

# **Oversight of the *Public Interest Disclosures Act 1994***

Annual Report 2016-17

22 November 2017



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## Foreword

The focus of this year's annual report on the *Public Interest Disclosures Act 1994* (PID Act) is the operational challenges faced by public authorities. We listened to the experience of practitioners through a survey and at our second practitioner forum during the year. Unsurprisingly, the most difficult challenge is to manage the human elements – such as creating an ethical climate that welcomes staff speaking up, and dealing with the heightened emotions of the parties involved in the internal reporting process. Authorities come to us for advice and assistance on these issues. We advise that robust PID practices within authorities must be underpinned by clear policies and formal reporting systems.

Throughout the report, we highlight examples of the advice we have given to both public officials and public authorities when they contact us. If contacted at an early stage, we can advise public officials on how to make a report, and practitioners on how to respond to reports, in a way that minimises risks. We also provide guidance on whether a report meets the criteria of a public interest disclosure as set out in the legislation.

In many respects, the technicalities and complexities of the PID Act only heighten the challenges faced by both reporters and practitioners. During the year we provided a background paper and submission to the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission that was undertaking a statutory review of the PID Act. We welcome the Committee's recommendations – in a report tabled on 23 October 2017 – to simplify the legislation so that it better achieves its objective to encourage and facilitate disclosures of public interest wrongdoing and provide broad protection to those who make them.



Professor John McMillan AO

**Acting Ombudsman**

22 November 2017

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## What we do

The *Public Interest Disclosures Act 1994* (PID Act) encourages public officials to report serious wrongdoing by providing them with certain legal protections if they do so. The Act also deters detrimental action from being taken in reprisal for a person making a public interest disclosure (PID) – by providing that such action is a criminal offence, grounds for disciplinary action, and grounds for seeking compensation for damages. The term ‘public official’ refers to public sector staff, contractors of public authorities and people performing statutory functions, including volunteers.

The Public Interest Disclosures Unit (PID Unit) within our office coordinates the implementation of the Ombudsman’s functions under the PID Act. These functions include:

- promoting public awareness and understanding of the Act
- providing information, advice, assistance and training to public authorities, investigating authorities and public officials on any matters relevant to the Act
- issuing guidelines and other publications to assist public authorities, investigating authorities and public officials
- auditing and monitoring the exercise of functions under, and compliance with, the Act by public authorities
- providing reports and recommendations about proposals for legislative and administrative changes to further the objectives of the Act
- handling PIDs made to our office about maladministration.

## Our objectives

The PID Unit has four objectives. They are to:

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

## Our performance in 2016–17

Public awareness and engagement	
<b>What was our statutory function?</b>	<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>
<b>What did we want to achieve?</b>	<p>Engage with stakeholders.</p> <p>Raise awareness of PIDs across the public sector.</p> <p>Support and strengthen the PID coordinator role.</p> <p>Provide advice to public authorities and public officials.</p>
<b>How did we set out to achieve this?</b>	<p>Deliver training.</p> <p>Attend relevant conferences.</p> <p>Issue the PID e-News.</p> <p>Coordinate PID practitioner forums.</p> <p>Review and develop PID guidance material.</p> <p>Provide advice in response to enquiries.</p>
<b>What were our key achievements?</b>	<p>Trained 1,625 public officials at 44 PID awareness sessions and 37 PID management sessions across metropolitan and rural NSW – rated positively by 97% of participants.</p> <p>Distributed four issues of the PID e-News to over 1,000 subscribers.</p> <p>Facilitated two PID practitioner forums – rated positively by all attendees.</p> <p>Hosted information stands at two conferences and spoke at nine events.</p> <p>Provided advice in response to 213 PID-related enquiries and reviewed the PID policies of six public authorities.</p> <p>Hosted an online community, the Whistling Wiki.</p>
Monitoring and reviewing	
<b>What was our statutory function?</b>	<p>Audit and monitor compliance with the PID Act.</p> <p>Assist the PID Steering Committee.</p> <p>Make recommendations for reform.</p>
<b>What did we want to achieve?</b>	<p>Ensure compliance with the Act.</p> <p>Identify emerging trends and areas for future improvement.</p>



<b>How did we set out to achieve this?</b>	<p>Conduct audits of public authorities.</p> <p>Facilitate the provision of six monthly statistical reports by public authorities.</p> <p>Provide support to the PID Steering Committee.</p> <p>Contribute to the review of the PID Act.</p> <p>Contribute to PID-related research and policy development.</p>
<b>What were our key achievements?</b>	<p>Conducted two face-to-face PID audits, reviewed 21 files and made 17 recommendations to public authorities to improve their systems.</p> <p>Received 666 PID statistical reports from public authorities for two reporting periods.</p> <p>Held two PID Steering Committee meetings.</p> <p>Prepared a background paper and submission to the PID Act review, making 12 recommendations for reform.</p> <p>Supported the <i>Whistling While They Work 2</i> research project as a partner organisation.</p> <p>As members of a technical committee, commenced reviewing the Australian standard on whistleblowing.</p>
<b>Complaint handling and investigation</b>	
<b>What was our statutory function?</b>	Receive PIDs about maladministration.
<b>What did we want to achieve?</b>	<p>Ensure timely and efficient handling of complaints.</p> <p>Identify problems and deficiencies to improve the handling of PIDs.</p>
<b>How did we set out to achieve this?</b>	Assess and handle PIDs, purported PIDs and complaints about the handling of PIDs by public authorities.
<b>What were our key achievements?</b>	<p>Received 15 PIDs, 11 purported PIDs and seven complaints about the handling of PIDs.</p> <p>Commenced formal investigations into three PIDs received.</p>





# Part 1: Challenges faced by public authorities

Drawing on the experience of practitioners, examples of good practice, complaints and enquiries made to our office, and relevant research, this part discusses the most common challenges faced by public authorities.

The theme of our first PID forum for 2017 was ‘Hearing from you – Let’s discuss common problems facing PID practitioners’. Before the forum, we asked all PID practitioners to tell us about the top three problems or roadblocks they faced in their role. This helped set the agenda for the forum. On the day, practitioners joined one of five discussion groups – where they were asked to identify possible solutions to the most common problems.

These problems were:

- creating a positive reporting culture
- establishing reporting pathways
- assessing reports
- preventing reprisals and maintaining confidentiality
- managing complex PIDs.

Throughout this part of the report, we have included direct quotes from PID practitioners highlighting their experiences.

## 1.1. Creating a positive reporting culture

One of the greatest challenges PID practitioners told us they face is addressing (real or perceived) obstacles to reporting wrongdoing. The barriers identified were not unique to councils or universities or government departments – they were common across the sector. The most frequently cited hurdles staff face when reporting wrongdoing were the fear of reprisal and the stigma associated with reporting on colleagues.

- **Fear of reprisal.** Practitioners noted that often when they receive reports of wrongdoing, relationships in the workplace are already strained. Compounding this, work units are small and it can be easy to work out by a process of elimination which staff member made the report. In this context, practitioners understood that the reluctance of prospective reporters to come forward is quite rational behaviour. Mitigating this fear was a high priority in strategies adopted by public authorities to foster a good reporting culture.
- **Stigma associated with reporting wrongdoing.** In the view of practitioners, negative attitudes towards reporters play a significant role in discouraging staff from making reports about wrongdoing. Practitioners provided examples of the negative perceptions that reporters had encountered in their workplaces. In some workplaces there is a strong culture of unity and camaraderie, and reporters are labelled as ‘snitches’ or as being disloyal to the team. In other workplaces there is an ‘us and them’ mentality between operational staff and administrative staff, and there is reluctance to report across these perceived boundaries.
- **Some staff have limited knowledge of the PID Act.** Knowledge of what constitutes wrong conduct varies across staff. Practitioners also remarked that staff seem to want to do the right thing when

they report wrongdoing, but the staff reports often do not contain enough detail or supporting information. If practitioners do not consider the reports meet the criteria of the PID Act, they cannot reassure the staff member that they have legal protections.

- **The reporting structure can be difficult to access.** The PID Act requires reports of wrongdoing to be made to specific staff in a public authority, as nominated in the internal reporting or PID policy. These staff are generally known as nominated disclosures officers (NDOs). Practitioners commented that staff are not always aware that a disclosure must be made to an NDO for it to be assessed as a PID. Practitioners agreed that, even if staff are aware who the NDOs are, they are less likely to report to people they have never met or who are too far removed from them in the organisational hierarchy.
- **A perception that management won't do anything.** Practitioners observed there is a view among staff that there is little point in reporting wrongdoing because nothing will be done. The findings of the 2017 People Matter Employee Survey (PMES) showed that only 34% of respondents believed action would be taken on the results of the survey by their organisation. On top of this, only 41% of respondents felt that senior managers listen to employees.<sup>1</sup> These findings were highlighted as some of the lowest scoring indicators. Practitioners reflected that the respective authorities they work for do not always announce changes that have been made as a result of an internal report, and thus miss an opportunity to shift the perceptions staff hold of management. It is equally important to provide sufficient information to reporters about what action was taken in response to their concerns – see 'Providing advice' 1.
- **A perception that responsibility lies with others.** Practitioners mentioned that creating a collective sense of responsibility in the workplace is not always easy. They have come across views that question the need to report because: 'Management should know – they get paid enough.'
- **Promotional material from oversight authorities is insufficient.** A good reporting culture starts with efforts and strategies implemented at the local level in the workplace. However, investigating authorities are also responsible for fostering a good reporting culture. Investigating authorities not only support the institutional framework for the operation of the PID scheme, they also play a role in providing advice and support to PID practitioners. Investigating authorities, including our office, can promote a good reporting culture by producing clear guidelines that are targeted at specific audiences within the PID reporting scheme – such as practitioners, reporters and subject officers.

*'Breaking down some of the stigmas associated with reporting which, in local government, are quite ingrained because of history and culture – specifically, the "don't dob on your mates" mentality.'*

*'Staff confidence and knowledge in the PID Act can be limited. As a result, we often get reports with not enough or no supporting information.'*

1. Public Service Commission 2017, *People matter 2017: NSW public sector employee survey – NSW public sector*.

*'PIDs need to be promoted as a positive action, something that may/will benefit the whole community. Promotion should not be based on "protection" of the discloser, we have no evidence that a PID can be protected. We can learn from the private sector who are defining "risk culture" and how risk management can be an integral component of business ethics. Reporting wrongdoing (PIDs) can benefit from being embedded within an organisation's culture.'*

*'Publicising lessons learnt to staff.'*

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### **Providing advice 1: Taking a person-centred approach to communication**

After completing an investigation into a PID, a PID practitioner called us to discuss how the outcome of the investigation should be communicated to the reporter. The practitioner was trying to work out how to explain the complex finding and issues which emerged during the investigation.

When providing information to reporters, a person-centred approach should be adopted. We discussed how the authority could consider the reporter's personality, their likely response to the information, and any individual requirements they may have to ensure they understood the information provided. We also advised that any potential risks or unintended outcomes for either the reporter or the authority should also be considered when drafting and delivering the information.

As a way to support a positive reporting culture within the authority, we suggested the authority thank the reporter for coming forward and highlight that they welcomed PIDs within the organisation.

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PID practitioners shared strategies they had used in their workplaces to try and break down the stigma associated with reporting and encourage a good reporting culture. Creating a governance culture, where all staff are responsible for identifying risks and considering ethics, was noted as key. Practitioners also discussed the importance of ensuring staff know who their NDOs are. Strategies included:

- Establishing a 'Whistleblowing hotline'.
- Increasing the number of NDOs in the public authority. Special attention was paid to designating team leaders and supervisors as NDOs because staff are more likely to interact with these people on a daily basis.
- Increasing internal communication by reducing the siloing of different work units within the authority.
- Encouraging NDOs to be discreet when meeting with staff – in an attempt to protect the discloser's identity.
- Providing real world examples to staff to increase knowledge about what might be considered 'wrongdoing'. As one practitioner noted, 'Everyone likes a scandal, they are easy to remember and it's easy to point out what the wrong conduct is'. One authority kept a bank of case studies for training purposes.
- Having toolbox meetings where staff trained each other in PID related material. This was reported to have increased awareness and also to have started the process of breaking down 'us and them' mentalities and making reporting just a part of everyday work life.
- Including PID training in all employee inductions.
- Providing stationery to staff printed with messages encouraging reporting.

- Having a poster with photos of NDOs or at least making the list of NDOs widely accessible.
- Announcing when changes to practice are made within the authority as a result of an internal report. This was done via email, articles in newsletters, and postings on the staff intranet.
- Ensuring that the organisational culture on whistleblowing was set from the top of the authority. Senior management became more involved in sending out information to staff, participated in educational videos, and praised staff for bringing information to their attention.
- Including reporting in role descriptions and, where appropriate, framing reporting in workplace health and safety terms.
- Emphasising that each position has a unique perspective on the operations of the public authority and will get to see different things.

### **Good practice:** \_\_\_\_\_ **How internal reporting supports an ethical framework**

The **Department of Premier & Cabinet's** internal reporting policy includes a chart that outlines how the policy relates to its code of conduct. The chart links all code of conduct related policies – including the internal reporting policy, performance management policy, work, health and safety policy, and its bullying free workplace policy.

### **Good practice:** \_\_\_\_\_ **Raising staff awareness**

**Burwood Council** produced a PID e-learning video that was made available to all staff via council's fortnightly online forum – 'A line in the sand'. This was presented by the Internal Ombudsman with a foreword endorsed by the General Manager.

**Berrigan Shire Council** reviewed its internal reporting policy. Copies were displayed at worksites and circulated to all staff via email or payslip, along with a flyer from our office.

The **Legal Aid Commission of NSW** discussed their updated policy – reflecting an expansion of the number of NDOs – with staff at their regular 'Table Talk', supported by a staff wide message from their Chief Executive Officer.

**Murrumbidgee Local Health District** surveyed staff about their knowledge of PIDs, access to information, and (for managers) ability to identify potential PIDs.

**Wollondilly Shire Council** included their internal reporting policy in their 'Policy of the month' awareness program.

**Weilwan and Menindee Local Aboriginal Land Councils (LALCs)** prompted open conversations with staff and board members about PIDs, stressing the ability to make a report without fear of criticism and the importance of confidentiality.

*'If the outcome of a PID has a positive impact on business then promote it locally. How do you do this? I received a PID from an internal reporter who witnessed an employee pocketing cash sales, stealing items, on-selling and bullying. All of the PID was confirmed following investigation. Management actions saw staff terminated under a separation agreement... At no time did we promote across the organisation or the community that the PID had delivered a significant benefit.'*

*'We have not even had one PID. How do you know whether it's because everyone is doing a really good job or because people just aren't reporting?'*

**Transport for NSW** held an executive morning tea where integrity agencies and the Secretary spoke about the importance of supporting staff who report concerns internally. A video of the Secretary's speech was posted on the intranet to publicise his commitment to supporting staff.

A flyer detailing information about **State Transit Authority's** PID system and reporting lines was developed and is included in Bus Operator training.

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### **Providing advice 2: PID poster emerges from background to prompt staff action**

A council employee called us to discuss making a PID about the conduct of a senior council officer that she and other staff had witnessed in the workplace. She said that when she and the other staff were sitting in the staff room discussing what they should do about their concerns, they saw the PID Unit details on our office's *'Don't stick your head in the sand'* poster displayed on a wall – and this prompted her to call us.

We discussed the allegations and advised her that as the conduct she described appeared to be corrupt, it should be reported to the Independent Commission Against Corruption (ICAC). We encouraged her to submit a joint report with the other staff who had also observed what was happening.

We also provided advice about the protections provided to reporters under the PID Act, as she was fearful that if she reported the PID internally she would be treated differently due to the level of seniority of the subject officer at the council.

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Public authorities may wish to regularly evaluate their efforts in creating a positive reporting culture by asking staff whether they feel comfortable raising concerns and have trust in the system for reporting wrongdoing. The Public Service Commission's PMES is a valuable source of information for state government public authorities to assess their reporting culture. It asks participants whether they have witnessed misconduct/wrongdoing at work in the last 12 months and, if so, whether they reported the misconduct/wrongdoing witnessed.

The 2017 survey resulted in the highest response rate to date, with 42% (n = 140,063) of all public sector employees responding. As shown in Table 1, one quarter of respondents indicated that they had witnessed misconduct/wrongdoing at work in the last 12 months (defined in the survey as 'behaviour that is unethical or wrong, that breaches your organisation's code of conduct, or that compromises your duties'). Of those respondents who witnessed such behaviour in the last 12 months, 63% said they reported it. These results remain unchanged from 2016.



**Table 1.** PMES results for the NSW public sector, 2014 to 2017

Survey question	2017	2016	2014
In the last 12 months I have witnessed misconduct/wrongdoing at work (yes)	25%	25%	30%
If yes, have you reported the misconduct/wrongdoing you witnessed in the last 12 months (yes)	63%	63%	62%

Over the year, we analysed the results of the 2016 PMES survey at an agency level by considering whether the agency was substantially above or below the sector average for these statements. We also considered those results relating to whether participants had witnessed or been subjected to bullying at work in the last 12 months – given the impact this behaviour can have on a workplace environment that encourages staff to speak up about their concerns. By identifying public authorities with concerning results, we can better target our audit and training program. In the coming year, we intend to consult those authorities with results above the sector average to identify factors that contribute to a positive reporting culture.

## 1.2. Establishing reporting pathways

As practitioners noted, a key part of creating a positive reporting culture is ensuring that managers are aware of their responsibilities when staff report wrongdoing to them. A limitation of the PID Act is that it requires reports to be made to certain officers that a public authority nominates in their internal reporting or PID policy. An ongoing challenge for authorities is to nominate an appropriate number of officers and ensure they capably respond when a report is made.

One of the most common recommendations we make to public authorities when auditing their PID systems is that they increase the number of NDOs to include those staff who routinely receive such reports or are most likely to. These recommendations also consider the accessibility of such officers, particularly if the authority has staff in multiple geographic locations. We have noted a tendency for public authorities to limit the number of officers nominated to receive disclosures to staff in specialist units or very senior management, given the responsibilities associated with the role. There can also be reluctance among senior management to nominate a large number of NDOs at different levels across the organisation.

The problem with this approach is that it is counter to research that shows most disclosures of wrongdoing within organisations are made to supervisors or managers.<sup>2</sup> PID practitioners told us that they have

2. For example, Donkin, M, Smith, R and Brown, AJ 2008, 'How do officials report? Internal and external whistleblowing', *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press, Canberra, pp.83-108; Ethics Resource Centre 2012, *Inside the mind of a whistleblower: A supplemental report of the 2011 National Business Ethics Survey*, United States.

*'One of the challenges we face here is mapping how many PID coordinators and officers across the entire department are required and which employees to target. Especially challenging in workplaces where there are two employees or other smaller regional centres.'*

*'Why is anyone going to report to someone they have never even met before?'*

been trying to flatten out the reporting hierarchy. When discussing how many officers to nominate, practitioners raised the following:

- There is no 'best practice' ratio of the number of NDOs to the number of staff. Each authority needs to determine what best suits their needs.
- At least three large state government departments nominate all senior executives (Director level and above). This is a large number of people. However, in practice, this can raise access problems for reporters as Directors often have 'gatekeepers' who monitor their diaries and arrange appointments. If a reporter is required to give a reason for a meeting, confidentiality can be breached.
- As one council practitioner noted, they are conscious of the need to try and reach people like 'the guy who has the keys and opens the depot first thing every morning'. Best practice is to nominate both indoor and outdoor staff.
- It is important that NDOs are both male and female.
- NDO responsibilities should sit with staff who are seen to be approachable, accessible and friendly. It may be better for the responsibility to sit with a 'person' and not a 'position'.
- If staff are seen approaching the person everyone knows has responsibility for dealing with complaints, it is unlikely that their identity as the reporter can be kept confidential. It is therefore advisable to have people in other central functions such as human resources (HR) and payroll as NDOs, as there are other plausible reasons staff may have for meeting with that person.

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### **Providing advice 3 When is enough... enough?**

We received a call from a public official who was being considered as a PID officer to find out if training was mandatory for this role. We advised that – although there was no legislative requirement for PID officer training – we would strongly recommend it was provided, and that this is an issue we consider when we audit public authorities.

He then asked whether there is a requirement for the number of PID officers to be nominated to receive PID reports within an authority. We advised that we recommend that an authority nominate all staff who are likely to receive such reports. Factors to be considered include the number of staff and their locations – to ensure there are enough nominated PID officers to be accessible to staff.

We suggested that as the authority had approximately 150 staff and only two senior executive level officers nominated as PID officers, the authority may wish to consider nominating managers that employees are likely to go to with their concerns. We also noted that it may draw attention to the situation if a junior employee is seen approaching a senior executive when making a PID.

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## Good practice: Reporting pathways

**Newcastle City Council** has an NDO to receive disclosures in all directorates and business units. They are supported in this role by mandatory training conducted every two years for all disclosure officers and senior staff by our office.

The **Department of Premier and Cabinet** established a separate email address so staff can send confidential communications to NDOs, who are the only people that can access the account.

Many state government departments have also sought to centralise the handling of PIDs and, in doing so, have developed an internal reporting policy that applies to numerous entities within their cluster. This can be a sensible approach, particularly when the entities are small – such as boards and committees. It also gives staff of such entities an additional independent reporting avenue to the department. One of the drawbacks to such an approach is that the number of NDOs is often limited – for example, to the head of the related entity. It is questionable too whether staff of the related entities are aware that the policy applies to them. This limits the number of reports of wrongdoing by staff of related entities that receive the protections of the PID Act.

### Providing advice 4: Cluster complications

A public official preparing a state government department's internal reporting policy asked whether it was appropriate from a legal standpoint to have staff in related entities in their cluster report to officers of the department. We discussed that the PID Act does not contemplate the cluster structure and that, practically, it makes sense to have a centralised policy. We noted the importance of nominating in the policy that the head of the related entities could receive disclosures, but that this also needed to be extended to people who staff usually make reports to in related entities. The Secretary had previously thought that nominating 30 officers across the cluster was too many. We stressed the importance of nominating a sufficient number of officers so that staff received legal protections for having raised matters.

The department released a policy that, in addition to the PID coordinator and the Secretary, nominated 50 officers across the cluster to receive PIDs.

Practitioners noted that it is also common for staff who witness wrongdoing to report it to managers, who then pass the information on to the central unit responsible for dealing with disclosures. Under these circumstances, the protections of the PID Act do not apply to the staff who had witnessed the wrongdoing – but to the individuals that brought these matters to the attention of an officer nominated

*'Breaking down traditional hierarchical channels for making a disclosure – employees feel a sense of loyalty or expectation to report to or via their manager(s) which has the potential to affect the protections that might be afforded them under the PID Act. They recognise that there'd be a sense of distrust if they were to go over their manager's head or around them. By doing so, this has the potential to compromise any subsequent investigation, contaminate evidence, or even stop the complaint from being pursued if a manager was complicit or simply wished to brush the issue under the carpet.'*

*‘Getting the complainant – and not their manager – to report the information for the PID.’*

to receive disclosures. The staff member who witnessed the alleged wrongdoing is most in need of the protections of the Act, particularly the protections against reprisals.

‘Providing advice’ 5 shows how reporters can be left without the protections of the PID Act when reporting wrongdoing if the authority fails to nominate sufficient officers to receive PIDs and put in place measures to ensure employees are fully aware of the PID reporting pathways. A solution for NDOs who have received a referral from a manager or area such as HR is to make direct contact with the initial reporter so that the disclosure can be considered a PID.

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#### **Providing advice 5: Who made the PID?**

After recently receiving a PID about alleged misconduct that occurred two years before, a PID practitioner called us to enquire whether the PID Act applied any time limitations in relation to making a PID. The PID Act is silent on this issue so we advised him that the disclosure could still meet the criteria to be a PID. However the length of time since the conduct occurred may be a consideration when determining what action is taken. He told us that the reporter’s allegations had been taken seriously and the authority had started enquiries into the matter.

During the discussion it came to light that the reporter had made the allegations to a HR officer, who then notified the PID coordinator. As the reporter had made the disclosure to the HR officer who was not an officer nominated to receive PIDs, it meant that the HR officer may have technically made the PID – leaving the reporter with no protection under the PID Act. We advised it would be good practice to contact the reporter so they could make the PID to an NDO in case they needed to rely on the PID Act protections in future.

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A further complication is that staff from separate public authorities who work together in the one location or who perform functions for another public authority may come across wrongdoing by staff of another public authority. ‘Providing advice’ 6 highlights the difficulties that can occur with reporting a PID when public authorities are co-located on the same site, and how the PID Act does not deal with these situations well.

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#### **Providing advice 6: Reporting pathway leads to a bend in the road**

The PID coordinator at public authority A called us for advice about a possible PID. The reporter was an employee of co-located public authority B, and had made a PID to an NDO at public authority A. The PID concerned alleged misconduct by a third party service provider contracted by public authority B and other systemic issues.

We discussed that contractors could be public officials if they provide services to or on behalf of a public authority. However, we determined that this matter was not a PID because of the reporting pathway. This

is because an employee of public authority B cannot make a PID to an NDO of public authority A unless it is about public authority A or the conduct of its staff.

We advised the caller to contact the employee and encourage them to make the disclosure to an NDO within public authority B. This is to ensure they could receive protection under the PID Act if the report otherwise met the PID Act criteria, and because they are best placed to provide support to the reporter. We gave the caller details of the PID coordinator at public authority B so that both authorities could liaise to make appropriate enquiries into the matter.

*‘Ensuring we receive all complaints that could be PIDs to assess (completeness), including from the principal officer given that they receive lots of reports of various natures.’*

Practitioners also discussed the difficulties with educating all NDOs on their responsibilities and the authority’s management of PIDs, especially given staff turnover. It is particularly important that NDOs are able to recognise when a concern may be a PID and know who in the authority assesses such matters and decides what action should be taken. Practitioners thought that having key performance indicators in role descriptions or duty statements would ensure the position holders had appropriate PID awareness and management skills.

In response, we have developed the following statements that could be included:

- PID coordinators – receive, assess and manage reports of wrongdoing, and ensure the authority complies with the PID Act.
- NDOs – receive reports of wrongdoing, both verbally and in writing, and refer them for assessment.
- Managers/supervisors – create a positive reporting culture and help staff to make reports in accordance with the authority’s internal reporting policy.
- All staff – report wrongdoing in accordance with the authority’s internal reporting policy.

### 1.3. Assessing reports

Staff should always be encouraged to raise any concerns they have about an individual’s behaviour or the functioning of a public authority and not face detriment for doing so. The object of the PID Act, however, is to encourage and facilitate the disclosure – in the public interest – of certain specified categories of conduct. To receive the protections under the PID system, the person’s concerns must be about wrongdoing that is so serious it is clearly in the interests of the citizens of NSW that it is reported. Assessing whether or not a report meets this threshold can be a difficult decision to make.

Public authorities told us that staff often claim to be making a PID when their concerns are more appropriately dealt with through a grievance process. This includes concerns that relate to the way someone’s behaviour or a particular process is affecting them as

*‘Grievance vs PID.’*

*‘Determining whether something is just bad management or maladministration. This is a grey area with most of the allegations I receive regarding maladministration.’*

*‘Further examples of what constitutes maladministration, within the context of “improper motives, unreasonable, unjust, oppressive or negligent” in nature.’*

an individual – such as actions or decisions by managers or other employees that involve inequitable treatment in the workplace or harassment or bullying. These types of issues are only PIDs if they are part of a course of conduct, particularly a general practice affecting a number of staff and the functioning of an authority.

Maladministration is defined in s 11 of the PID Act as conduct that involves action or inaction of a serious nature that is either:

- contrary to law (other than a legal technicality)
- unreasonable, unjust, oppressive or improperly discriminatory
- based wholly or partly on improper motives.

PID practitioners discussed that the possibility a better decision could have been made did not mean a decision was wrong or evidence of maladministration. Even a poor decision may be a single instance of an error of judgement. Similarly, poor management – such as not dealing appropriately with the conduct or staff not communicating well – is not in itself maladministration. Rather, maladministration is conduct that is obviously wrong. It may be indicated by failures in decision-making over time, systemic failings, or an authority not functioning as it should.

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#### **Providing advice 7: When personal interest is not in the public interest**

We received a call from an independent member of a conduct review panel that had been engaged by a public authority to investigate a PID, about whether the authority conducted its business in line with relevant legislative requirements. She contacted us to discuss her opinion that the PID related more to a disagreement about local practices and office management. We considered these issues should be dealt with as grievances, although we noted that a PID about work practices could be maladministration if it was of a serious nature. We clarified that matters of a serious nature would include systemic problems or issues that could have significant consequences, and gave the caller our PID guidelines and other fact sheets which further clarified relevant factors and explained why personal matters are not PIDs.

The caller also asked if a matter must be treated as a PID if the reporter requests this. We advised that we would expect the public authority to assess whether the report met the criteria in the PID Act for it to be considered a PID. We provided our PID assessment template and other guidelines to help her assess the report.

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#### **Good practice: Being clear about what’s not a PID**

The **Federation Council’s** briefing for supervisors and managers about PIDs includes frequently asked questions (FAQs) with typical scenarios and the correct reporting process. The FAQs also include scenarios that are not PIDs such as employment grievances, bullying allegations, and complaints from members of the public – and refers staff to the appropriate policy and process for these types of matters.

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Our office also faces the challenge of explaining to public officials that the matters they are describing are more appropriately considered grievances or disputes over a management decision. For example, we received the following enquiries:

- A public official alleged that the standards for university assessments had been inconsistently applied by the convenor, particularly in relation to foreign language students. The issues raised seemed to stem from a grievance with the course convenor and we explained that they may not meet the threshold for 'serious' maladministration.
- A public official wanted to complain to us about an authority's failure to follow its policies and procedures for assessing risks after a complaint of bullying and harassment had been made about his conduct. When we explained that this was an employment related matter outside our jurisdiction, he questioned why breaches of policy were not maladministration. We advised that there would need to be more systemic breaches to meet the threshold of a PID.
- A public official sought to complain about maladministration. Her concern was that a contractor was appointed to a vacant position rather than the authority initiating a recruitment process. We explained that this is a decision management are open to make, unless she had evidence that the decision was motivated by favouritism for example.

For disclosures about maladministration to constitute a PID they must be 'of a serious nature'. Determining whether an issue is serious depends on the circumstances of each individual authority. Situational factors may include size, accepted practice within the industry, culture, policies and procedures, and resourcing levels. When determining whether a matter is serious, we advise authorities to consider the severity, frequency and impact on the community and the public sector generally. Factors or indicators that may suggest a matter is serious include:

- conduct that is part of a pattern of behaviour
- conduct that is deliberate
- conduct that is extensive, involves a large number of public officials or affects a large number of people
- substantial waste or mismanagement of public money or resources
- where there are significant operational or legal consequences
- significant disruption to services or outputs
- serious safety risks that place people at an unacceptable risk of injury or death.

Ultimately an assessment of whether a report is a PID is contextual and based on the facts of the particular case. PID practitioners must exercise their own discretion. It was discussed that it is therefore important that PID practitioners document their thought process and provide reasons for their assessment.

*'Determining whether "sufficiently serious" to meet threshold to accept as a PID.'*

*'The thresholds for seriousness, or whether it is just wrongdoing of a serious nature.'*

*'Getting sufficient detail when notified by email to make a determination if it is a PID or not.'*

*'PID reports assessed as not meeting requirements of Act by organisation then being made to other organisations, assessed as PID and referred back. This poses a challenge to an organisation that has assessed and managed a matter, now requiring some retrospective action – is a re-assessment appropriate and what are the implications for an organisation in these circumstances?'*

PID practitioners also noted that they often receive complaints which are lacking in detail or supporting evidence. To be considered a PID, a reporter must have an honest belief on reasonable grounds that their information shows or tends to show wrongdoing. While the reporter's belief must be assumed to be honest unless there is evidence to suggest otherwise, sufficient information needs to be provided so that a reasonable person would form the view that wrongdoing occurred. Reports should be assessed on their face, but it is sometimes necessary to ask a reporter to provide further information about their allegations or to clarify the issues raised.

Another challenging issue is whether PIDs can be re-assessed, particularly if they are referred from one authority to another under s 25 or s 26 of the PID Act. Our view is that the PID Act does not prevent the receiving authority from conducting their own assessment of whether the report meets the criteria set out in the PID Act. This may lead to an authority that has been referred a PID making a different assessment to the authority that had the report made to them. It is important to remember that only a court of law can make a determination of whether a report is a PID – for example, in a criminal prosecution of reprisal, if deciding compensation, or most commonly when determining whether or not to release information under the *Government Information (Public Access) Act 2009*. Authorities are just deciding whether or not they will treat the report as a PID.

PID practitioners can contact our office at any time for advice on whether the criteria in the PID Act have been met. For example, over the year we received a number of enquiries about whether certain people are considered public officials under the PID Act, such as:

- Staff of non-government organisations (NGOs) – it depends on the wording of the contract or the funding/service agreement that an NGO has with a public authority. For example, if an NGO is engaged by a public authority to provide services to or on behalf of them, then staff who directly provide these services are likely to be considered public officials. However, many funding arrangements specifically state that the recipient NGO is not providing the service on behalf of the government so staff of these organisations will not be public officials.
- Private accredited certifiers – the definition of a public official in the PID Act specifically includes accredited certifiers under the *Environmental Planning and Assessment Act 1979*. This means that private building certifiers engaged by property owners may make and be the subject of a PID.
- The chair and members of governing boards – as these individuals are in the service of a public authority and typically perform public official functions, they are considered public officials under the PID Act.



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**Providing advice 8: When words come back to bite you...**

A PID practitioner sought advice on whether a report of reprisal made by a reporter can be considered a PID in itself. The situation involved a reporter, person A, who had made a PID about person B. Person B made statements that they were going to get back at person A, which were overheard by person C. Person C told person A who had now raised concerns about reprisals. Person C also disclosed to the practitioner what they overheard. We advised yes, that reprisal was corrupt conduct and if it met the other criteria in the PID Act could be considered a PID. The caller asked if both person A and person C could make PIDs about the same conduct and we advised that they could.

The caller also asked if they would need to notify our office. We advised that they could if they were seeking advice and assistance but there was no statutory obligation to do so. However, if they had a reasonable suspicion of corrupt conduct, as a public authority they would be obliged to notify the ICAC under s 11 of the *Independent Commission Against Corruption Act 1998* (ICAC Act).

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**Providing advice 9: Common misunderstanding that role reporters are not making PIDs**

After our PID training to a public authority in regional NSW, a senior public official contacted us to clarify the 'role reporter' provisions within the PID Act – as there was some confusion among participants on this issue. He was seeking clarification about managers who identify PIDs through the course of performing their day-to-day functions, and how the reporting and acknowledgement requirements and protections under the PID Act apply to them.

We advised that a role reporter who identifies an issue must have disclosed the matter to an NDO or the principal officer for it to be considered a PID. There is no requirement under the PID Act to provide role reporters with a PID acknowledgement letter or a copy of the internal reporting policy. These matters can be described as 'technical' PIDs. They are reports made for some other purpose – for example, as part of an investigation or audit report – that coincidentally also meet the criteria in the PID Act. These technical PIDs should also be counted in an authority's reports to our office.

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**Providing advice 10: When a subject of allegations has already left the workplace**

A public official sought advice about whether a report could be a PID if the allegations were about a contractor who is no longer engaged by the authority. The reporter is currently employed by the authority. We confirmed that the alleged wrongdoing occurred when the contractor was a public official providing services to the authority. We referred to s 8(4) of the PID Act which states: 'A disclosure made about the conduct of a person while the person was a public official is protected by this Act even if the person is no longer a public official'.

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*‘Concerns of person making a PID about reprisal.’*

## 1.4. Preventing reprisals and maintaining confidentiality

One of the primary ways that the PID Act aims to encourage and facilitate reports of serious wrongdoing is to protect people from reprisals. Given the evidentiary difficulties facing any prosecution of reprisal, the emphasis of PID practitioners is on taking a proactive approach – trying to make sure that disclosures are managed in a way that best prevents adverse consequences and reprisals. This may include, if appropriate, keeping confidential the reporter’s identity or even the fact that a PID has been made.

PID practitioners talked about how important it is to have a face-to-face conversation with the reporter as soon as they have made a PID – to discuss the process, their expectations and whether these are realistic, whether there are any ongoing performance management processes or workplace conflict, and to give the reporter information about who to contact if they experience reprisal. One public authority has found this reassures reporters that their concerns will be taken seriously and provides an opportunity to address any misconceptions at the outset. Ongoing contact with the reporter regularly throughout the process reaffirms these views.

Some strategies that PID practitioners implement to prevent reprisals include:

- asking reporters to provide a copy of their latest performance development report in case there are future allegations of poor performance in reprisal
- moving the subject officer out of the workplace
- transferring the reporter
- warning the subject officers that taking reprisal is a criminal offence
- conducting a mediation between two reporters who were in conflict.

‘Providing advice’ 11 and 12 both highlight the importance of proactively managing the risk of reprisal when keeping the identity of the reporter confidential is not an option or is unlikely. In these cases, we encourage authorities to be proactive by telling the subject officer and others that a PID has been made, that management supports the reporter, and that taking reprisals is a criminal and disciplinary offence.

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### **Providing advice 11: Delayed response contravenes the PID Act and leads to continued misconduct and risk of reprisal**

In May 2017, a reporter contacted us to talk about a disclosure he had made in late 2016 to a senior officer alleging wrongdoing by a public official, which was then passed on to the public authority’s PID coordinator. The reporter told us that in early 2017 he had been notified that his disclosure was being treated as a PID but he felt no action had been taken since. He asked us whether the requirement in s 27 of the PID Act – to notify reporters within six months of

the disclosure being made of the action taken or proposed to be taken about the PID – started from when he made the disclosure or when the authority decided to treat it as a PID. We advised that the six month time frame was from when he first spoke to the senior officer. We also noted that the authority had not provided an acknowledgement to the reporter within the required 45 day period.

The reporter told us he was concerned that the authority's apparent inaction had led to continued misconduct by the subject officer, which was having a significant effect on the workplace. He had recently contacted the PID coordinator to see what was happening. We told him to wait to see if he received a response, but that he could make a complaint to our office about the way the PID had been handled – enabling us to then make enquiries of the authority.

He contacted us approximately four weeks later and told us that he had met with the PID coordinator. The coordinator had advised that the allegations were about to be put to the subject officer and sought the reporter's views on whether his identity could be disclosed as a way of proactively managing the risk of reprisal. The reporter continued to have concerns about bullying, not just by the subject officer but also by a 'gang' that had formed. He was especially fearful of reprisal action being taken against another reporter in the workplace who was particularly vulnerable.

We discussed that if the identity of reporters is known or likely to be suspected, the risk of reprisal may best be managed by the authority being upfront with the subject officer that it is a criminal offence for anyone to take action against a person for reporting wrongdoing. We noted the importance of senior management showing their support for the reporting process and actively monitoring the workplace. We also noted that, depending on the risks involved, the authority might wish to consider relocating the reporters.

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### ***Providing advice 12: PID allegations turn the spotlight on entrenched culture of misconduct***

A PID practitioner contacted us during his investigation into a PID related to corrupt conduct and systemic issues, which were part of a long-term culture of misconduct within a division of the authority. He wanted to discuss possible risks to the reporter. During a recent altercation the reporter had disclosed to his supervisor, who was also the subject officer, that he had made the PID.

We discussed the importance of doing a risk assessment in relation to possible reprisals before the reporter returned from his current leave, particularly as the subject officer was the reporter's supervisor. The PID coordinator was looking to develop a relocation strategy as part of the risk prevention and support plan being put in place to protect the reporter, as the reporter was considered to be vulnerable to the culture of bullying and harassment that existed within the division.

We suggested that the PID coordinator speak with the ICAC about how to investigate the corrupt conduct and gave him information about our PID risk assessment resources.

*'In a small organisation it can be difficult to protect the identity of a reporter.'*

*'Maintaining confidentiality during investigation and afterwards.'*

*'Progressing matters where the evidence is not strong, but raises suspicions, and the risk of reprisals is high. In these circumstances it is difficult to get further information because of the risk of reprisal, but there is not enough information to progress with a formal investigation process.'*

The PID coordinator later contacted us and advised that he had referred the matter to the ICAC. The reporter had been relocated to another part of the authority, an investigation had been conducted into bullying and harassment in the division, and a senior manager had been issued a warning for his conduct.

The fear of reprisal is a genuine concern. During the year, the Local Government Professionals Association (LGPA) consulted us when they were developing their discussion paper 'Conduct complaints and NSW local government'.<sup>3</sup> In response to the LGPA's survey of 55 general managers and senior staff across the state, 82% of respondents believed that making a PID made them vulnerable to reprisal action – with rural and regional and former reporters the most concerned (at 84% respectively). Additionally, 53% of respondents believed the PID Act provides weak confidentiality protections.

Keeping confidential the fact that a PID has been made was seen as the best strategy to provide the reporter with protection from reprisals. In some cases, it is possible not to identify that an issue arose from a report – for example, by conducting an audit of a whole area. PID practitioners noted though that in most cases this was simply not possible, not least because the reporter had already discussed their concerns with colleagues or local management.

PID practitioners were also concerned about the trend towards procedural fairness obligations requiring that an increased amount of information be provided to the subjects of any allegations, without consideration being given to how the disclosure of sensitive information compromises reporters. A recent case in the Queensland Supreme Court held that a breach of natural justice had occurred because the person the subject of investigation had not been given access to all the information and documents relied on by the investigations/clinical reviewers/decision-maker, including unredacted copies of all witness statements.<sup>4</sup> One public authority now does not identify that a PID was made in an investigation report and treats any information from the reporter the same as any other witness statement.

An inability to give any meaningful undertaking about confidentiality is likely to have a significant impact on reporters coming forward to raise concerns and witnesses being prepared to provide full and frank information to investigators. The PID Act specifically provides that procedural fairness is an exception to confidentiality obligations. A requirement that a decision-maker/investigator provide the degree of disclosure called for in the Queensland decision could have the effect of sterilising the confidentiality safeguards provided to reporters.<sup>5</sup> Investigators would no longer be in a position to give confidentiality undertakings, other than in very limited circumstances.

3. J Schubert 2017, *Conduct complaints and NSW local government*, Local Government Professionals Association.

4. *Vega Vega v Hoyle* [2015] QSC 111.

5. NSW Ombudsman 2016, *Administrative law: Implications of recent decisions for investigators*.

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### **Providing advice 13: Disclosing the reporter's identity during legal proceedings... is it a fait accompli?**

A PID practitioner was conducting a review into how a PID had been handled by a public authority. During legal proceedings dealing with workplace performance allegations against a subject officer that had come to light during a PID investigation, the authority had provided documents that identified the reporter in response to a subpoena. The practitioner wanted to know whether there were any legal grounds on which the authority could have refused to provide these documents.

We confirmed that s 22 of the PID Act is not a statutory ground to resist the production of PID-related records when included in the scope of a subpoena. However, the public authority could still object and apply to have the summons set aside as a matter of public interest. The relevant judicial officer or adjudicator would then make a decision about whether full or de-identified access to the records identifying the reporter should be granted.

We also discussed that, even if the authority was required to provide the information, it appeared as though they had failed to notify the reporter that they were disclosing their identity and provide appropriate support to them during the proceedings.

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'PID practitioners noted that the reprisal criminal offence provision has rarely been used and there have been no successful criminal prosecutions under the PID Act. The nature of reprisal means it is difficult to gather evidence to substantiate any allegations of detrimental action being taken for making a PID. The provisions pre-suppose that making a PID is a discrete occurrence – but there are usually other factors that may have led to such action occurring, many of which may have occurred/existed before the PID was made.

In many cases it may not be appropriate to formally investigate allegations of reprisal. If there is an existing and extensive history of conflict or dissatisfaction in the workplace which existed before the report was made, it is unlikely that an investigation will be able to establish that the detrimental action was motivated by revenge or retribution for making the report. If the subject officer or colleagues are not dismissed after any investigation, the working relationship between the parties may become so strained as to be untenable. In such cases it may be better for managers to concentrate on taking action to stop any further detrimental action, and try to repair the existing relationship between the two parties and resolve the issues they have.

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### **Providing advice 14: Moving forward... managing fractured work relationships in a climate of ongoing fear of reprisal**

We were contacted by a public official who had made a PID about misconduct by a senior colleague which had been investigated by the authority. He had a history of conflict with the manager in his workplace and this, along with making the disclosure, led to significant

*'Managing allegations of retribution.'*

*'No successful prosecutions for reprisals.'*

*'Misuse of the PID Act where internal reporters are using it to act out grievance type matters. In these circumstances the internal reporter usually believes that wrongdoing has occurred, but when the matter is reviewed we find that their perceptions have been skewed by a dysfunctional relationship with the subject of their allegations (eg I don't like what they're doing, it must be corrupt).'*

*'Managing reports from repeat complainants, including those who raise multiple issues (allegations or corrupt conduct, grievances etc).'*

stress requiring him to take leave from work. He discussed with us how his disclosure had led to negative changes in his working relationship with other staff, and how they actively ignored and ostracised him. This made his work untenable and required him to be transferred to another location. He told us that staff at the new location also began to ostracise him which disadvantaged him in the workplace, and that he suspected his family members were being subjected to a range of adverse effects as a result of his disclosure.

In this situation, proving that the action taken by the others was in reprisal for him making the PID was a complex issue. It was likely that there were a range of factors leading to his treatment, including the issues that he had raised before and the consequences of his report. We considered that it was unlikely that we would look at this matter, as it would be difficult to gain evidence that – for example – showed ostracism. Any investigation we conducted would be unlikely to fix his ongoing working relationships and could actually make things worse. We advised him the best course of action was to pursue these issues with the public authority.

## 1.5. Managing complex PIDs

The greatest difficulty for public authorities in effectively implementing the PID Act often lies with managing the people and workplaces involved, as opposed to dealing with the substantive matter. 'Complex PIDs' include matters where the conduct of the reporter may be questionable – for example, where they are involved in ongoing workplace conduct, are underperforming, or are not cooperating with an investigation process. The reporter may prolong a matter by questioning the outcomes of any investigation, or an investigating authority may become involved.

PID practitioners discussed the problems created by:

- Staff attempting to gain the protections of the PID Act for making reports about issues not covered by the Act, such as:
  - staff involved in an ongoing workplace conflict trying to use the Act as a shield or weapon in that conflict
  - underperforming staff making disclosures either to avoid performance management or to harm the reputation of a manager seen as trying to take such action against them
  - staff making a PID in response to a notice to show cause as to why disciplinary action should not be taken against them
  - unhappy staff trying to obtain the protection of the Act for lodging a grievance.
- Reporters failing/refusing to properly cooperate with the investigation into the allegations in their report – for example, by withholding information or providing selected (and therefore misleading) information.

- Staff who are told that they are protected by the Act – when they have made a PID that appears to meet the ‘honest belief on reasonable grounds’ criterion in the Act – but on investigation it is found that the information provided was misleading to the extent that the reporter could not have had an honest belief in the matters alleged.
- Staff who disagree with the outcome of an investigation into their report and then complain that their allegations were not dealt with competently, the investigator or decision-maker had a conflict of interests, or not all witnesses were interviewed.
- Staff who are dissatisfied with the public authority’s response to their report and then continually make further reports about largely the same issue, escalating from the public authority to the Minister and/or an investigating authority.

*‘PID reporters involved in wrongdoing/difficult conduct – making PIDs a complex process – the challenge of protecting the organisation from the risk of reprisal allegations in these circumstances when taking management action.’*

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#### **Providing advice 15: Protections for self-incrimination**

An anonymous caller contacted us to talk about making a PID. His ‘hypothetical’ allegations were about senior public officials engaging in corrupt conduct. He wanted to know about the protections provided to reporters under the PID Act if the investigation identified that the reporter had also participated in the wrongdoing.

We explained that the protections in the PID Act related to making a disclosure and were not relevant to the reporter’s previous conduct. We discussed how any investigation should ensure that procedural fairness is provided to a reporter who had also engaged in the wrongdoing, and that any mitigating factors – such as the fact that the person had come forward to raise the issue – could be considered at that time. We referred to our guideline D3 ‘Internal reporters involved in wrongdoing’, which talks about how discretion can be applied. Any action taken would depend on the circumstances of the matter.

He asked whether he could make allegations against others without providing information about himself, and we confirmed that this option was open to him. We encouraged him to discuss the matter with the ICAC as the allegations concerned serious corrupt conduct.

*‘The difficulties when reporters won’t let go of an issue, there is a workers’ compensation claim and they refuse to return to the workplace. That sometimes it will be impossible to restore that relationship.’*

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#### **Providing advice 16: PID used by reporter to deflect the heat from work performance investigation**

A PID coordinator at a council had received multiple allegations of wrongdoing from a staff member. Some of the allegations had been assessed as PIDs, but others were being dealt with as grievances. Investigations into these matters were underway. Separate to these investigations, council had engaged an external provider to investigate concerns about the reporter’s workplace performance. During an interview, the reporter told the external investigator that they could not answer particular questions because they were related to the reporter’s PIDs.

The coordinator contacted us to ask whether it was appropriate to obtain the list of the questions the external investigator wanted to ask the reporter so that she could confirm which questions were PID-related and which ones were not. She suspected it was likely they were unrelated to the PID and that the reporter may be using the PID process as a 'shield' to deter the investigation.

We confirmed that work performance and/or disciplinary investigations can proceed at the same time as PID matters. It did not appear to be an issue to ask for the list of questions and give advice to the investigator as to whether they were related to the PID. We also provided our guideline D3 for her reference.

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Strategies discussed to address these problems included:

- When a report is made, assess what is a grievance and what is a PID and deal with them separately – for example, by referring bullying and harassment matters to HR to deal with, while conducting a separate investigation into corrupt conduct allegations. Be clear with the reporter that this will happen and why.
- Ensure managers and supervisors properly document staff performance issues as they arise, and take appropriate action to manage poor performance as they become aware of it.
- If it can reasonably be anticipated that a reporter is likely to complain (particularly externally) about how certain decisions were/are made in relation to the PID or that that they see as detrimentally affecting them, take proactive steps to have those decision-making processes independently investigated/reviewed before such complaints are made.
- Take a strong stance in response to:
  - any failure by a reporter to cooperate with an investigation, possibly including discontinuing an investigation if the reporter's evidence is vital but they continue to refuse to cooperate
  - any attempt to mislead, either by providing selected information that reasonably appears to have been an attempt to mislead the public authority or investigator, or providing misinformation to the authority or investigator
  - the making of multiple further reports about largely the same issues that have already been dealt with.
- Be upfront that making a PID does not stop any ongoing disciplinary process.
- Listen to what the reporter is saying and, if unsure about the outcome they expect, ask them what that might be.
- If the relationship between a reporter and the public authority has irrevocably broken down, explore options for changing employment arrangements with the reporter's consent.



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### **Providing advice 17: A history of poor workplace performance shines a light on an uncooperative PID reporter**

A PID practitioner contacted us with concerns about a reporter who had made a PID that the public authority was currently investigating. His concerns included that the reporter had breached confidentiality by talking about the PID with another officer, and lack of cooperation with the investigation by not returning phone calls. As a result, the investigation had little detail to go on. It had also come to light that the reporter was subject to serious workplace performance breaches and their employment was about to be terminated.

The practitioner wanted to clarify whether adverse action could be taken against the reporter for conduct unrelated to their PID. We advised that it could be and recommended that the authority:

- ensure the reasons for doing so were documented
  - ensure the action taken is commensurate with action that would be taken against a non-reporter in the same circumstances
  - ensure that the person making the decision about the reporter's employment was independent from the PID and investigation process
  - talk to the reporter about the fact that these processes had been kept separate to manage any perceptions of reprisal
  - refer the reporter to their own responsibilities under the internal reporting policy or code of conduct to maintain confidentiality and cooperate with an investigation.
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Although it is reasonable to provide formal written correspondence to reporters, we would also expect that any vulnerability of reporters is taken into account when taking action – and consideration is given to providing a person-centred approach that addresses any risks or individual support needs the reporter may have. In 'Providing advice' 18, giving information to the reporter about their breach of confidentiality via a face-to-face meeting may have given them the opportunity to discuss any concerns about their identity becoming known and, in turn, give the authority information that could help them manage any risk of reprisal.

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### **Providing advice 18: Reporter self-identifies**

A PID coordinator called us to ask how to respond to a reporter who had breached confidentiality by telling a subject officer at a meeting that a PID had been made about them. The reporter was already subject to performance management for unrelated conduct. We advised her that she could caution the reporter that revealing confidential information about an investigation is a breach of the authority's code of conduct. The PID coordinator told us that she preferred not to meet face-to-face with the reporter and would issue a 'warning' letter herself – so as not to identify the reporter further by sending a letter via the HR department.

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*'Supporting staff managing complex PIDs – this is tricky stuff.'*

*'Ensuring that the discloser is kept duly informed of progress and outcome when the matter gets passed between several parties; by way of example, an in house NDO may receive the complaint initially, pass to an external agency such as the ICAC, which then passes it back to a different person in the organisation to deal with who then decides to engage an external investigator. During this time, there may be staff turnover or organisational changes which compound this issue. As such, there's a potential lack of continuity between these parties on their obligations to manage and support the discloser throughout this*

*timeframe and all the while the discloser's stress levels are heightened as they may still be employed in the offending area and don't see any actions being taken. In turn, if the discloser isn't kept informed, they may lose faith in the PID framework, despite many promises and reassurances being made at the outset, and this may disincentivise further reporting and allow the wrongdoing to continue. The discloser then has the option after six months to inform a journalist or MP which may have ramifications for the organisation, including reputational damage, if they aren't mindful of their obligations in this regard.'*

A further issue discussed related to supporting staff managing complex PIDs. This was seen as an important issue for many PID coordinators and disclosure officers. Several people noted the crucial importance of strong support from senior management, particularly the head of the authority. Another strategy seen as important was regular meetings of staff with PID responsibilities to discuss issues, although it was noted that this strategy was only available to larger authorities or those within a cluster. Attending the PID forums run by our office, and being able to seek advice from PID Unit staff, were also seen as providing support for PID practitioners, particularly those from smaller authorities.

PID practitioners also raised the issue of matters being referred between public authorities, or between public authorities and investigating authorities. This can result in a lack of clarity about responsibilities, as well as extended time frames for resolving the substantive issue. As the quote above highlights, this can have a significantly detrimental effect on the reporter.

Some strategies that may mitigate these risks include:

- When referring a PID, provide all available information to the receiving authority to enable them to properly deal with the issue.
- Be clear when referring a PID about which authority effectively owns the disclosure under the PID Act (if more than one authority is aware of or has an interest in the same disclosure), including which authority is responsible for providing support or information updates to the reporter. If more than one authority needs to provide progress reports, make sure this is properly coordinated.
- Adopt a policy requiring that there is regular liaison with reporters to provide them with progress reports and check on their wellbeing. A system could be introduced that automatically notifies the PID coordinator to communicate with the reporter at certain intervals.

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### **Providing advice 19: When taking action means taking no action**

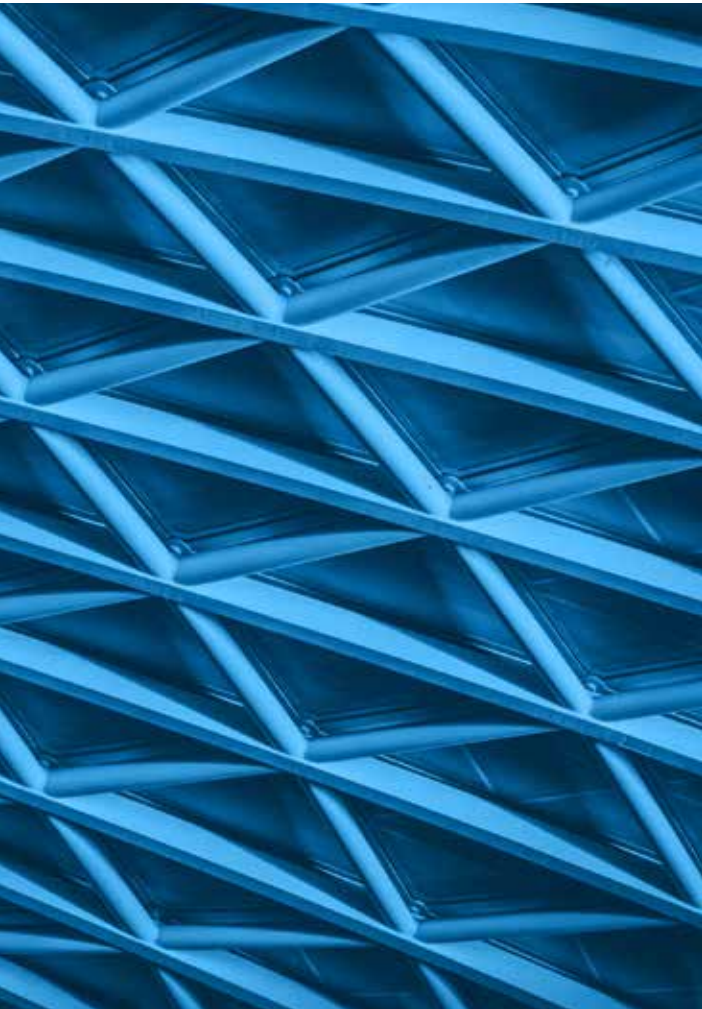
A PID practitioner contacted us to discuss correspondence they had received from a staff member's spouse, which included information that the staff member had made a PID to an investigating authority. The spouse also referred to the reporter hand delivering a copy of the PID addressed to the Lord Mayor of council, but it appeared this letter had been lost. The PID practitioner had contacted the investigating authority, but they would not disclose any information about the matter for operational reasons. The PID practitioner was unsure how to deal with the situation as council had little detail about the PID.

We advised that – as the allegations were being dealt with by the investigating authority – council should wait for further information from the authority before dealing with the substantive issue. However as council was now aware a PID had been made, they were responsible for ensuring any staff members involved did

not suffer any reprisal action. This was particularly relevant as the PID practitioner was concerned that the reporter may have made the PID to avoid performance management action. We discussed that as the reporter was on leave there was no action the practitioner could take at the time, but that this should be revisited if the reporter returns to work. Council might also wish to ask that the letter to the Mayor be resubmitted.

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# Part 2: The PID landscape

This part reports on the 774 PIDs made internally to public authorities and externally to investigating authorities over the year, and how this compares to other jurisdictions.

## 2.1. PIDs reported by public authorities

Since 1 January 2012, the PID Act has required public authorities to report certain statistical information about their activities under the Act directly to our office every six months (s 6CA), as well as in their own annual report (s 31). To facilitate the secure provision of these statistical reports to our office, we developed the PID online reporting tool. We use the information provided by authorities to inform and appropriately target our future awareness and auditing activities.

Table 2 shows the number of statistical reports provided to our office for the two relevant six monthly periods, as at 8 November 2017. PID practitioners in all public authorities were emailed before the due date, to remind them of their reporting obligation. It is therefore disappointing that 25% of identified public authorities failed to provide a report to our office in the most recent period.<sup>6</sup> Given our limited resources this year, we were unable to follow up with individual public authorities about their non-compliance as we usually would. In the next financial year, we will be conducting an audit of all public authorities that have repeatedly failed to meet their statutory reporting requirement.

**Table 2.** Statistical reports provided by public authorities to our office

Reporting period	Number of statistical reports provided	Proportion of identified authorities
July–December 2016	361	89%
January–June 2017	305	75%

### Explanation on counting

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

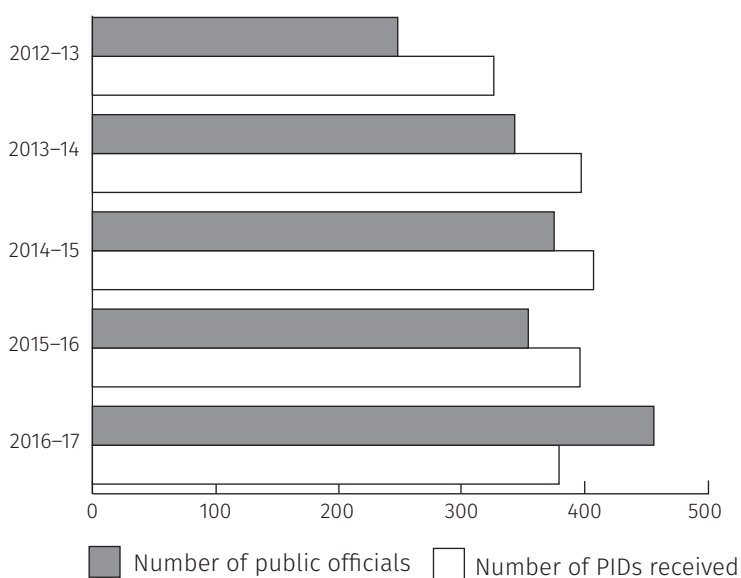
We told public authorities that the number they reported to us should refer to PIDs the authority took responsibility for handling, regardless of whether they were made directly to the authority or referred by another public or investigating authority under s 25 or s 26 of the PID Act. They should not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

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

6. Given the broad scope of the definition of a public authority, it is difficult to comprehensively identify the exact number of authorities with responsibilities under the PID Act.

Figure 1 shows the variation in the number of public officials who made PIDs directly to public authorities and the number of PIDs received by authorities over time. It shows the number of PIDs received has been declining over the last three financial years. In 2016–17, 24% of public authorities (n = 86) reported receiving 379 PIDs – a 4% decrease from the 396 received in 2015–16.

**Figure 1.** Number of public officials who made PIDs directly to, and number of PIDs received by, public authorities over time



The difference between the number of public officials who made a PID and the number of PIDs received in 2016-17 is largely due to one authority reporting that 121 public officials made one PID. The allegations concerned bullying and harassment and collectively met the threshold of serious maladministration, namely the inappropriate use of systems and processes for the purpose of bullying.

Consistent with previous years, most identified public authorities (76%, n = 280) did not report receiving any PIDs over the year. Universities and state owned corporations were the type of authority most likely to receive PIDs (both 60%, n = 6), followed by state government agencies (47%, n = 44).<sup>7</sup>

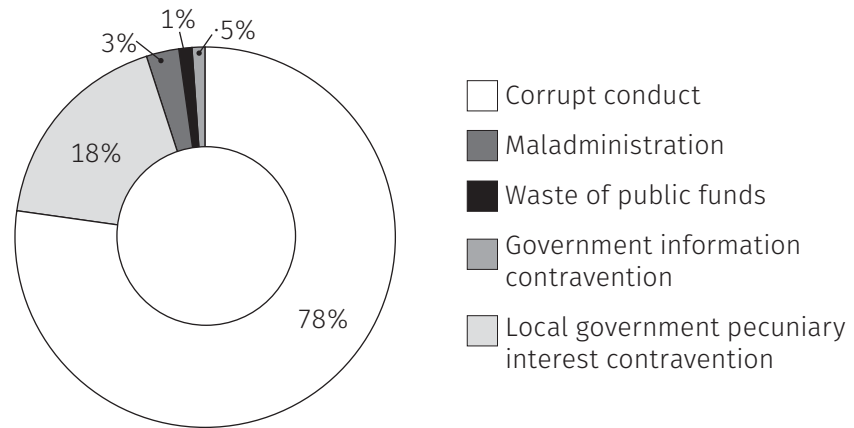
### 2.1.1. Subject matter of the PIDs

If a PID contains multiple allegations that could fit into more than one category of wrongdoing in the PID Act, we 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 about corrupt conduct also contained allegations of maladministration or other categories of wrongdoing.

7. For this analysis, if a public authority has only submitted a report to our office for one six month period, we assumed that they did not receive any PIDs in the period for which we do not have information.

Consistent with previous years, Figure 2 shows that the large majority of PIDs people make to public authorities in 2016–17 continue to primarily allege corrupt conduct (78%, n = 295). This is despite the proportion of PIDs alleging corrupt conduct declining from 88% in 2015–16, and the number of PIDs alleging maladministration (18%, n = 68) or a serious and substantial waste of public funds (3%, n = 11) doubling. Very few PIDs received by authorities allege a government information contravention (1%, n = 3) or a local government pecuniary interest contravention (0.5%, n = 2).

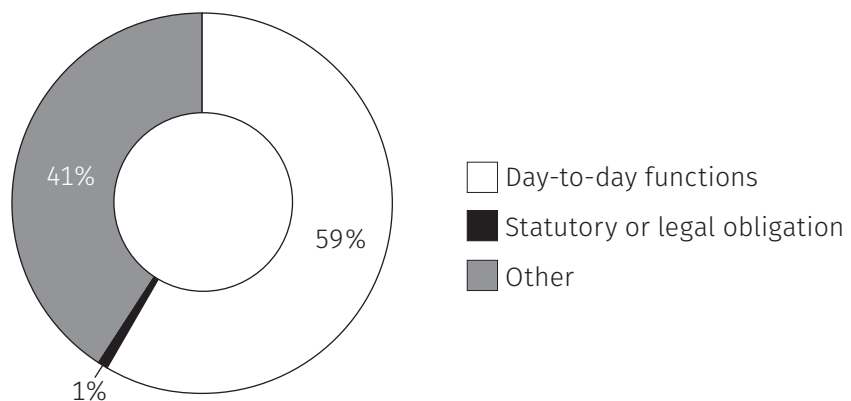
**Figure 2. Primary category of wrongdoing alleged (PIDs received by public authorities in 2016–17)**



### 2.1.2. Role of public officials making PIDs

The PID Act does not distinguish reports made by public officials performing their day-to-day functions (such as managers, internal auditors, corruption prevention staff and investigators) 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. Since 1 January 2014, public authorities have been required to provide our office with information about the role of public officials making PIDs. Figure 3 shows that more than half (59%, n = 222) of all PIDs received by authorities over the year were reportedly made in the performance of a public official’s day-to-day responsibilities.

**Figure 3. Role of public officials making PIDs (PIDs received by public authorities in 2016–17)**



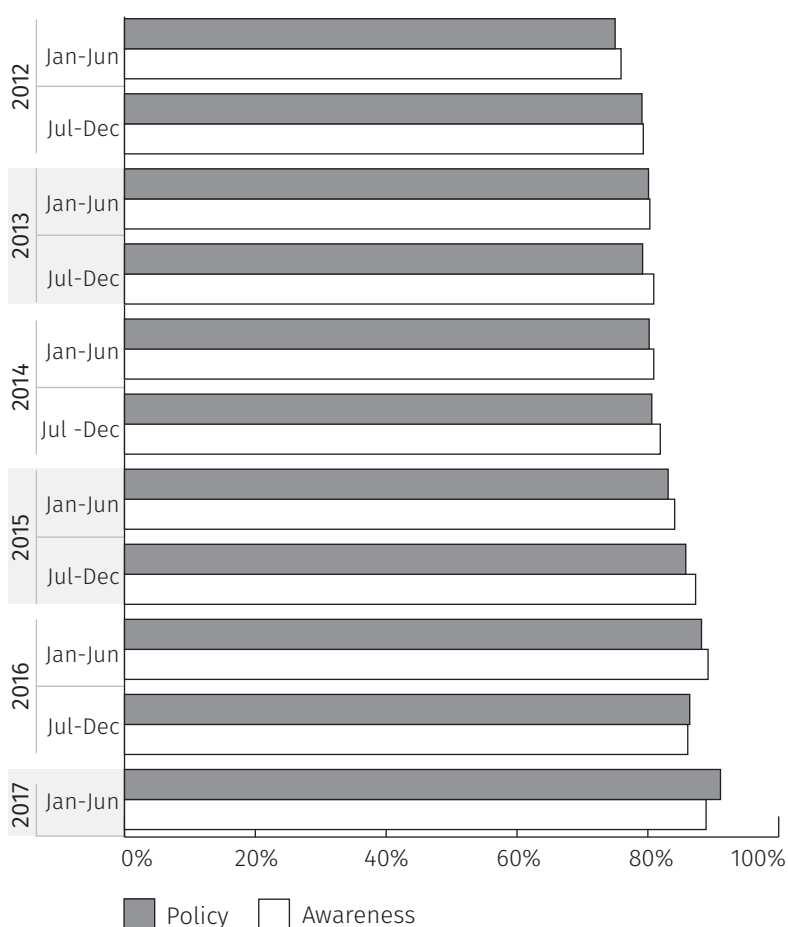


In responding to enquiries from public authorities and clarifying reports provided, we have noted some misinterpretations of these categories – for example, the belief that PIDs referred to or from the ICAC should be included in the ‘statutory or other legal obligation’ category. Many authorities also report all PIDs received as being made by public officials performing their day-to-day functions. The reliability of the information provided about these categories is therefore questionable and we believe there is little value in collecting it.

### 2.1.3. Internal reporting policies

An internal reporting policy is a critical starting point for public authorities to clearly demonstrate their commitment to supporting the reporting of wrongdoing by staff and properly handling such matters. Under s 6D of the PID Act, all authorities must have a policy that provides their procedures for receiving, assessing and dealing with PIDs. The six monthly reports provided to our office by public authorities show there has been an increase in the proportion indicating they have an internal reporting policy – from 75% in the first reporting period (January to June 2012) to 91% in the January to June 2017 period (see Figure 4).

*Figure 4.* Proportion of public authorities that reported having an internal reporting policy and raising staff awareness over time



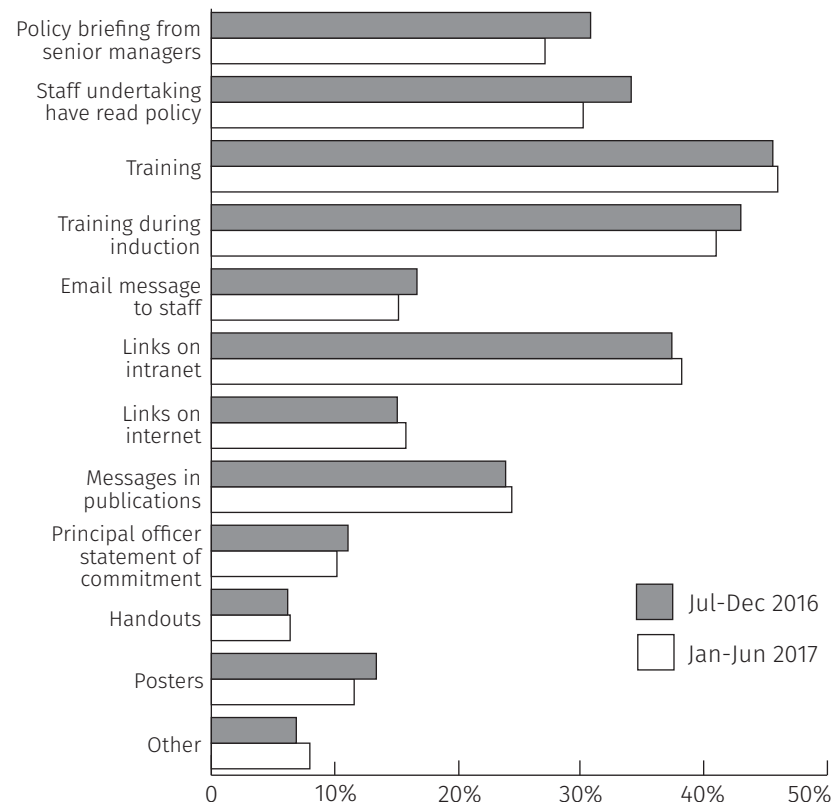
Some public authorities that have not established a reporting policy are entities such as trusts that do not have any staff. Many LALCs also indicate they do not have an internal reporting policy or have not raised staff awareness – 22% and 20% respectively in the January to June 2017 period. We continue to promote our model internal reporting policy designed specifically for LALCs when engaging with them and are pleased that many have reported adopting it.

### 2.1.4. Staff awareness

The heads of public authorities are responsible under s 6E(1)(b) of the PID Act for ensuring their staff are aware of the contents of the authority’s internal reporting policy and the protections provided under the Act. There has been an improvement over time in the proportion of authorities that report the head of the authority has taken action to meet their staff awareness obligations – up from 76% in the January to June 2012 period to 89% most recently (see Figure 4).

Figure 5 shows the range of actions taken by public authorities to raise staff awareness. The majority reported adopting a number of strategies – including training staff, providing information during staff induction programs, and having links to their internal reporting policy on the intranet. These have been the most common strategies over all reporting periods to date. There continues to be a slight increase in the proportion of public authorities that require staff to sign an undertaking that they have read the authority’s policy.

Figure 5. Proportion of public authorities that reported adopting each awareness strategy in 2016–17



## 2.2. PIDs handled by investigating authorities

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

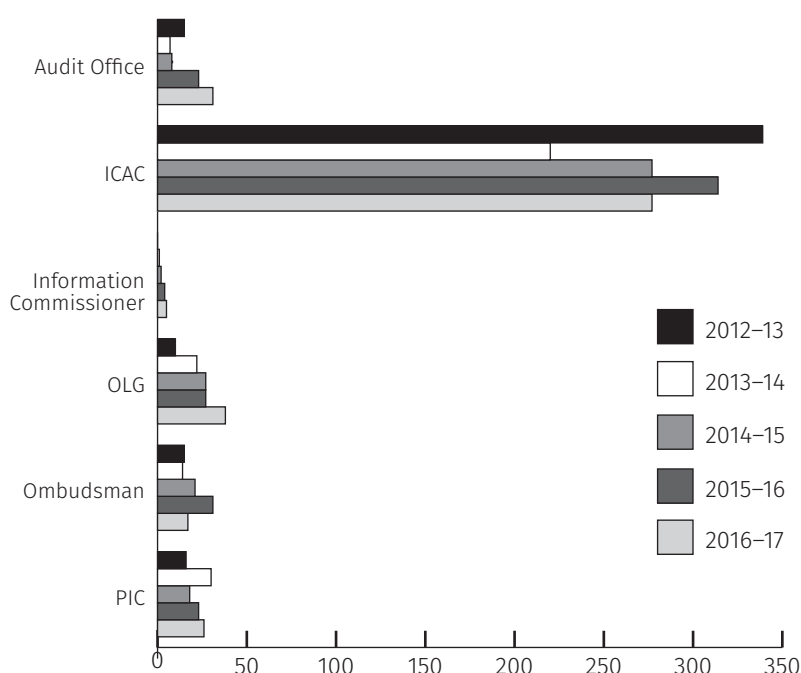
In 2016–17, there were nine investigating authorities under the PID Act:

- Audit Office
- ICAC
- Information Commissioner
- Office of Local Government (OLG)
- Ombudsman
- Police Integrity Commission (PIC)
- Inspector of the ICAC
- Inspector of the NSW Crime Commission
- Inspector of the PIC.

On 30 June 2017, the PIC, Inspector of the NSW Crime Commission and Inspector of the PIC ceased operations. The Law Enforcement Conduct Commission (LECC) and Inspector of the LECC came into operation on 1 July 2017.

Figure 6 shows the number of PIDs received by key investigating authorities over time. The Inspectors of the ICAC, the PIC and the NSW Crime Commission did not receive any PIDs in the reporting period.

**Figure 6.** Number of PIDs received by key investigating authorities over time



In total, investigating authorities received 395 PIDs in 2016–17, a 34% increase on the number of PIDs received in the previous financial year (n = 295). The increase is attributable to the ICAC assessing more s 11 reports from principal officers of authorities as PIDs.<sup>8</sup> Of the 339 PIDs received by the ICAC, 112 were made under a statutory or other legal obligation. The number of PIDs received by the Audit Office doubled (from n = 7 to n = 15), reflecting the increase in the number of PIDs received by public authorities alleging serious and substantial waste. The OLG and the PIC received half the number of PIDs that they did in 2015–16.

## 2.3. PIDs around Australia

There is legislation in all states and territories of Australia to encourage the disclosure of wrongdoing and provide protection to public officials who make PIDs. A direct comparison of the legislation is not possible because it varies in who can make a disclosure, what conduct can be disclosed, how a disclosure can be made, how disclosures are responded to, and how those who make disclosures are managed and protected.

The following is a summary of disclosures in other jurisdictions in 2015–16:

- *Australian Capital Territory*: The Ombudsman is a ‘disclosure officer’ under the *Public Interest Disclosure Act 2012* (ACT) and can also take complaints and review the handling of a PID. Two disclosures were made during the reporting period and referred to the head of the respective directorate for investigation. Four parties made six complaints about the handling of a disclosure and two investigations were undertaken.
- *Commonwealth*: The Commonwealth Ombudsman received 65 approaches from people wishing to make PIDs under the *Public Interest Disclosure Act 2013* (Cth), of which 29 were assessed as PIDs. In total, Commonwealth agencies received 612 PIDs.
- *Northern Territory*: The Commissioner, Information and Public Interest Disclosures handled 66 disclosure files during the reporting period under the *Public Interest Disclosure Act 2008* (NT) – 48 of these were received during the period. Of those matters handled, 38 were assessed as not meeting the criteria to be a PID.
- *Queensland*: The Queensland Ombudsman received seven PIDs under the *Public Interest Disclosure Act 2010* (Qld). Of the 585 PIDs received across the state, 88% alleged corrupt conduct. Almost half of all PIDs were substantiated (47%), with an additional 10% partially substantiated.

8. Principal officers have a duty under s 11 of the ICAC Act to report to the ICAC any matter that the person suspects on reasonable grounds concerns or may concern corrupt conduct.

- *Tasmania*: The Tasmanian Ombudsman received five approaches which might potentially be seen as disclosures under the *Public Interest Disclosures Act 2002* (Tas). Seven determinations were made that disclosures (not necessarily received in the reporting year) were not PIDs.
- *Victoria*: The Independent Broad-based Anti-corruption Commission (IBAC) assessed 653 matters as protected disclosures under the *Protected Disclosure Act 2012* (Vic), more than triple the previous year. This was mostly due to a change in the *Victoria Police Act 2013* (Vic) which determined all complaints made by police about police must be assessed as protected disclosures.
- *Western Australia*: The Public Sector Commission received six PID matters which were actioned under the provisions of the *Public Interest Disclosure Act 2003* (WA). This is comparable to the five PID matters received in 2014–15.





# Part 3: Performing our functions

Our work includes proposing legislative change, handling PIDs and related complaints, auditing public authorities, training public officials, building practitioner capacity, collaborating with other agencies, and providing advice.

### 3.1. Proposing legislative change

In 2011, significant reforms were made to the PID scheme. This included giving our office lead responsibility for overseeing its implementation by the public sector, and monitoring how well public authorities complied with their obligations to support staff who reported their concerns.

The PID Act provides that, after the reforms have been in place for five years, a statutory review should be conducted to:

- determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for meeting those objectives
- consider the effectiveness of the amendments that came into operation in 2011
- consider whether the structures in place to support the operation of the scheme remain appropriate
- consider the need for further review of the Act.

The Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission (JPC) started this review in June 2016.

To assist the committee's deliberations, we prepared a background paper identifying some of the major challenges faced by public officials who want to report wrongdoing and by public authorities in implementing the PID Act. We based this on a review of the PID-related complaints and enquiries we had received, the findings and recommendations of our audits of public authorities, the views of public authorities (including at two consultation forums we convened focusing on the review of the legislation), a comparison of PID-related legislation across Australia and the experience of similar oversight agencies, and a review of relevant research.

Our paper discussed four key issues to be considered in strengthening the operation of the current regime:

- Simplifying the Act – many of the provisions are unduly complex and technical, and create barriers to the Act achieving its objective to encourage and facilitate disclosures of public interest wrongdoing and provide broad protection to those who make them.
- Encouraging prevention – the primary focus of the current legislation is on providing legal mechanisms to remedy reprisal, rather than on preventing adverse outcomes by ensuring authorities have strong, proactive systems in place.
- Reducing administrative burdens – the legislation should not place unnecessary burdens on public authorities, and any amendments should be practical and easily implemented.
- Ensuring accountability – it is important that information is collected about the use of the PID Act, implementation is monitored, and there is coordination between investigating and other key authorities.



We also provided a formal submission to the review, where we set out five key issues that we believed would benefit from legislative reform. Our aim was to identify necessary and sensible recommendations that were likely to enjoy wide support across the NSW public sector and the community. These were to:

- Remove barriers around who can receive a report – by ensuring that public authorities nominate an adequate number of officers to receive PIDs, and that public officials receive protection if they unintentionally make a PID to the incorrect public authority or officer.
- Focus on proactive prevention and management, rather than relying on legal protections after the fact – by requiring public authorities to take reasonable steps to prevent reprisals and appropriate action to address any reprisals if they occur, including notifying our office of any allegations of reprisal.
- Manage the perceptions of reporters – by explicitly providing that the Act does not prevent reasonable management action from being taken against reporters (provided it is not taken in reprisal), and specifically excluding disclosures based solely or substantially on an individual employment-related grievance.
- Require public authorities to provide more useful information to evaluate how the system is working – including about PIDs received and purported PIDs – while streamlining the reporting requirements.
- Ensure protection for public officials who report serious wrongdoing in the course of their day-to-day functions – while removing administrative burdens for public authorities in handling these matters.

We note that the JPC tabled its report on the review of the PID Act on 23 October 2017. We welcome the 38 recommendations made to improve the PID regime and look forward to the NSW Government's response to the report.

## 3.2. Handling complaints

Of the 33 complaints that we received this year relating to PIDs:

- Fifteen were assessed as meeting the criteria to be a PID – we are formally investigating three, made enquiries with the relevant public authority about seven, and five are being handled by another, more appropriate, investigating authority.
- Seven complaints were about the handling of a PID by a public authority – we made enquiries into three of these matters with the relevant authority about the action they had taken, but took no action in the others as we were of the view that the original complaint did not meet the criteria to be a PID. Schedule 1 of the *Ombudsman Act 1974* excludes our office from looking at employment-related matters unless the conduct arises from the making of a PID.
- Eleven complaints were purported PIDs – that is, the person making the complaint claimed it was a PID, but we assessed it as not meeting at least one of the mandatory criteria set out in the PID Act.

**Case study 1: PIDs stem the flow of water regulation breaches**

We received a number of PIDs as well as a complaint from a member of the public alleging that the Department of Primary Industries Water (DPI Water) was failing to take appropriate action on breaches of water legislation. The allegations were about matters such as illegal dam construction, taking water without a licence, and water theft through meter tampering.

Given the seriousness of the allegations, we started a formal investigation into DPI Water and Water NSW. We are in the process of gathering and analysing evidence. This has included conducting formal hearings using our Royal Commission powers and requiring the production of documents from a range of sources. A progress report was tabled in Parliament on 15 November 2017.

**Case study 2: Providing the right advice encourages the right response**

A reporter made a disclosure to the head of their public authority about inconsistencies in the timesheet records of certain staff members and concerns that line managers were not taking appropriate action. The reporter also complained about experiencing bullying and being subject to performance management. Some months later, the reporter complained to our office that the authority had not assessed her report as a PID and that a misconduct investigation started against her constituted detrimental action in reprisal.

In response to our inquiries, the public authority stated that they did not treat the report to the chief executive as a PID because the PID coordinator did not consider that the information provided was sufficient to show or tend to show wrongdoing. Also, the reporter did not provide relevant supporting documentation when asked. The public authority nevertheless initiated an internal review of the relevant timesheet records.

In our view, the reporter's disclosure to the chief executive appeared to meet the threshold of a PID. Although the reporter could not provide the relevant supporting timesheet records, she described her concerns and produced a file note which detailed the discrepancies she reportedly witnessed after carrying out three audits for her manager. As the information disclosed appeared to show or tended to show possible corrupt conduct or serious maladministration, we suggested that the public authority re-assess the disclosure and provide the reporter with a formal acknowledgement in this regard.

A senior manager had also been critical of the reporter for escalating her concerns to the chief executive and said her allegations appeared to be vexatious. We noted that this was not appropriate. The PID Act provides that a public official can make PIDs in certain ways, including to the principal officer or head of an authority. We suggested that the manager be counselled about the propriety of her statement.

We were unable to find sufficient evidence that the authority had taken reprisal action. The misconduct allegations appeared to relate to separate matters. Importantly, before the reporter's disclosure to the chief executive, an informal performance management process involving coaching, support and training was already underway to address what the reporter's line managers perceived to be an escalating conflict within the team. We were concerned however that one of the subjects of the reporter's allegations was involved in preparing an investigation report that made adverse findings about the reporter's conduct. We suggested that the report did not have the requisite independence and should be disregarded.

After discussions with the public authority, it accepted all of our suggestions. The public authority apologised to the reporter for the errors that occurred and the distress caused, and took steps to ensure that the errors would not be repeated. The findings made against the reporter based on the investigation report that was not prepared independently were also removed from her record of employment.

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The implementation phases of the *Government Sector Employment Act 2013* have led to a number of restructures at public authorities. One theme in the PID complaints that we received this year has been claims of reprisal made in the context of these restructures, particularly at the Senior Executive Service (SES) level. Senior executives, who had made serious reports of wrongdoing that had been assessed as meeting the criteria to be PIDs, had their positions either made redundant or were otherwise adversely affected by restructures. Those senior executives complained to us that the restructures were a form of reprisal for them making the PIDs.

Although we were not able to find evidence that the changes to their roles were reprisals as defined in the PID Act, in all of the cases that we dealt with it was clear that the public authority had not considered whether these changes could be perceived as reprisals. In case study 3, there was also a lack of documentation to explain the changes to the reporter's role. It is critical that an authority can prove all actions that affect a reporter were taken for a legitimate reason and that decisions are documented.

### **Case study 3: Watchful eyes... Monitoring an external investigation**

A senior executive made a PID internally and to the ICAC about corruption by another senior executive, including failure to declare a conflict of interests when engaging a company. The allegations were investigated internally and – although the public authority found there was no evidence of corruption – it was clear that a conflict of interests had not been declared when it should have been.

The reporter said that she subsequently suffered reprisals – in that decisions were made to downgrade her role from SES and make structural changes so that she would have no direct reports. She would also no longer report directly to the Secretary, but to the Deputy Secretary who had been implicated in the allegations.

The reporter made the reprisal allegations internally, and the public authority appointed an external investigator to examine them and report back to the Secretary. The reporter objected to the involvement of the Secretary because the allegations of reprisal had included concerns about their conduct. To address these issues, we decided to monitor the investigation – with the external investigator reporting directly to our office during the investigation.

The investigator did not find any evidence of reprisal as defined in the PID Act. However, it was not surprising that the reporter had perceived that her PID was related to the action to change her role – given the timing of the restructure and the involvement of people implicated in circumstances leading to her allegations. There were also some procedural irregularities in the way that the changes were made to the role and a lack of sufficient documentation to explain why the reporter’s role had been downgraded.

After receiving some external advice, the public authority decided not to proceed with the downgrading of the role and she continued to have a reporting line to the Secretary.

#### **Case study 4: *Tell me why... the importance of good internal communication***

A senior public official made a PID alleging that false information had been presented to Cabinet by senior executives within the public authority, including the Deputy Secretary. The public authority accepted the report as a PID and investigated the allegations. No wrongdoing was found. Instead, the PID arose due to a professional disagreement about the way technical information should have been presented in a document.

The reporter contacted us approximately one year after making the PID, as he had been advised that his role was being made redundant in a restructure of responsibilities. He said that this was in reprisal for him making the PID. He also claimed that other action taken by the public authority could also be construed as detrimental action. For example:

- He was not fairly considered for other roles after the advice about the redundancy – including being advised that the applications for one role had already closed, despite applying before the advertised closure date.
- Allegations were made against him about misconduct at a work party and he was threatened with an investigation into the allegations.
- His position was terminated before the advised date.

We made enquiries with the public authority about how it had handled and investigated the PID, including whether the risk of reprisal to the reporter had been assessed. The authority gave us a copy of the risk assessment it had completed upon receiving the PID, and demonstrated that the PID coordinator had met at regular intervals with the reporter to discuss any issues as they arose.

The authority advised that the redundancy was part of the Senior Executive Implementation process, a process that affected a number of executives across the public sector. The authority used a 'calibration process' to rank employees and decide who would be successful in obtaining a new position within the authority. This process was done by senior executives who did not have any knowledge of the PID. A number of other individuals were also affected by the restructure, lost their jobs and were unsuccessful in obtaining a new position. It did not appear to us that reprisal action had occurred in this case.

#### **Case study 5: *When organisational reform leads to perceptions of reprisals***

A reporter made a report of maladministration internally, which was treated by the council as a PID. The allegations concerned his immediate manager.

The reporter said to us that he subsequently suffered reprisals at council. There was a restructure of the unit in which the reporter had worked for many years and his position was made redundant. After receiving advice of the redundancy, the reporter applied for a role which was slightly more senior than the role that he had previously been in. However he was not successful in gaining that role. He also applied for several other positions which were lower graded positions but was again not successful.

We wrote to council asking a number of questions about the restructure and the reasons that the reporter was not successful in attaining a new position at council. Council advised that 12 positions were deleted in the restructure. The decision to restructure was made by the incoming chief financial officer who spent six months reviewing, monitoring and observing the unit and its functions and performance. Council also provided us with documents showing the selection process for the roles that the reporter was not successful in obtaining.

After our review, we were satisfied that there was no evidence of reprisal.

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Case studies 3–5 illustrate that individuals who have made PIDs may feel vulnerable in their workplace after they have made a PID, and may come to see changes in their work environment as motivated by reprisal. Authorities should consider these perceptions when they are making decisions that may adversely affect an individual's employment, and what steps they could take to mitigate these decisions being perceived as reprisals.

Case study 6, in which the reporter construed action taken many years later by a different authority to where he had made the report, demonstrates the enduring nature of such perceptions.

**Case study 6: Past PIDs create current concerns**

We received a complaint from an employee of a council. He said that he suffered detrimental action at council as a result of PIDs that he made in 2011 and 2012 to a different state government agency that was not related to the council. He also claimed that he made the same PID to the Premier. The detrimental action that he complained about included his perception that his personnel file at council may have restrictions on it to limit his employment and that council failed to respond adequately to his grievances. He said that these were reprisals for making the PIDs, although he did not explain the connection between his reports and the action taken against him.

The reporter did not provide any evidence to us that his reports to the other government agency and the Premier were assessed as meeting the criteria to be PIDs. As the Premier is not able to accept a PID from a public official in NSW – except in the limited circumstances where a PID can be made to a Member of Parliament or journalist – this report could not be a PID.

We decided to decline to take action on his complaint. Leaving aside the issue of whether he had made a PID – which was uncertain on the information that he had provided – there was no evidence that he had suffered detrimental action, as defined in s 20 of the PID Act, in his employment at council. Also, even if he had suffered a detriment, it was doubtful that this could be related to the PIDs that he said he made in his previous employment as there was no evidence that council staff were aware of this occurring.

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### 3.3. Auditing public authorities

We have a statutory function to audit the exercise of functions under and compliance with the PID Act by public authorities. In 2016–17 we conducted two audits on the handling of PIDs within public authorities. These involved reviewing 21 files – 10 PIDs and 11 internal reports – and making 17 recommendations to public authorities for improving their internal systems.

Some of the recommendations we made to authorities during the year included that they should:

- Conduct a written assessment of all reports of wrongdoing made by staff or contractors, that prima facie meet the other requirements set out in the PID Act, to determine whether the report should be treated as a PID.
- Review their ‘protected disclosure’ reporting policy and make certain changes, including updating terminology.
- Review their assessment of certain matters and determine if they should have been treated as PIDs, and make any necessary amendments to their PID reports to our office for the relevant period.

- Consider whether the method currently used for recording PIDs allows the authority to accurately and easily report on the PIDs that they receive.
- Advise our office if they took steps to investigate allegations of reprisal made by a reporter and what the outcome was if this was investigated.
- No longer count PIDs that are made to the ICAC and are referred to the public authority only under the ICAC Act, rather than under s 25 of the PID Act, as PIDs received by the authority.
- Conduct a written risk assessment of each matter received that meets the criteria to be a PID.
- Ensure that a written acknowledgment is sent to each PID reporter, along with a copy of the internal reporting policy.
- Advise our office if the authority's internal audit committee has conducted any audits of record keeping.
- Provide our office with information about the security measures that are currently in place to prevent unauthorised access to PID files.
- Arrange for PID training to be provided to records staff and frontline administration staff that may receive PIDs so that they can correctly identify if matters need to be brought to the attention of the PID coordinator.

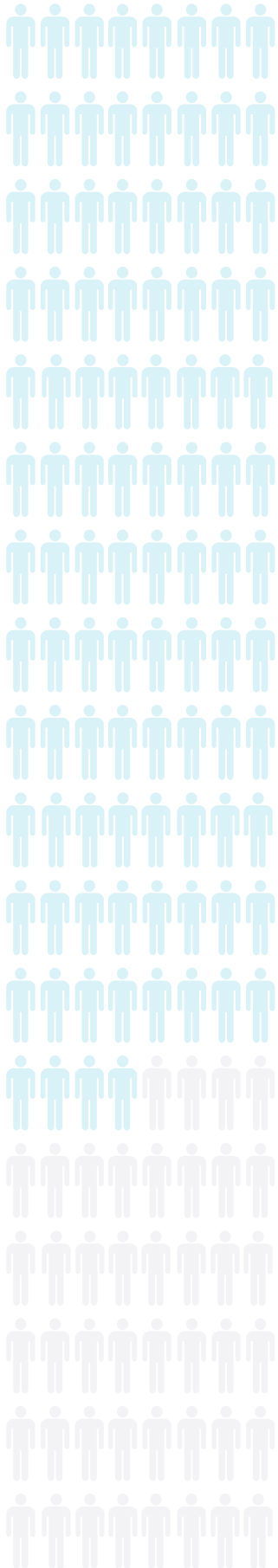
### 3.4. Training public officials

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

We provide free training sessions to groups of ten or more. These training sessions help public authorities to promote staff awareness of the importance of PIDs, encourage a positive reporting environment, comply with the requirements of the PID Act, and manage PIDs effectively. We provide one or both of the following training sessions, free of charge, at venues nominated by authorities:

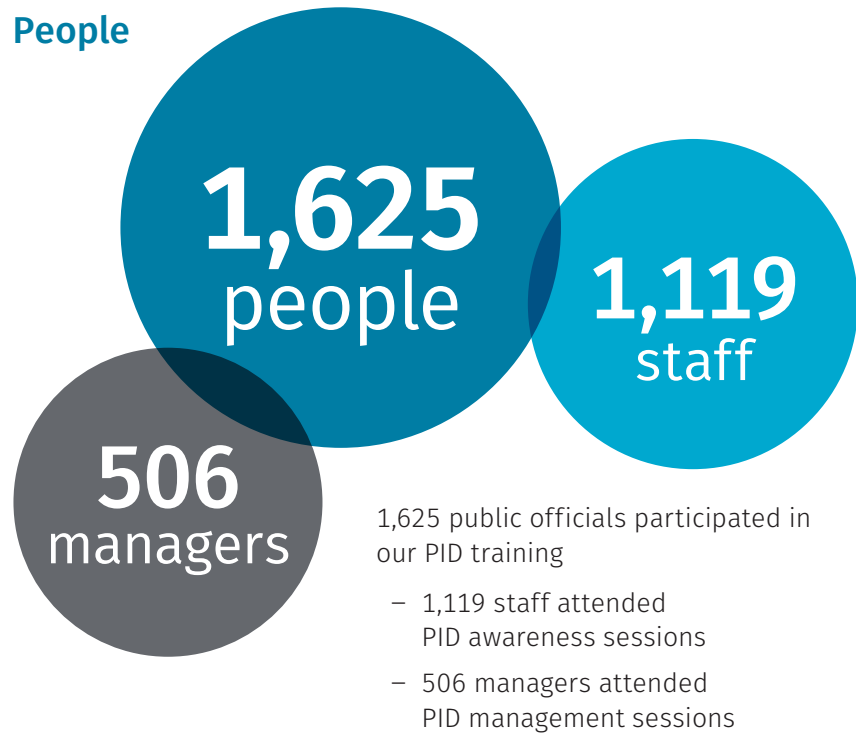
- PID general awareness information sessions – one hour session suitable for all staff.
- PID management training – three hour session suitable for senior staff, supervisors and NDOs.

We also offer open workshops at various locations if authorities have a small number of staff who need training.

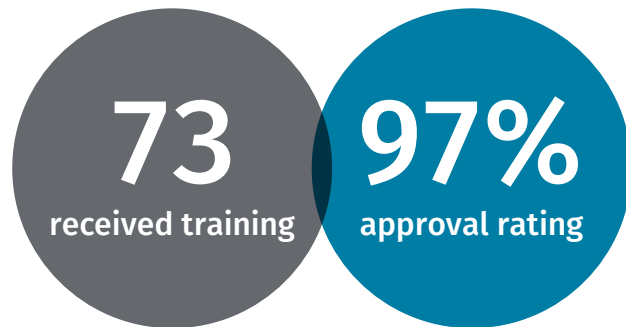


### 3.4.1. Snapshot of PID training in 2016–17

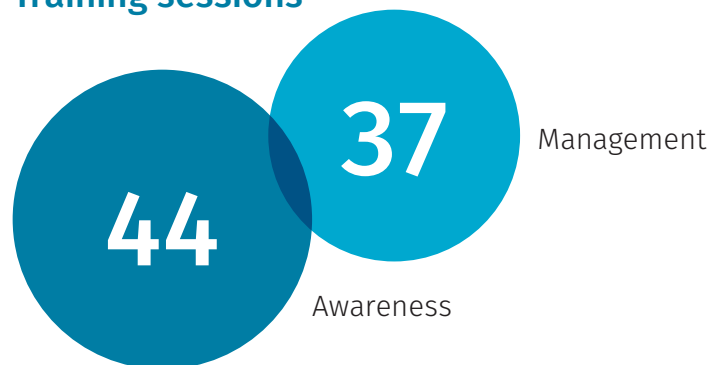
#### People



#### Public authorities

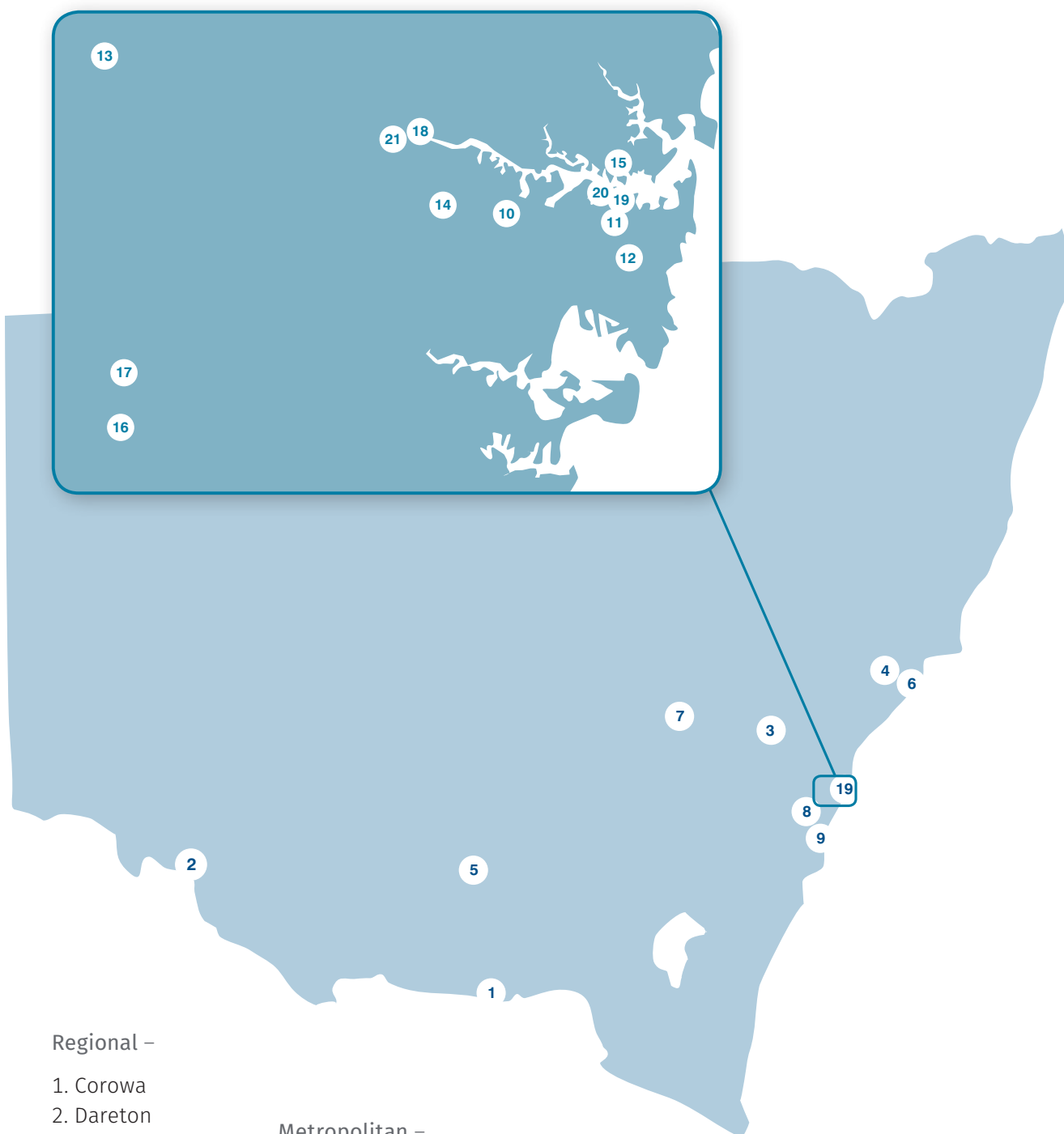


#### Training sessions





## Locations



### Regional –

- 1. Corowa
- 2. Dareton
- 3. Lithgow
- 4. Maitland
- 5. Narrandera
- 6. Newcastle
- 7. Orange
- 8. Picton
- 9. Wollongong

### Metropolitan –

- 10. Burwood
- 11. Chippendale
- 12. Kensington
- 13. Kingswood
- 14. Lidcombe
- 15. Milsons Point
- 16. Narellan
- 17. Oran Park
- 18. Parramatta
- 19. Sydney CBD
- 20. The Rocks
- 21. Westmead

*'A sincere thank you for the passion and commitment in the way you deliver the PID training. You are a consummate professional and an asset to the Ombudsman's office. One may think they are familiar with the legislation but there is always more to learn such as PID (online reporting).'*

### **3.4.2. Evaluating our training**

Our commitment to ensuring our PID training meets every participant's expectations means we value their feedback about how we are performing. This is why we encourage every training participant to complete an evaluation form. We take all comments seriously and use this information to identify ways in which we can improve or confirm that our training is meeting the needs of public authorities.

Most of the 1,625 public officials who attended PID training sessions completed an evaluation form. Participants were asked to comment on the session, the presenter, the content, and their confidence in implementing what they have learnt back in their workplace. Overall their satisfaction rating is 97% and this feedback has reinforced that our training is useful and relevant.

## **3.5. Building capacity**

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

### **3.5.1. Holding PID practitioner forums**

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

We held two PID practitioner forums during the year:

- October 2016: Let's talk about investigations! – Ombudsman staff addressed the audience on the use of external investigators, procedural fairness and reprisals. A guest speaker from the Department of Education spoke about their investigation processes.
- April 2017: Hearing from you – we invited PID practitioners to discuss common problems they face in their role. Before the forum we asked PID practitioners to help us identify the top three problems or roadblocks, which helped set the agenda.

These forums were rated as good or excellent by all attendees. Feedback has also helped us to identify areas of interest for PID practitioners, which we use to inform future forums.

### 3.5.2. Attending conferences and events

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

We were also invited to attend and speak at a range of events, including to the:

- Transport cluster executives morning tea
- Ministry of Health's forum for PID practitioners
- Transport for NSW's investigations team meeting
- National Investigations Symposium
- CENTROC (Central NSW Councils) HR group
- Sydney Trains Probity Assurance (Fraud & Corruption) seminar
- Western Australian Anti-Corruption Conference
- Western Australian Corruption and Crime Commission staff
- Governance in Local Government Intensive course.

*'Have to say one of the best "forum" types of presentation. I attend others but this forum provides an excellent template for others to follow.'*

*'Very useful for me. Good to learn about the issues being experienced by other agencies and to be able to discuss them.'*

### 3.5.3. Distributing the PID e-News

We inform people about our work through a regular electronic newsletter. This is an effective and efficient way to disseminate information to the community of PID practitioners and other interested stakeholders. Past issues can be accessed from our website.

During 2016–17, we distributed four issues of the PID eNews to 1,001 subscribers. The articles in the PID e-News covered topics such as:

- encouraging authorities to participate in the *Whistling While They Work 2* project and presenting the results of the first phase of the research
- the themes from our audit of allegations of reprisal
- effective record keeping about PIDs
- updates on the review of the PID Act
- when it is appropriate to revisit the assessment of a PID
- developing appropriate terms of reference for investigations
- summaries of our PID practitioner forums for those unable to attend.

## 3.6. Working with others

Collaborating with stakeholders is an integral part of our work. During the year, we worked with other organisations on a number of projects.

### 3.6.1. PID Steering Committee

The PID 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. We provide the steering committee with secretariat support.

The statutory functions of the steering committee are to:

- advise the Premier on how well the PID Act is operating and recommend changes
- advise the Premier on reports from our office about our functions under the PID Act
- provide advice to a JPC on its review of the PID Act.

During the reporting year, the steering committee met twice. Matters considered included:

- What is meant by the term ‘public authority’ in the context of the PID Act, in particular the status of LALCs.
- The need for clearer guidance on the circumstances in which a report about bullying and harassment in the workplace should be treated as a PID, as opposed to being addressed through the workplace grievance policy.
- Updates to the committee’s terms of reference, which set out the responsibilities of members and the secretariat.
- The review of the PID Act being undertaken by the JPC, including the submissions made to the review.
- The recommendations in the review of the Commonwealth *Public Interest Disclosures Act 2013* conducted by Philip Moss, the Queensland Ombudsman’s review of the *Public Interest Disclosure Act 2010* (Qld), and the Victorian Parliament IBAC Committee’s report ‘*Improving Victoria’s whistleblowing regime: a review of the Protected Disclosure Act 2012* (Vic)’.
- The development of guidance material by our office to help public authorities assess the risk of reprisal when a PID is made and respond to allegations of reprisal appropriately.
- The approval of the steering committee’s annual report 2015–16. The chairperson submitted the report to the Premier for tabling in each House of Parliament on 10 February 2017.

As required under the PID Act, a separate PID steering committee annual report 2016–17 outlines the activities of the steering committee during the reporting period.

### 3.6.2. Whistling While They Work 2 research project

We have partnered with researchers and 22 other integrity and governance organisations in *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*, led by Griffith University. Spanning Australia and New Zealand, it is the world’s largest research project into whistleblowing to date.

On 8 November 2016, we hosted the launch of the project's first report 'Whistleblowing processes and procedures – An Australian and New Zealand snapshot'. The latest report from the project, 'Strength of organisational whistleblowing processes – Analysis from Australia', launched on 3 May 2017, provides the first benchmarks across 18 industry groups and public sectors. It compared responses from 634 organisations across five key areas about the process of managing reports of wrongdoing and the disclosers who make them – incident tracking, support strategies, risk assessment, dedicated support and remediation.

NSW government agencies and councils recorded comparatively strong processes on average – ranking third, below only the Commonwealth and Queensland public sectors. Areas of strength in NSW were having systems for recording and tracking wrongdoing concerns and assessing the risks of detrimental impacts that reporters may experience (eg stress, workplace conflict, reprisals). The results show the greatest areas for improvement are providing dedicated support to reporters and remediating detrimental impacts when they do occur.

During the year, we were also involved in developing the second phase of the research – *Integrity@WERQ* (Workplace Experiences and Relationships Questionnaire) – the project's more comprehensive survey of staff, managers and systems in those organisations that elect to participate in depth.

### **3.6.3. Australian and international standards on whistleblowing**

We are members of a Standards Australia technical committee on organizational governance (QR-017) that is responsible for a number of governance standards. Of particular interest to our office is developing an Australian standard for whistleblowing programs in organisations.

The intention is for this standard to mirror the first international management system standard in this field, which is in development. The standard will include minimum requirements for a comprehensive whistleblowing program applicable across sectors and regardless of organisational size. To inform this process, we undertook a comparative analysis of existing international standards on whistleblowing to identify current best practice and any gaps.

### **3.6.4. Whistling Wiki**

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

*'I was so impressed with your advice and your helpful manner. I really appreciate the information you have provided.'*

### 3.7. Providing advice

We regularly speak to public authorities to help them respond to individual PIDs, interpret the PID Act and develop internal reporting policies.

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

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

We received a total of 213 PID enquiries during 2016–17, less than in the previous year (n = 240). Of these:

- 84 were from public authorities with a policy query
- 50 were from public authorities about managing a report
- 79 were from public officials who had reported wrongdoing or were thinking about doing so.

We also responded to approximately 290 enquiries from public authorities about the administrative processes around submitting a PID report to our office. In particular, there were a number of enquiries about how local government mergers affected the reporting requirements under the PID Act.

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#### **Providing advice 20: Our door opens to provide access to a range of information resources and supports**

The new Chief Executive Officer of a LALC contacted us to discuss a recent audit that identified financial mismanagement and maladministration at the LALC. As she had raised a number of issues for discussion and was interested in PID training, we arranged a meeting at our office.

During the meeting, she tabled audit information that showed serious misconduct by LALC members and a lack of governance within the LALC. Our advice included that the matter should be reported to the ICAC. The matter was complex and raised systemic governance issues with implications for possible reforms under the *Aboriginal Land Rights Act 1983* which she wished to forward to the Minister for consideration. We offered a range of supports to the LALC, which included:

- referral to our Aboriginal Unit to assess what assistance we could provide
- free PID training
- administrative conduct training for a fee

- referral to our community education team
- advice about other relevant training – such as that offered by the ICAC about dealing with conflicts of interest.

*‘Your advice on our draft PID documents was invaluable and we have updated them to reflect where appropriate your comments. So thank you.’*

### 3.7.1. Reviewing policies and procedures

The PID Act requires public authorities to have policies and procedures for receiving, assessing and dealing with PIDs. During the year, we reviewed the internal reporting or PID policies and procedures of six public authorities. We checked compliance with the PID Act’s current requirements and compared their policy to our relevant model internal reporting policy. We identified good practice and made suggestions for improvements.

### 3.7.2. Our PID web page

All of our publications are available on our website. This allows public authorities and public officials from metropolitan, rural and remote areas to access the information at a time and place that suits them. Our PID web page is a useful way for public authorities and public officials to access practical guidance and procedures for making PIDs.

Table 3 shows that there were 8,261 visits to our ‘PID information for public authorities’ web page, fact sheets, guidelines and templates in 2016–17. This is an 8% decrease in unique page views compared to 2015–16.

**Table 3:** Online access to PID resources in 2016–17

	Unique page views
PID information for agencies page	1,007
PID fact sheets	3,717
PID guidelines and templates	3,537
<b>Total</b>	<b>8,261</b>



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