs.

Distinguishing between different categories of reporters provides a clearer picture of whether the PID Act is achieving its objective and encouraging and facilitating disclosures by public officials about wrongdoing

Reports provided

The PID online reporting tool was developed to facilitate the secure provision of reports to our office by public authorities. We changed the tool in 2014 to accommodate the new reporting requirements. We use the information provided by authorities to inform and appropriately target our future awareness and auditing activities.

As at March 2015, our office has received reports from:

- 376 public authorities for the 1 January to 30 June 2012 period
- 353 public authorities for the 1 July to 31 December 2012 period
- 361 public authorities for the 1 January to 30 June 2013 period
- 321 public authorities for the 1 July to 31 December 2013 period
- 307 public authorities for the 1 January to 30 June 2014 period.

Given the broad scope of the definition of a public authority, it is difficult to work out the exact number of authorities that have responsibilities under the PID Act. Of the authorities we have identified, close to one third did not provide reports to our office in 2013–2014. Compliance with the reporting requirements has been decreasing over time. This is despite our office contacting every authority we are aware of that has not provided a report by the due date to remind them of their statutory obligation.

We will continue to reinforce the reporting obligations under the PID Act, and seek the compliance of the remaining public authorities we have identified that have not provided a report. For example, since the release of our 2012–2013 annual report, we have received an additional 145 reports from authorities for earlier reporting periods. Some information reported last year has therefore been updated.

Explanation on counting

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

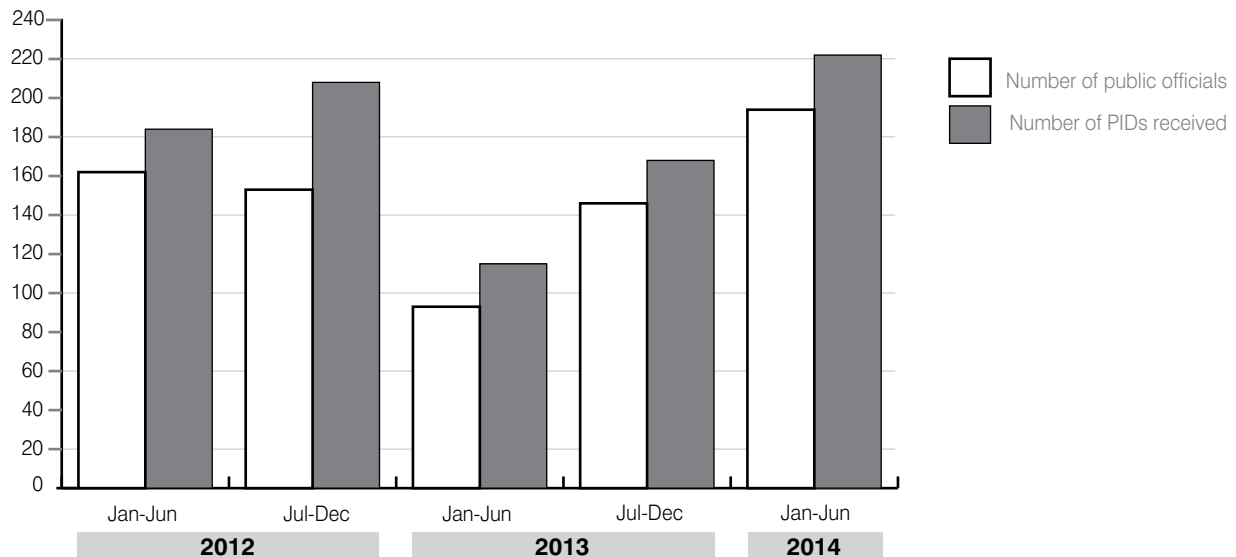
We told public authorities the number reported to our office should refer to PIDs the authority took responsibility for handling, regardless of whether they were made directly to the authority or referred by another public or investigating authority under sections 25 or 26 of the PID Act. It should not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

This is primarily to ensure that PIDs are not double counted. A PID made directly to Authority X and then referred under section 26 of the PID Act to Authority Y should only be counted as one PID, despite the fact that two authorities were involved in its handling. The PID Regulation does not require public authorities to tell us how many PIDs made directly to them they referred to another authority.

The 2013–2014 reports told us that 390 PIDs were received by 75 separate public authorities. Most authorities (78%) did not report receiving any PIDs over the last two reporting periods. Universities were the category of public authority most likely to receive PIDs (60%), followed by state government agencies (38%) and state owned corporations (31%).

Figure 4 shows the variation in the number of public officials who made PIDs directly to public authorities and the number of PIDs received by public authorities over time. It shows a great deal of variation over the five reporting periods. The last three periods have seen the number of PIDs and public officials steadily increase, with more PIDs being received between January and June 2014 (222) than in any other six month period since the start of 2012.

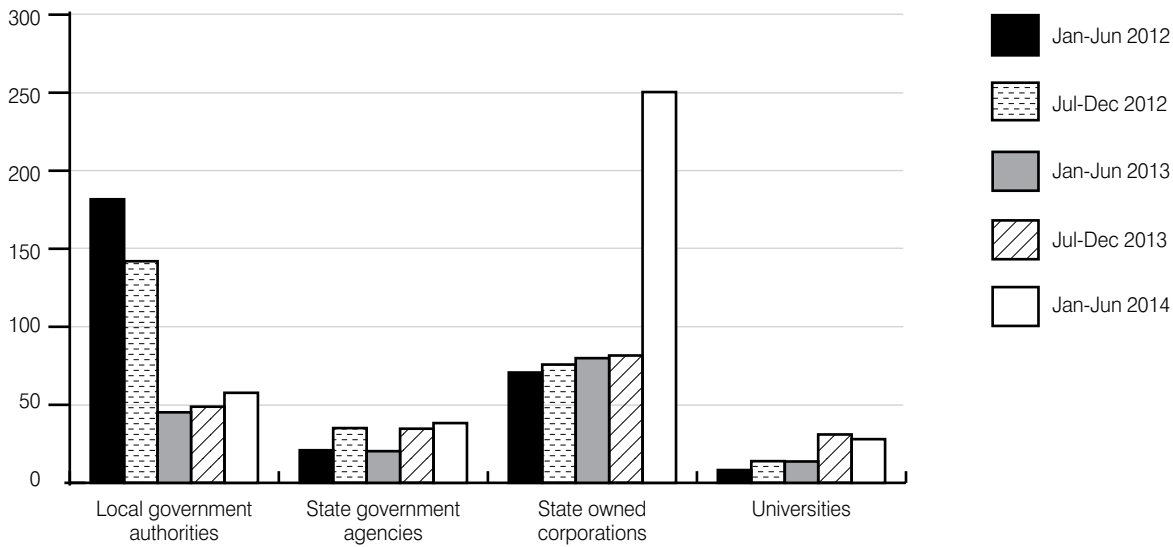
Figure 4. Number of public officials that made PIDs directly to, and number of PIDs received by, public authorities over time



PIDs received per 100,000 staff

Figure 5 shows that, taking into account the number of staff within public authorities, the number of PIDs received varies greatly depending on the type of authority. While the number of PIDs received per 100,000 staff increased across all types of authorities since the first half of 2013, state owned corporations experienced the largest change. This was because of an increase in the number of PIDs received by three state owned corporations. The number of PIDs received per 100,000 staff within universities also more than doubled.

Figure 5. Number of PIDs received per 100,000 staff by type of public authority over time

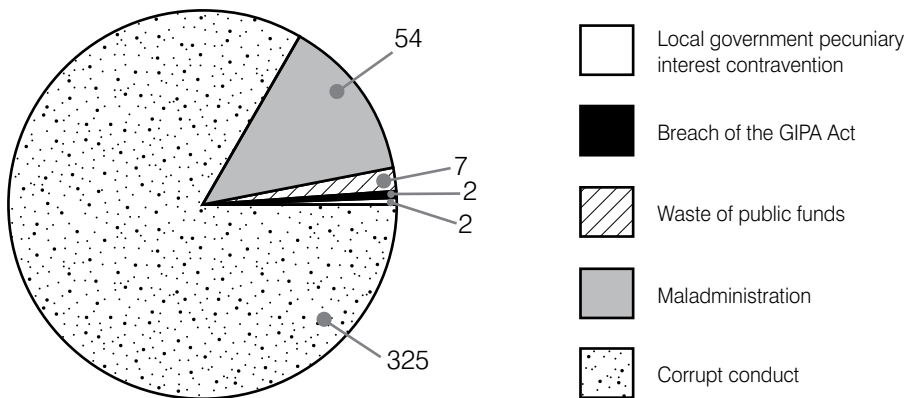


Subject matter of the PIDs

Where a PID contains multiple allegations that could fit more than one category of wrongdoing in the PID Act, we asked public authorities to only report the primary category of wrongdoing alleged – that is, the most significant or serious breach. We do not know how many PIDs primarily concerning corrupt conduct also contained allegations of maladministration or other categories of wrongdoing. This categorisation may also be influenced by the terminology used by the reporter in their allegations.

Figure 6 shows that the vast majority of PIDs received by public authorities in 2013–2014 continue to primarily allege corrupt conduct (83%). Maladministration is primarily alleged in 14% of PIDs, serious and substantial waste of public funds in 2%, and a breach of the *Government Information (Public Access) Act 2009* (GIPA Act) or local government pecuniary interest contravention in 0.5%. The proportion of PIDs alleging each category of wrongdoing has remained relatively consistent over the five reporting periods to date.

Figure 6. Primary category of wrongdoing alleged in PIDs received by public authorities in 2013–2014

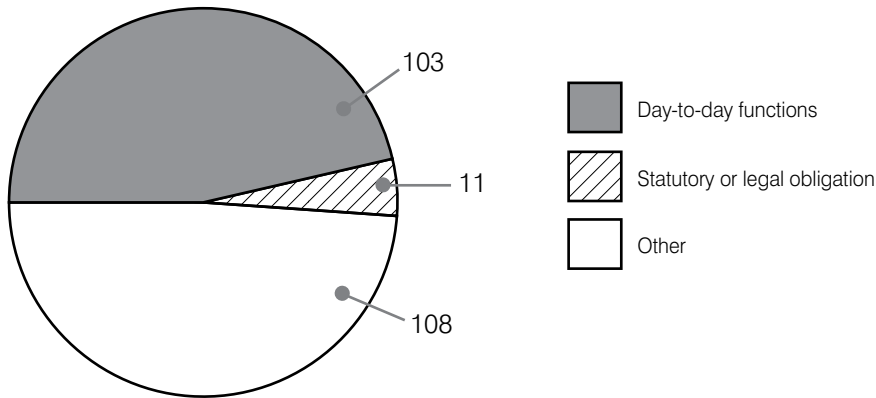


Role of public officials making PIDs

Public authorities reported on the role of the public officials making PIDs in the January to June 2014 reporting period. As seen in Figure 7, almost half (48%) of all PIDs received by public authorities were made in the performance of a public official's day-to-day functions. This suggests that in many cases reporting serious wrongdoing is simply seen as part of a public official's role.

We will continue to work with public authorities to ensure that they are identifying PIDs made by public officials in the performance of their day-to-day functions and appropriately categorising PIDs.

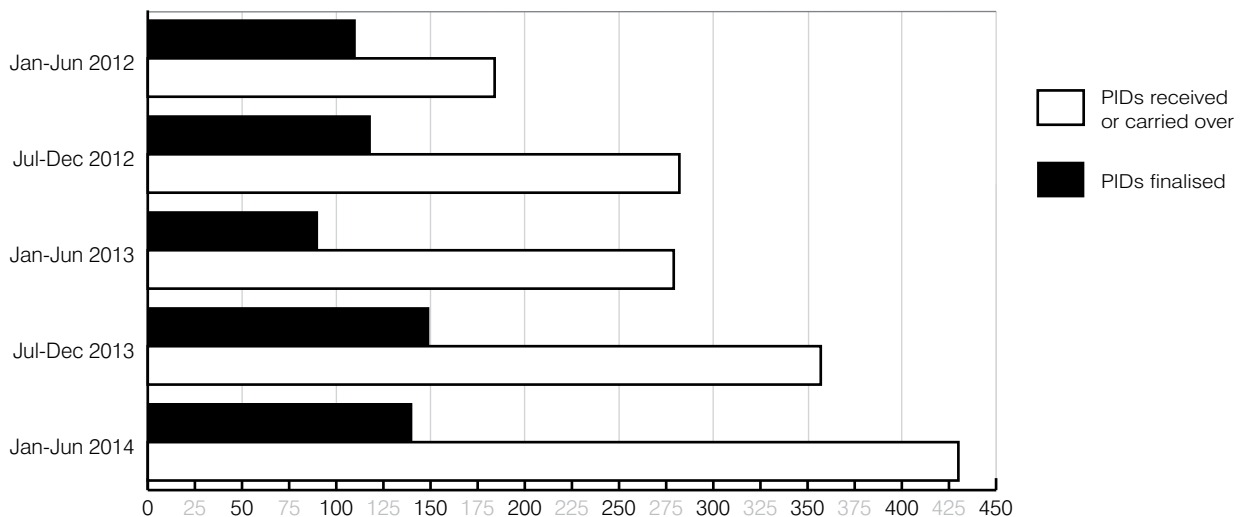
Figure 7. Role of public official in PIDs received by public authorities in 2014



PIDs received that were finalised

Figure 8 shows the number of PIDs received by public authorities that were finalised in each six-month period. Overall, the proportion of PIDs received that have been finalised has remained steady (between 58% and 71%).

Figure 8. PIDs received by public authorities that have been finalised over time



PIDs handled by investigating authorities

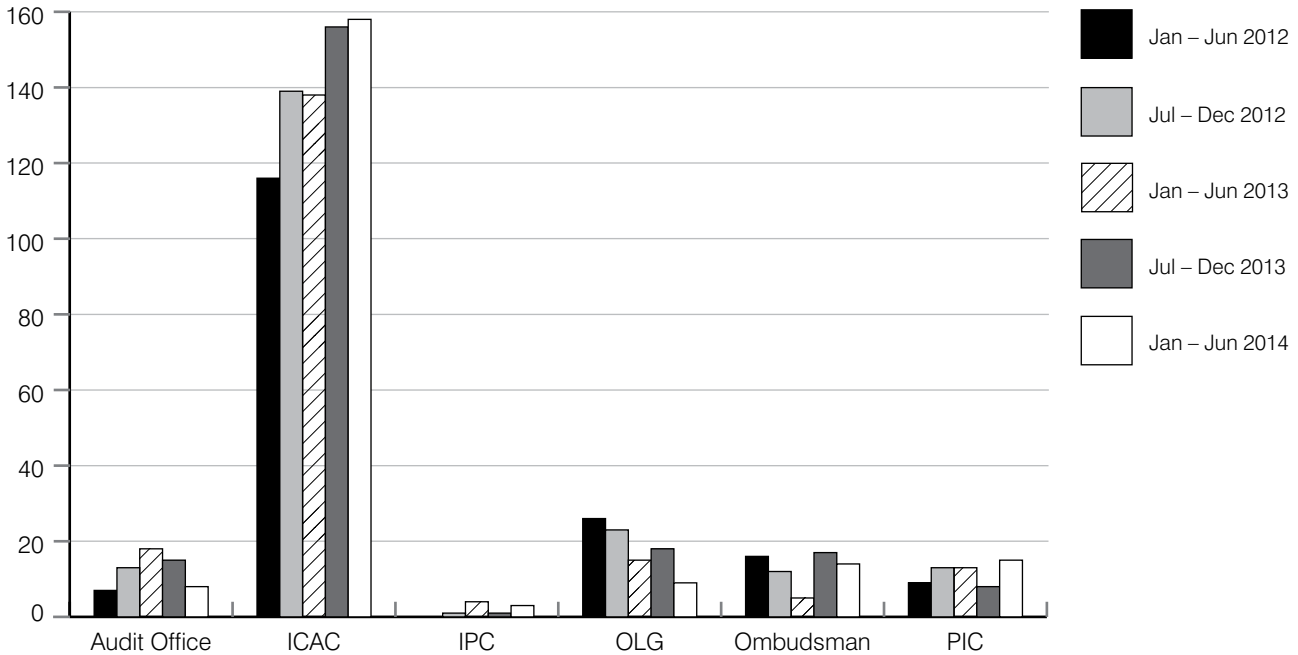
There are nine investigating authorities under the PID Act – the Audit Office, OLG, Independent Commission Against Corruption (ICAC), Information and Privacy Commission (IPC), Ombudsman, Police Integrity Commission (PIC), Inspector of the ICAC, Inspector of the PIC and Inspector of the NSW Crime Commission.

While not required under the PID Act, we coordinate the sharing of information between investigating authorities about the PIDs handled in their capacity as investigating authorities to obtain a full picture of PIDs in NSW.

Figure 9 shows the number of PIDs to investigating authorities in 2013–2014. The Inspector of the ICAC, Inspector of the PIC and Inspector of the NSW Crime Commission are not included as they did not handle any PIDs during the year. This chapter of the report only includes the 31 complaints received by our office that we assessed as meeting the criteria in the PID Act, and not the complaints about the handling of PIDs by public authorities or the reports that were claimed to be PIDs which we assessed as not meeting the criteria in the Act (see Chapter 5).

The ICAC handled the majority of PIDs made to investigating authorities (74%). While this is consistent with the previous years, the number of PIDs to ICAC increased in 2013–2014, presumably due to the coverage given by the media to high profile public inquiries. It is not surprising, therefore, that the majority of PIDs handled by investigating authorities concerned corrupt conduct (83%).

Figure 9. Number of PIDs handled by investigating authorities over time

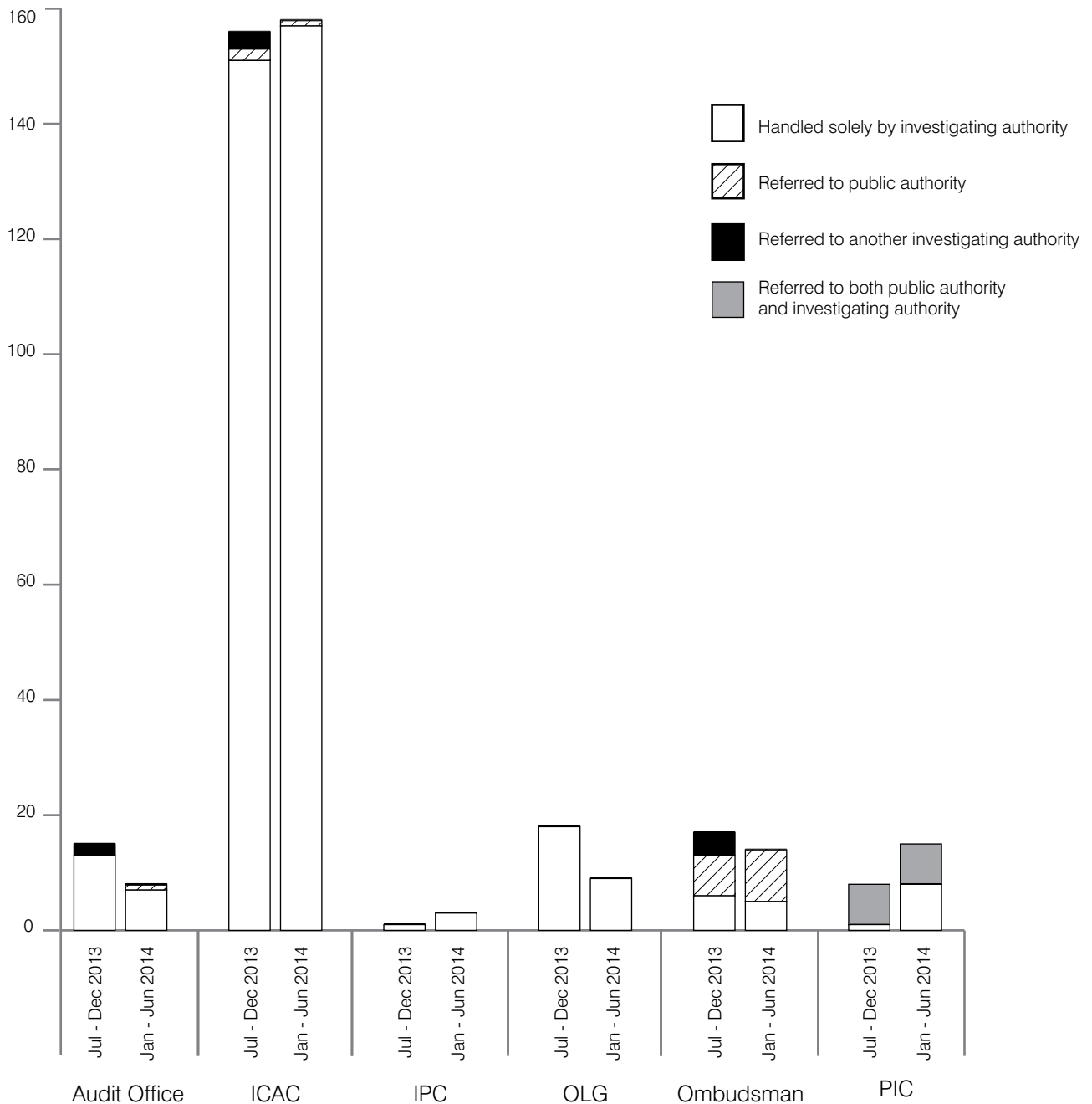


Most PIDs handled by these investigating authorities were made directly to them (89%). A small proportion of PIDs were received via a referral to the investigating authority by a public authority under section 26 of the PID Act (6%) or by another investigating authority under section 25 of the Act (5%).

Figure 10 shows that investigating authorities retained responsibility for handling the majority of PIDs and for meeting the associated obligations under the PID Act (90%). Few PIDs were referred by an investigating authority under the Act. The exception is PIDs about the NSW Police Force:

- More than half of the PIDs made directly to the PIC were referred by them to both the NSW Police Force and the NSW Ombudsman under section 25 of the PID Act. In this report, we have not included these matters as PIDs handled by the Ombudsman as it is considered that the responsibility for handling them lies with the NSW Police Force and they should not be counted by both authorities.
- All PIDs received by the Ombudsman about the NSW Police Force were referred to them for handling under section 25 of the PID Act. Our office’s Police Division monitors what action is taken in response under the *Police Act 1990*.

Figure 10. Handling of PIDs by investigating authorities in 2013–2014



The information provided in 14 PIDs retained by investigating authorities prompted formal investigations:

- The ICAC commenced seven formal investigations into PIDs alleging corrupt conduct.
- Four PIDs handled by the PIC about corrupt conduct resulted in a formal investigation.
- The OLG commenced two formal investigations into PIDs alleging serious and substantial waste and a local government pecuniary interest contravention.
- One PID about a breach of the GIPA Act was investigated by the IPC.

In estimating the total number of PIDs received in NSW, we do not include PIDs that were referred by investigating authorities as we consider that the responsibility for reporting on the PID also transfers to the receiving authority. Therefore, the total number of PIDs received by investigating authorities in 2013–2014 was 379.

PIDs around Australia

A review of oversight agencies' annual reports from various jurisdictions reveals differences in how PIDs are reported, including differences in key statistics.

Differences in PID legislation make it difficult to compare jurisdictions. In Australia, legislation within state and territory jurisdictions varies in regards to the type of oversight authority, who can make a disclosure, how a disclosure can be made, how disclosures are responded to, and how those who make disclosures should be managed and protected.

Disclosures in other Australian jurisdictions, 2012–2013

Australian Capital Territory: The *Public Interest Disclosure Act 2012* (ACT) commenced in early 2013. One PID was made to the Chief Minister's Directorate during the reporting period.

Northern Territory: The Commissioner for Public Interest Disclosures handled 66 disclosure complaints. Of these, 37 were new disclosures. Eight of those matters were referred to the Commissioner by responsible Chief Executives (who are required to refer any PIDs made to them within 14 days). A remaining 29 were partly investigated disclosures carried over from the previous year.

Queensland: On 1 January 2013, the Queensland Ombudsman became the oversight agency for the *Public Interest Disclosure Act 2010* (Qld). The Public Service Commission was previously the oversight agency. A total of 1,140 PIDs were reported to the Queensland Ombudsman, which represented a 4% decrease on the previous year. Of the total, 43.2% were substantiated (290 PIDs), 5.2% were partially substantiated (35 PIDs) and 48.5% were unsubstantiated (326 PIDs).

South Australia: The South Australian Ombudsman can receive information in confidence from a person wishing to inform about possible improper or illegal actions under the *Whistleblower Protection Act 1993* (SA). In this reporting period the Office provided advice on four matters in relation to the Act.

Tasmania: The Tasmanian Ombudsman was approached about three purported disclosures. In 2012–2013 the Tasmanian Ombudsman had yet to determine whether two of the approaches were PIDs. One purported PID was formally referred to the Integrity Commission and to the Australian Securities and Investment Commission for investigation.

Victoria: The Independent Broad-based Anti-Corruption Commission receives complaints about improper conduct under the *Protected Disclosure Act 2012* (Vic). The IBAC can only investigate public sector conduct that amounts to a 'relevant offence' and is 'serious'. IBAC determined that 131 disclosures it received were protected disclosure complaints. Six of these were endorsed for investigation by IBAC.

Western Australia: The Public Sector Commission received 11 PID matters, which were dealt with pursuant to the *Public Interest Disclosures Act 2003* (WA). This was an increase from two received in the previous reporting period.

Commonwealth: On 26 June 2013, the Australian Parliament passed the *Public Interest Disclosure Act* (Cth), which established the first internal reporting scheme for federal public servants, contractors and employees of contractors who report wrongdoing within the Australian Public Service. The legislation came into effect from mid-January 2014.

Chapter 4. Our evolving relationships with stakeholders

Stakeholder engagement is an integral part our work. During this year, in addition to our daily interaction with public authorities and public officials, we were also involved in a number of meetings and events with other stakeholders.

Providing advice

Staff from our PID Unit regularly speak to public authorities to help them respond to individual PIDs, interpret the PID Act and develop internal reporting policies. By providing PID practitioners with information, advice and assistance, we can improve the handling of PIDs and the protection and support for the people who make them.

We also provide advice to public officials who are thinking about reporting wrongdoing or who have made a PID and have questions on the process.

We can provide practical advice on issues such as assessing whether a report is a PID, assessing for the risk of reprisal, strategies in maintaining confidentiality and the pros and cons of making an anonymous report.

Contact the PID Unit at pid@ombo.nsw.gov.au or on 02 9286 1000 for advice on managing or making a PID.

During 2013–2014, we received 177 inquiries relating to PIDs which is a 26% increase compared the previous financial year. Of these:

- 87 were from public authorities with a policy query
- 61 were from public authorities about the management of a PID
- 29 were from public officials who had reported wrongdoing or wished to do so.

We also responded to approximately 250 enquiries from public authorities in relation to the administrative processes around submitting a PID report to our office.

I have been meaning to e-mail you with hearty thanks.. You're always so responsive and kind about my many requests! I really appreciate it. So thanks a million.

Thank you for your notes from the meeting – they are a very helpful point of reference in relation to the discussion. We all agreed that there was immense value in being able to have this type of discussion with the office of the NSW Ombudsman. Thank you all for your time and interest.

Thanks very much for your assistance. It's a pleasure to have someone who is happy to assist instead of having the attitude "it is not my job."

Snapshot of our advice

– An anonymous caller enquired whether she could make a PID about fraud even though she and the subject officer are no longer employed as contractors to the public authority. We advised that the PID Act would not apply unless the reporter is a 'public official' when they make the report. We encouraged the caller to give the information about the alleged fraud to the authority so any systemic issues could be addressed and a referral could be made to the police and the ICAC if an investigation substantiated the allegation.

– An anonymous caller enquired about whether authorised carers are covered by the PID Act. The caller referred to the NSW Family and Community Services' internal reporting policy which notes that authorised carers can make a PID. We confirmed that if carers receive public funding as independent contractors from the public authority it is likely that the protections of the PID Act would apply.

– A public authority enquired about whether they needed to report a PID about corrupt conduct to the NSW Ombudsman given that the university had already reported it to the ICAC. We responded that PIDs also need to be reported to us – but that this was only high level information such as the number of PIDs received.

– A manager from a public authority enquired about whether she should treat a report of wrongdoing as a PID even though the public official who made it did not want protection from reprisal. We responded that, if it met the criteria of the PID Act, the report was a PID and the protections of the Act would apply regardless of whether the public official wanted protection. The manager was provided with further advice about assessing all reports of wrongdoing from staff to determine if they were PIDs and referred to the assessment templates on our website.

– A caller enquired about whether a public official is protected by the PID Act if their report of wrongdoing is made to their manager who reports it to a nominated officer or the principal officer. We responded that a report is only protected if it is made directly to a nominated officer or the principal officer. In this situation, the manager may be protected. We advised the caller, a nominated disclosures officer, to contact the reporter directly to ensure the public official could rely on the protections of the PID Act if needed.

– A public authority wanted to know whether they should be counting purported PIDs in their report to our office. They had received six complaints from a public official but had not yet finalised their assessment. We responded that they should only be counted if the authority considers they are PIDs. We also suggested they finalise the assessment as soon as possible in order to manage the expectations of the reporter.

– A public authority asked for advice about releasing information in a personnel file that contained a PID. A former employee had requested a copy of her personnel file. The former employee was not aware that a PID had been made about her. The caller was concerned about releasing this, given the confidentiality requirements of the PID Act. She advised that the information would reveal the identity of the person who had made the PID. We advised against releasing that part of the personnel file if it would identify the person who made the PID and given none of the confidentiality exceptions of the PID Act applied.

– A public authority enquired whether multiple PIDs in relation to the same issue made by the one public official should be considered and counted as separate PIDs. We advised that, if the reports related to the same course of conduct and provided no additional information, they should only be counted as the one PID.

– A public authority contacted us because of a concern that it was approaching six months since a purported PID had been made to them and they were yet to assess whether it met the criteria in the PID Act. We emphasised that the authority should ensure the assessment was completed quickly in order to prevent further complaints about delay. We also explained that the requirement in section 27 of the PID Act is to advise the person making the disclosure of the action taken or proposed within six months. This does not mean that the authority has to conclude the investigation if they decide to investigate but that they need to advise the reporter what is happening.

– A public authority wanted to know whether it was appropriate to advise a reporter that an anonymous disclosure with similar content had recently been received in an attempt to determine if they were also the source of this report. We advised that the PIDs should be treated as separate reports and that there was no need to inform the reporter of the anonymous disclosure. We also advised the authority to be mindful of the investigation process revealing who made the anonymous report and the need to manage the risk of any detrimental action being taken in reprisal against them if they were not the same person.

– A public official wanted to confirm whether the requirement for a PID to be made voluntarily had been removed from the PID Act. We confirmed that this amendment to the Act commenced in March 2013.

PID practitioner forum

In April 2014, we held a PID practitioner forum in conjunction with an open workshop on managing PIDs. The forum brought together 37 PID practitioners from state and local public authorities to discuss issues and identify solutions to problems.

The agenda included topics that were identified through queries the PID Unit receives from authorities as well as from our complaint and audit work such as:

- Recognising and assessing reports against the criteria in the PID Act using our updated assessment templates.
- The background to the amendment to the reporting requirements in the PID Regulation and the kinds of PIDs that should be captured in each of the three new categories.
- A briefing on the PID audit program to date, including findings of good practice and common pitfalls.
- A panel question and answer session.

95% of participants rated the PID practitioner forum ‘Good to Excellent’

Those who attended noted that they particularly liked the Q&A session – ‘hearing directly from staff with expertise’, the open discussions, real life examples and the audit tips and common pitfalls. In our experience, disclosures co-ordinators are more likely to directly contact our PID Unit after attending a PID Practitioner Forum or training session.

Health disclosures co-ordinators forum

The PID Unit presented a session for disclosures co-ordinators at the Ministry of Health in April 2014. The forum provided an opportunity for disclosures co-ordinators to discuss issues arising since the introduction of legislative changes to statistical reporting of PIDs and to enhance our relationship with disclosures co-ordinators across local health districts.

PID investigating authorities

Most investigating authorities under the PID Act not only receive, assess and investigate PIDs themselves, but have the ability to monitor their handling by public authorities. In March and June we met with staff from the Audit Office, ICAC, IPC, OLG and PIC to share information and assist with a consistent and coordinated approach in handling PIDs across the public sector.

PID Steering Committee

The Public Interest Disclosures Steering Committee is made up of the heads of the PID Act investigating authorities, as well as the Department of Premier and Cabinet, the Public Service Commissioner and the NSW Police Force. The PID Unit provides the Steering Committee with secretariat support.

Steering Committee’s statutory functions

- advise the Premier on how well the PID Act is operating and recommend changes
 - advise the Premier on reports from the Ombudsman about our functions under the PID Act
 - review PID legislation implemented by the Commonwealth Government
 - provide advice to a Parliamentary Joint Committee in its review of the PID Act.
-

During the reporting year, the Steering Committee met in September, March and June.

As required under the PID Act, a separate *PID Steering Committee Annual Report 2013–2014* specifically outlines the activities of the Steering Committee during the reporting period.

Review of the Commonwealth legislation

Under section 31B of the PID Act, the Steering Committee was required to review any legislation of the Commonwealth 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 within six months after the enactment of the legislation and prepare a report on its outcome and any arising recommendations for reform in NSW.

In meeting its obligations, the Steering Committee reviewed various aspects of the *Commonwealth Public Interest Disclosures Act 2013* (Commonwealth Act). The review focused on whether there are any provisions or concepts in the Commonwealth Act that could usefully be incorporated into the NSW PID Act.

The Steering Committee made a number of recommendations aimed at ensuring the values and objectives of the legislation are met. For example, the Committee recommended an amendment to enable the protection of reports made to a reporter's supervisor – as the person most likely to receive a report. The Committee also recommended clarifying the definition of a public authority to simplify the reporting requirements of the PID Act. The full report of the review can be accessed on our website.

Amendments to the PID Act

In June 2014 the Ombudsman wrote to the Premier on behalf of the Steering Committee recommending legislative amendments. The following amendments were recommended to address specific issues that are currently causing difficulties for the operation of the PID legislation:

- expanding the PID Act to allow information sharing between investigating authorities
- amending the PID Regulation to confer a dispute resolution function on our office and to exempt certain public authorities from the reporting requirements contained in the PID Act.

Australian oversight bodies

Staff from the PID Unit took part in the second PID Oversight Forum on 20 March 2014 at the Commonwealth Ombudsman's office in Canberra. The forum is aimed at allowing our offices to:

- exchange and share resources and information about practices, current issues and challenges
- engage in strategic and coordinated policy development to promote common areas of interest and ensure consistency in approaches
- support research, evaluation and monitoring of the implementation of PID type legislation nationally
- explore opportunities for inter-jurisdictional collaboration between agencies.

Representatives from the following oversight agencies across Australia also attended the forum:

- Northern Territory Commissioner for Public Interest Disclosures
- Commonwealth Ombudsman
- Victorian Independent Broad-based Anti-Corruption Commission
- Commonwealth Inspector-General of Intelligence and Security
- Queensland Ombudsman
- Victorian Ombudsman
- Western Australia Public Sector Commission.

Some of the items discussed at the forum were:

- Improving awareness about PID legislation by engaging with stakeholders.
- The *Commonwealth Public Interest Disclosure Act 2013*, which is the most recent PID legislation in Australia, commencing on 15 January 2014.
- Key trends in what PIDs were about, such as conflict of interest, bias, improper conduct and bullying and harassment.
- Issues such as the under-reporting of PIDs in the public sector, challenges in managing reporters' perceptions and expectations, difficulties in substantiating reprisal and the use of PID schemes as 'a sword rather than a shield'.
- The value in conducting further research into whistleblowing.

Research project development workshop

In May 2014, we hosted a research project development workshop. This followed oversight authorities' interest in collaborating on such a project. The workshop included presentations which explored the challenges of research into internal reporting. Representatives from the following agencies and universities across Australia attended the forum:

- Australian National University
- Australian Prudential Regulation Authority
- Australian Securities and Investments Commission
- Commonwealth Ombudsman
- CPA Australia
- Governance Institute of Australia
- Griffith University
- New Zealand Ombudsman
- Telecommunications Industry Ombudsman
- University of Sydney
- Victorian Ombudsman.

Conferences

We hosted information stands at the Corruption Prevention Network Annual Forum in September 2013 and the Australian Public Sector Anti-Corruption (APSAC) Conference in November 2013. This gives participants the opportunity to raise queries relating to PIDs with us and clarify our office's roles and responsibilities.

Finding the right balance: Challenges and opportunities around PIDs

The NSW Ombudsman spoke about PIDs at the APSAC Conference, noting:

We have to work hard to make sure all public officials are aware of the scheme, and know where to take serious issues both within and outside of their organisation. They need to know when they will attract the protections of the PID Act, and what those protections are.

Chapter 5. Handling PIDs

Complaints received

We received 46 complaints relating to PIDs in 2013-2014. This was an increase from 40 in the previous financial year. Of those received in 2013-2014:

- 31 were assessed as meeting the criteria to be a PID.
- Three were about the handling of a PID by public authority.
- 12 were purported PIDs – that is, the person making the complaint claimed that it was a PID, but we assessed it as not meeting the criteria set out in the PID Act.

Survey of public authorities

We invited disclosures co-ordinators from approximately 300 public authorities to participate in an inaugural PID survey. The survey aimed to measure how well authorities are meeting their obligations under the PID Act. Participation in the PID survey was high, with 67% (n=208) of disclosures co-ordinators responding.

The survey provided public authorities with an opportunity to self-assess compliance and to share their internal reporting policies, procedures and related material by uploading them when responding to the survey (see Chapter 2).

For example, under the PID Act, public authorities must designate at least one officer of the authority as being responsible for receiving PIDs. The survey found that 97% (n=179) of authorities have nominated a disclosures co-ordinator. The disclosures co-ordinator role provides advice about the internal reporting policy, receive reports of wrongdoing and assists staff to make reports.

The responses from public authorities indicated that they have nominated an average of eight officers who can receive internal reports of wrongdoing, additional to the principal officer and disclosures co-ordinator. The selection of disclosure officers is at the discretion of the authority.

Good Practice: Transport for NSW

The Corruption Prevention Unit runs a Corruption and Misconduct Hotline and email service. Matters are registered in an on-line management system where they can be classified as a PID. This automates a checking system of acknowledging the PID and when to communicate to the reporter about outcomes.

Audits of public authorities

We have a statutory function in section 6B(1)(f) of the PID Act to audit and provide reports to Parliament on the exercise of functions under and compliance with this Act by public authorities (other than investigating authorities in respect of their functions as investigating authorities).

During the year, we conducted seven audits. When conducting an audit, we review:

- the public authority's policy and procedures that relate to PIDs and internal reports
- the steps taken by the authority to raise staff awareness about internal reporting
- a selection of internal reports of wrongdoing for a specified time period to review whether matters that may be PIDs are being appropriately assessed
- the handling of matters assessed as PIDs.

We meet with the disclosures co-ordinator at the start of the audit to discuss their processes and any concerns or difficulties with administration of the Act. Following the on-site visit during which all PIDs and a selection of internal reports are reviewed, a draft report is prepared and forwarded to the public authority for comment. When finalised, the report is provided to the principal officer of the authority with any recommendations for improving the process.

We select public authorities to audit based upon information obtained from a number of different sources. This includes:

- the information provided by a public authority in their six-monthly reports to our office
- complaints made to our office about the authority
- information about identified good practice.

In reviewing the handling of matters assessed as PIDs by the public authority, we consider the following:

- Were the PIDs acknowledged and reporters provided with a copy of the authority's internal reporting policy within appropriate timeframes?
- Were written assessments conducted in a timely manner regarding whether the reports constitute PIDs?
- Were reporters advised in a timely manner of the proposed action to be taken?
- Were assessments of the risk of reprisal to reporters conducted? Were any identified risks managed? Were the risk assessments reviewed?
- Do risk assessments consider the practicality and reasonableness of confidentiality being maintained? Where it cannot, do risk assessments identify strategies such as seeking the formal consent of the reporter or managing possible reprisal in other ways?
- Were PIDs investigated appropriately and in a timely manner? Were investigation plans developed? Was the selection of the investigator appropriate given the circumstances?
- Were subject officers advised of the allegations against them and provided with a reasonable opportunity to respond?
- Were reporters and subject officers advised of the outcome?
- Were recommendations arising out of investigations adopted and implemented?
- Was support provided to the reporters and subject officers by an appropriate person?
- Were appropriate access and security controls placed on the PID files? Were they stored securely?
- Was an appropriate level of documentation kept on the PID files?

Areas of good practice

Our audits of public authorities have identified a number of areas of good practice:

- Investigations are generally of a high quality across the NSW public sector.
- Some authorities provide a range of disclosure officers in different sections or locations, especially when there are multiple work sites over large geographical areas.
- Various authorities have developed specific templates for use by staff dealing with PIDs to assist with the different stages of the PID process, for example, assessment templates and acknowledgment letters. This ensures that assessments and reasons for decisions are documented. The documentation also provides clarity to those seeking to understand the decision making process and supports consistency in decision making.
- A variety of strategies have been implemented by authorities to provide reporters with protection. For example, 'routine' audits have been conducted to gather information when a PID has been made so as to protect the identity of the reporter.
- Specific communication strategies have been established by some authorities to assist in the identification and assessment of PIDs. This has included regular meetings between human resources and internal audit areas or using a panel of senior executives to assess and monitor PID matters.

Common pitfalls and recommendations

We have also identified a number of areas where public authorities can improve how they handle internal reports of wrongdoing and their compliance with the PID Act.

Record-keeping

Failing to document key interactions (such as meetings with reporters) is common. Documented advice given to reporters and/or subject officers regarding the outcome of their matter is also missing from many files. In these situations, we have made recommendations that public authorities:

- advise reporters in writing of the action to be taken or proposed to be taken in relation to their report within six months of receiving the report
- advise reporters and the subject officers in writing that the matter has been investigated and of the outcome of the investigation where appropriate.

Many public authorities are not conducting written assessments of internal reports against the criteria set out in the PID Act. More importantly, a number of authorities are not properly documenting the reasons why an internal report is not considered to be a PID when the reporter believes that it is. It is particularly important to document why something is not a PID and to convey these reasons in writing to the reporter in order to manage their expectations upfront (see Chapter 1).

We have recommended to many public authorities that they ensure a written assessment is placed on each PID file, detailing how each PID meets the specific criteria set out in the PID Act and whether or not an internal report is a PID.

We have also revised our templates to align with how public authorities conduct assessments in practice. Our audits have revealed that often recipients of reports were conducting a preliminary assessment of whether a matter might be a PID before forwarding the report to the disclosures co-ordinator to conduct a more considered assessment. While we previously only had one assessment template, we have since developed an 'initial' assessment form and another which allows for more detailed information to be captured.

Assessing and managing risk

In many matters, public authorities appear to be able to keep the identity of the reporter confidential. However, we have found few instances where strategies have been developed to manage the risk of reprisal when confidentiality cannot be maintained. In general, there is little documented evidence that authorities are considering whether there is a risk of reprisal to an individual and how to manage this risk.

Another common audit recommendation is that public authorities conduct a risk assessment regarding the likelihood of reprisal and related workplace conflict as standard procedure. By developing a new template to assist authorities to carry out thorough assessments to manage the risk of reprisal and related conflict, we are hoping to strengthen the practice of authorities in this area.

Reports made to supervisors or managers

It appears that many reports of wrongdoing from public officials are made directly to supervisors or managers – and also handled at this local level.

This is not a problem in itself but if the managers are not trained to identify PIDs and pass the reports on to the principal officer, disclosures co-ordinator or another nominated disclosures officer, then reporters will not be able to rely on the protections in the PID Act.

Further in some cases the supervisor or manager will report the matter to the disclosures co-ordinator themselves, which may mean that it is the manager who is protected rather than the initial reporter. In many cases the manager is not the one who needs the protections offered by the PID Act.

In this situation the local supervisors or managers need to assist the reporter to report directly to the disclosures co-ordinator or another nominated disclosures officer. To this end, as part of our audits we recommended that public authorities:

- Provide PID training to all supervisors and line managers who are likely to receive internal reports of wrongdoing.
- Remind supervisors and line managers who are likely to receive internal reports of wrongdoing that may constitute PIDs of their obligation to assist the reporter to make the disclosure directly to a nominated disclosures officer or the disclosures co-ordinator.
- Nominate more disclosures officers and provide those officers with training in receiving, assessing and dealing with PIDs.

Assessment and counting

We have also identified matters where our assessment of an internal report against the criteria in the PID Act has differed from the assessment made by the public authority.

For example, some anonymous reports have not been treated as PIDs when, based on the information provided, they could have only come from people working at the public authority. Where it is likely that an anonymous report is from a public official, we recommend that authorities treat the report the same way as all other PIDs and include it in their six-monthly reports to our office.

By accepting anonymous reports – as well as showing a willingness to take action in response – public authorities can encourage risk-averse staff to report wrongdoing when they otherwise would not.

Public authorities also appear to be counting referrals of reports made to them under section 53 of the *Independent Commission Against Corruption Act 1988* as PIDs received. In order to ensure that PIDs are not counted twice when they are referred between authorities, we advise authorities to only include PIDs made directly to them or referred to them under section 25 or 26 of the PID Act in their annual reports and reports to our office.

Monitoring the State Emergency Service

During the reporting year, the ICAC conducted an investigation into the NSW State Emergency Service (SES) Commissioner's handling of PIDs – 'Operation Dewar'. The investigation found that detrimental action was taken against a public official in reprisal for making a PID, which is a criminal offence under the PID Act. Case Study 7 is taken from ICAC's report *Investigation into the Conduct of the Commissioner of the NSW State Emergency Service*.

Case Study 7

Reprisal against a reporter

Ms Tara McCarthy, SES Deputy Commissioner, was employed in late 2012 to review procurement contracts and deliver budget savings. Ms McCarthy made PIDs to Mr Murray Kear, SES Commissioner, about Mr Steven Pearce, SES Deputy Commissioner, alleging a range of conduct, including entering into two contracts without due process, the use of SES funds to purchase roof racks and electric brakes for Mr Pearce's car, personal use of work vehicles and other financial mismanagement.

In May 2013, Ms McCarthy's employment contract was terminated.

The ICAC investigated allegations that Commissioner Kear had taken detrimental action against Ms McCarthy, including dismissal from her position, in reprisal for Ms McCarthy's allegations that Mr Pearce had engaged in corrupt conduct.

The ICAC made corrupt conduct findings against Commissioner Kear and recommended that the advice of the Director of Public Prosecution should be sought with respect to the prosecution of Commissioner Kear for an offence under section 20 of the PID Act for taking detrimental action in reprisal against Ms McCarthy.

Mr Kear tendered his resignation on 12 June 2014.

We believe that this case study contains lessons for all public authorities:

- Assessing internal reports against the criteria set out in the PID Act is critical – in this case, it was not recognised that Ms McCarthy had made a PID. If a report is made by a public official, about one of the types of conduct identified in the PID Act, to the right person within a public authority, it is likely to be a PID. The public official may simply be doing their job and does not need to state that they are making a PID. A PID may be in the form of a memo, email, phone call and or discussion at a meeting.
- One of the reasons why PIDs were not identified in the SES was because they did not have an internal reporting policy or an up-to-date code of conduct. There was a lack of understanding among senior management of how PIDs can be made and to whom, how they should be dealt with and the authority's responsibilities under the PID Act.
- Ms McCarthy was responsible for reporting wrongdoing as part of her role as a manager with responsibilities for improving corporate governance, including by conducting audits. Although many people who are required to make such reports in the performance of their day-to-day functions will not face reprisal for doing so, this example shows that some may need to rely on the protections provided by the PID Act.
- Prior to taking action such as dismissing or disciplining an employee, it is essential that they are notified of the concerns about their conduct, given an opportunity to respond and appropriate performance management procedures are used to do so. Failure to do so may cast doubt on the actual reasons for taking the action and may be perceived as reprisal action. Where there is potential for management action or inaction to be perceived as substantial reprisal in response to a PID, we also recommended that public authorities seek independent advice, such as from our office or a lawyer with knowledge of and experience in the PID Act.

In January 2014 we advised the SES Acting Commissioner that we will monitor all PIDs received, assessed, handled and referred to the SES for at least one year. This involves determining whether the PIDs are being managed appropriately in accordance with the PID Act. We also conducted a PID training session to the SES management team.

The use of external investigators

Where reports are to be investigated internally, we find that public authorities generally select internal investigators with experience in conducting PID investigations or at a minimum, someone with relevant investigative experience.

Good Practice: Burwood Council's internal reporting policy

As the disclosures co-ordinator is solely responsible for gathering and assessing the information during an investigation, it is fundamentally important that he/she is both unbiased and seen to be so. There can be no confidence in the investigation if there is any hint of bias. The disclosures co-ordinator must be mindful of any potential for conflicts between the subject of the investigation and matters personal to them.

Questions to ask:

Do I have, or will I have, a personal relationship with any of the people involved in the investigation?

Was I a participant in some of the issues involved in the investigation?

Do I have a financial interest in any matter involved in the investigation?

Am I prejudiced in any way towards a person involved in the investigation, or does my behaviour or comments suggest I may have prejudged issues or people?

If this is the case, you should complete a Conflict of Interest Disclosure and immediately refer it to the General Manger to resolve the conflict of situation and seek advice as deemed necessary.



In some circumstances, however, it may be more appropriate to engage an external body to undertake an investigation. This includes where:

- the public authority does not have staff with the appropriate skills or experience in conducting the type of investigation required
- the allegations concern a subject matter that is not the speciality of the investigators employed by the authority
- the investigation process needs to be expedited
- the allegations concern senior management.

In carrying out our role of monitoring and auditing how PIDs are handled by public authorities, we identified a number of concerns about how disclosures are investigated by external investigators. We have identified the following specific issues:

- failure to adhere to the terms of reference
- misunderstanding relevant legislative requirements
- failure to provide procedural fairness
- focussing investigations on preconceived outcomes
- making assumptions in investigation reports that are unsupported by the evidence
- failure to obtain all relevant evidence, for example not interviewing all relevant witnesses or not obtaining all relevant documents
- inadequate record keeping
- relying on evidence which does not meet the 'on the balance of probabilities' test
- excessive unexplained delays in completing investigations
- illogical and confusing report formats
- findings and recommendations in reports that are not supported by the available evidence.

It also appears there are no clear procedural guidelines to assist public authorities when appointing and managing external investigators. In the coming year we will develop guidelines to assist public officials with the selection, engagement, authorisation, briefing, monitoring/supervising and quality control of contractors carrying out administrative type investigations on behalf of authorities.



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