

***Public Interest Disclosures
Steering Committee***

Annual Report 2013–2014

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C/- NSW Ombudsman's office

Phone: 02 9286 1000

Toll free (outside Sydney Metro Area): 1800 451 524

Facsimile: 02 9283 2911

Telephone typewriter: 02 9264 8050

Email: pid@ombo.nsw.gov.au

Website: www.ombo.nsw.gov.au

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The Public Interest Disclosures Steering Committee was established under section 6A of the *Public Interest Disclosure Act 1994* (PID Act), following a review of the legislation in 2009. Under this section, the Ombudsman, as chairperson of the Steering Committee, is required to prepare an annual report of the Committee's activities and any recommendations made to the Premier to reform the PID Act.

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

Functions

The functions of the Public Interest Disclosures Steering Committee are set out in sections 6A, 31B and 32 of the PID Act, and require the Committee to:

- Provide advice to the Premier on the operation of the PID Act and recommend any necessary reform.
- Receive, consider and provide advice to the Minister (the Premier) on any reports from the Ombudsman in relation to the Ombudsman's functions under the PID Act.
- Review any Commonwealth legislation that is introduced in response to the 2009 report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* of the House of Representatives Standing Committee on Legal and Constitutional Affairs.
- Consult with and provide advice to a joint Parliamentary Committee to inform their review of the PID Act.

Part of the responsibilities of the NSW Ombudsman's Public Interest Disclosures Unit (PID Unit) is to provide assistance to the Steering Committee. A separate annual report details the work of this Unit and includes an overview of statistical reporting from authorities required under section 6CA of the PID Act.

Meetings and membership

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

As noted in the Steering Committee's terms of reference, the Committee met three times during the reporting year, in September, March and June. The June 2014 meeting was held on the papers and conducted electronically.

The following matters are considered as standing items at meetings:

- **Possible legislative amendments.** The Steering Committee will focus on these issues when a broader review of the PID Act is undertaken. The Steering Committee resolved to seek amendments to matters which are currently causing difficulties for the operation of the PID legislation (see further below under the heading 'Legislative Amendments').
- **The work of the PID Unit.** A report is provided to Members detailing current PID Unit projects, the training and audit program, forums, agency engagement and other public awareness activities.

The following matters were also considered by the Steering Committee during the reporting period:

- Provision of de-identified copies of PID Unit audit reports relating to councils to the Office of Local Government.
- Clarification of PID reporting categories listed in the amended PID Regulation.
- Overview of data provided by public authorities for PID reporting period July to December 2013.
- Review of the Commonwealth legislation (see further below under the same heading).
- Update and public release of the Steering Committee's Terms of Reference.
- Approval of the PID Steering Committee Annual Report 2012–2013.
- Overview of data provided by public authorities for PID reporting period January to June 2013.

Legislative amendments

The functions of the Steering Committee include providing advice to the Premier on the operation of the PID Act and recommending necessary reform. The Ombudsman wrote to the Premier on behalf of the Steering Committee recommending legislative amendments in June 2014.

Recommendations

The following amendments to the PID Act and Regulation were recommended to address specific issues that are currently causing difficulties for the operation of the PID legislation.

1. Amending the PID Regulation to confer a dispute resolution function on the Ombudsman.

The Steering Committee believed that this would bring into effect the objective of section 26B of the PID Act which clearly intends for the Ombudsman to have a dispute resolution role within the PID scheme. The Ombudsman is well placed to fulfil the dispute resolution role in light of the conciliation power under section 13A of the *Ombudsman Act 1974*.

The Steering Committee recognised that dispute resolution techniques such as mediation or conciliation would not be appropriate for dealing with the substantive conduct reported in a PID. However, the Steering Committee believed that dispute resolution techniques could be beneficial for dealing with workplace issues and disputes arising from the making of a PID or related to the subject matter of a PID.

This recommendation was made following consideration by the Steering Committee of a matter where the Ombudsman was asked by a public authority to conciliate a dispute arising as a result of the making of a PID. The Ombudsman was of the view that the underlying dispute may be resolved through effective conciliation.

2. Expanding the PID Act to allow information sharing between investigating authorities.

The Steering Committee considered that a general provision which allows the exchange of information for the purpose of the PID Act would be beneficial, particularly where investigating authorities are dealing with interconnected aspects of the same matter.

The Steering Committee noted that a number of investigating authorities have jurisdictions which significantly overlap, for example the NSW Ombudsman, the Independent Commission Against Corruption and the Office of Local Government.

The Steering Committee became aware of a matter in which a reporter made the same allegations to three different investigating authorities. The jurisdictions of the investigating authorities involved considerable overlap, resulting in three separate investigations into interconnected aspects of the one matter.

The above matter highlighted the limitations on the ability of some investigating authorities to exchange information for the purposes of better responding to PIDs that are made to more than one investigating authority. This is because the statutory framework under which they operate prevents the exchange of information (for example section 34 of the *Ombudsman Act 1974*). Currently, investigating authorities are authorised to exchange information only when referring a PID under section 25 of the PID Act.

3. Amending the PID Act to clarify the definition of 'public authority' for reporting purposes.

The Steering Committee recommended that the Public Interest Disclosures Regulation 2011 (PID Regulation) should be amended to declare that certain public authorities are exempt from the reporting requirements contained in sections 6CA and 31 of the PID Act.

The recommendation arose from reconsideration of the issue which became apparent during the first period of reporting by public authorities. In accordance with the PID Act, all public authorities must regularly report to the Ombudsman and Parliament, providing information from the reporting period on the public authority's compliance with its obligations under the Act. The specific information that must be reported is set out in the PID Regulation.

The Steering Committee noted that the definition of 'public authority' in the PID Act captures certain organisations that have one or no member/s of staff. The Steering Committee did not believe Parliament intended that organisations with one or no staff member/s should need to provide reports detailing the numbers of PIDs they receive. It seems anomalous for unstaffed public authorities to be required to report on the number of PIDs received when they do not have staff to engage in reportable conduct (or report the conduct). Furthermore, the Steering Committee recognised that the reporting requirements can be onerous on very small public authorities.

Review of the Commonwealth Legislation

In meeting its obligations under section 31B of the NSW PID Act, the Steering Committee reviewed various aspects of the *Commonwealth Public Interest Disclosures Act 2013* (Commonwealth Act). The Commonwealth Act was introduced in response to the 2009 report *Whistleblower protection: A comprehensive scheme for the Commonwealth public sector* of the House of Representatives Standing Committee on Legal and Constitutional Affairs and commenced on 14 January 2014.

A complete version of the report can be accessed at the NSW Ombudsman website.

The Steering Committee's review focused on whether there were any provisions or concepts in the Commonwealth Act that could usefully be incorporated into the NSW PID Act. The review compared the provisions of the two Acts to identify variations in mechanisms and terminology. These variations were then assessed to determine which approach would best promote the object of the NSW Act or would better align with recommendations arising out of Australian and international research into best practice internal reporter management.

Recommendations

Arising out of this review, the Steering Committee recommended that consideration be given to the following changes to the NSW PID Act:

1. Expanding s.3(1) to include the overarching objective '...to promote the integrity and accountability of the ... public sector...' (Commonwealth Act, s.6).

The Steering Committee believed this terminology emphasises the values that guide the legislation and that the object of the NSW Act should be expanded in a similar way. The Steering Committee noted that it should not replace the more specific objectives already provided for in s.3(1) of the NSW Act.

2. Amending the definition of 'public official' in s.4A to provide that disclosures can also be made by former public officials about matters they became aware of in their former capacity as public officials (s.26(1)(a), Commonwealth Act).

Both Acts cover current public officials, with the Commonwealth Act extending to a person who 'has been' a public official (s.26(1)(a)).

The Steering Committee believed that incorporating a similar provision in the NSW Act would promote its objectives by encouraging former public officials to come forward with information about serious wrongdoing. Former public officials may still face detrimental action in reprisal in the form of injury, damage or loss, and intimidation or harassment, or seek to rely on the protections in the PID Act (i.e. offence of reprisal, compensation, injunctions, protection against other actions and the confidentiality of their identity).

The protection under the PID Act should, however, be limited to disclosures made about matters that came into the person's knowledge in their former capacity as a public official.

3. Clearly stating that a PID may be made orally or in writing, may be made anonymously, and that a reporter does not have to assert that the disclosure is made under the PID Act (s.28, Commonwealth Act).

The Commonwealth Act provides clarity on whether disclosures can be made orally or in writing, anonymously and without the discloser asserting that they are making a PID (s.28). While the guidelines published by the NSW Ombudsman set out a clear view on each of these issues, a clear statement in the PID Act would remove any doubt. Reducing the burdens on public officials when they disclose wrongdoing will also facilitate the objective of the PID Act.

4. Amending ss.8 and 14 to provide that a disclosure can be made to a supervisor, and that the supervisor is obliged to pass on any such reports in accordance with the authority's internal reporting policy (ss.26 and 60A, Commonwealth Act).

Both the Commonwealth and NSW PID Acts protect disclosures made to the principal officer of an agency/authority or a person who belongs to the agency/authority who is authorised/nominated to receive disclosures. However, under the Commonwealth Act disclosures can also be made to a supervisor of the discloser (s.26), who is then obliged to give the information to an authorised officer of the agency (s.60A).

Research has shown that most disclosures of wrongdoing within organisations are made to supervisors.¹ The Steering Committee believed the Commonwealth approach would better promote the objectives of the NSW Act. Combined with the recommendation above that disclosures can be made orally and without the discloser asserting that they are making a PID, supervisors will be required to identify comments made in the course of a conversation as a possible PID. While this may present some challenges, the Steering Committee believed that all levels of management should have the knowledge and capacity to identify PIDs and take appropriate action. The training provided by the NSW Ombudsman will assist authorities in raising the awareness of their supervisory staff.

5. Providing that conduct related to a 'subsidiary agency' is taken for the purposes of the Act to relate to the 'parent agency' (s.35(2), Commonwealth Act).

Section 35(2) of the Commonwealth Act makes clear that conduct related to a 'subsidiary agency' – an unincorporated body such as a board, council, committee, sub-committee or other body that is established for the purpose of assisting or performing functions connected with another agency – is taken for the purposes of the Act to relate to the 'parent agency'.

Including a similar provision in the NSW Act would help to clarify the definition of a public authority, particularly where authorities have established subsidiary entities. The Steering Committee also recognised the complexity of this proposal and that any such amendment to the NSW Act would need to consider the issue of state government clusters, that divisions of the public service are not legal entities with a parent/subsidiary

1. 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.

relationship, that Schedule 3 of the Government Information (Public Access) Regulation 2009 (NSW) deems certain agencies parts of other agencies, and the changes made by the *Government Sector Employment Act 2013* (NSW). For these reasons, the terminology of any provision is likely to differ from that used in the Commonwealth Act.

6. Amending s.12A to reflect the Police Integrity Commission's jurisdiction to receive disclosures relating to the conduct of NSW Police Force administrative officers and NSW Crime Commission officers.

The Steering Committee believed that the NSW PID Act, in specifying the range of NSW investigating authorities to which a PID can be made, as well as their respective jurisdictions, is a better model than the Commonwealth Act which provides for only two investigative agencies.

However, the Steering Committee also noted that the NSW PID Act, as it stands, does not adequately reflect the jurisdiction of the Police Integrity Commission (PIC). Section 12A of the PID Act provides for public officials to make disclosures to the PIC which relate to conduct of a police officer. The PIC also has jurisdiction over NSW Police Force administrative officers and NSW Crime Commission officers. If a disclosure is about these groups the PIC is required to rely on the provision relating to 'misdirected disclosures' (s.15) when assessing whether it should be treated as a PID.

7. Adding a note to s.20B to make explicit that a court may grant an injunction to issue an apology, restrain termination or mandate reinstatement.

The Commonwealth Act contains a number of provisions that address the situation of a person suffering adverse treatment arising out of the making of a disclosure. The Steering Committee believed that the existing protections contained in the NSW PID Act provide sufficient redress to reporters seeking such relief.

Despite this, the Steering Committee acknowledged that, where the taking of reprisal has damaged the reputation of a reporter (either generally or in the workplace), a suitable formal apology (either alone or in conjunction with other remedies) from the person found responsible for that action may well be of great value to the reporter as evidence of vindication and to assist in restoring the reporters' reputation.² The Steering Committee believed that consideration should be given to making it clear that the court's injunctive powers provided for in s.20B of the NSW PID Act include the power to issue an apology, restrain termination or mandate reinstatement by way of a note in the Act.

8. Providing in Part 3 that a court cannot order the applicant to pay costs incurred in any proceedings relating to compensation or injunction unless the proceedings were instituted vexatiously or without reasonable cause, or the applicant's unreasonable act or omission caused the other party to incur the costs (s.18, Commonwealth Act).

The Commonwealth Act provides that a court cannot order the applicant to pay costs incurred in any proceedings relating to compensation, injunction or reinstatement unless the proceedings were instituted vexatiously or without reasonable cause, or the applicant's unreasonable act or omission caused the other party to incur the costs (s.18). Given that cost impediments and the risks involved in taking such action have been the most significant barrier to civil remedies to date,³ the Steering Committee believed that including a similar provision in the NSW PID Act would provide greater accessibility for reporters who have faced reprisal to seek the protections of the Act.⁴

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2. House of Representatives Standing Committee on Legal and Constitutional Affairs 2009, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector*, Canberra, p.98. Also see *Burns v Radio 2UE Sydney Pty Ltd & Ors* (No2) [2005] NSW ADT 24.
 3. Brown, AJ 2013, 'Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience', *E-Journal of International and Comparative Labour Studies*, vol.2, no.3, pp.153–182.
 4. A similar provision is included at section 216A(7) of the *Police Act 1990* (NSW).

9. Expanding s.6E to provide that the responsibilities of principal officers of public authorities include: appointing a sufficient number of disclosure officers to ensure they are readily accessible by public officials belonging to the authority; and ensuring that appropriate action is taken in response to recommendations in investigation reports (s.59(3), Commonwealth Act).

The Commonwealth Act requires the heads of agencies to take reasonable steps to protect reporters from detrimental action in reprisal and to ensure that confidentiality is dealt with in their internal reporting procedures. The Commonwealth Act also requires principal officers to:

- ensure that the number of authorised officers in their agency is sufficient to ensure they are readily accessible (s.59(3))
- ensure that public officials in their agency are aware of the identify of each authorised officer in their agency (s.59(3))
- take appropriate action in response to recommendations in an investigation report (s.59(4)).

The Steering Committee believed that incorporating similar obligations on the heads of authorities in the NSW PID Act would promote achievement of its objectives. The attitude and approach of heads of authorities can be expected to have a significant impact on the culture of the authority, and its attitude to internal disclosures and the people who make them. This change will need to be complemented by administrative arrangements within authorities. The Ombudsman would then monitor compliance as part of its audit program.

The Steering Committee was mindful in making these recommendations of the importance of a level of certainty among public authorities and public officials around how this important legislation will operate. This can be supported by avoiding frequent, piecemeal amendments to the NSW PID Act.

As such, the Committee suggested the above recommendations for change may best be considered as part of a broader review of the NSW Act.

Government response to recommendations

The Government responded agreeing in principle with the recommendations made by the Steering Committee. The implementation of the recommendations is proposed to be considered at the completion of the joint Parliamentary Committee review of the NSW Act in 2015.