




Public Interest Disclosures Steering Committee

Annual Report 2017–18

February 2019



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 Minister (the Premier) to amend the PID Act.

The PID Act sets out the framework for protecting public officials who make reports about wrongdoing from the risk of reprisal.

Public officials can make public interest disclosures (PIDs) about corrupt conduct, serious maladministration, serious and substantial waste of public money, a government information contravention or a local government pecuniary interest contravention.

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Functions

The functions of the Public Interest Disclosures Steering Committee are set out in sections 6A, 31B and 32 of the PID Act. They 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 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 – this review was completed and a report released in January 2014¹
- consult with and provide advice to a Parliamentary Joint Committee to inform their review of the PID Act.

Membership

Membership of the Steering Committee is established under the PID Act.

The members or their nominated representative were:

- Michael Barnes NSW Ombudsman
- Karen Smith Deputy Secretary, Department of Premier and Cabinet
- Barry Underwood Director, Office of the Auditor-General, Audit Office of NSW
- Roy Waldon Executive Director, Legal Division
Independent Commission Against Corruption (ICAC)
- Michelle O'Brien Acting Chief Executive Officer
Law Enforcement Conduct Commission
- Elizabeth Tydd Information Commissioner
- Emma Hogan Public Service Commissioner
- Gelina Talbot Assistant Commissioner, Professional Standards Command,
NSW Police Force
- Tim Hurst Chief Executive, Office of Local Government.

The NSW Ombudsman's Public Interest Disclosures Unit (PID Unit) provides secretariat support to the Steering Committee.

1. Available on the NSW Ombudsman's website: http://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/15195/Review-of-the-Commonwealth-public-interest-disclosure-legislation.pdf.

Meetings

The Steering Committee met in person twice and held one meeting on the papers during the reporting year. Meetings are an opportunity for high level discussion of PID related matters, as senior officials are brought together to ventilate any issues.

The following matters are considered as standing items at meetings:

- **The work of the PID Unit.** A report is provided to members detailing current PID Unit projects, the training and audit programs, forums, agency engagement and other public awareness activities.
- **PID statistical information.** An overview of each six-monthly reporting period is provided to the Steering Committee which includes information about the number of PIDs reported to the Ombudsman by public authorities and key trends.
- **Roundtable PID updates.** Members provide updates about PID-related activities.

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

- What is meant by the term ‘public authority’ in the context of the PID Act, and in particular, the status of NSW local Aboriginal land councils (LALCs). In order to clarify the status of LALCs under the PID Act, a discussion paper was written and then circulated to the Minister for Aboriginal Affairs, the Registrar of the *Aboriginal Land Rights Act 1983*, the NSW Aboriginal Land Council, and all LALCs. The paper:
 - set out the relevant legislative interpretation issues
 - considered whether, as a matter of policy, LALC public officials should receive protection for making reports of serious wrongdoing
 - sought feedback on whether LALCs should be exempt from the PID Act reporting requirements.

The responses received from stakeholders were considered by the PID Steering Committee. The committee recommended that, when reforming the PID Act, the government amend the definition of a public authority to explicitly include LALCs.

- The review of the PID Act that was undertaken by the Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, including the submissions made to the review (see ‘Parliamentary review of the PID Act’).
- Approval of the Steering Committee’s Annual Report 2016–2017. The chairperson submitted the report to the Premier and it was tabled in each House of Parliament on 23 November 2017.

Parliamentary review of the PID Act

In 2011, significant reforms were made to the PID scheme. This included establishing the PID Steering Committee in legislation and giving the NSW Ombudsman responsibility for overseeing its implementation by the public sector.

The PID Act provides that, after the reforms had 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 commenced 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 the statutory review of the PID Act in June 2016. In October 2017, the JPC completed its review of the PID Act and tabled a report making 38 recommendations for revision or amendment. The recommendations focus on simplifying the disclosure process, improving remedies for detrimental action, refining reporting requirements and providing clarification to the PID Act.

The PID Steering Committee held an extraordinary meeting to discuss the recommendations. In January 2018 the chairperson of the PID Steering Committee wrote to the Premier and set out the views of PID Steering Committee.

The government response to the PID Act review was tabled in Parliament in April 2018. It stated that the government will prepare a Bill to reform the PID system. That reform will be in accordance with the PJC's recommendations and the principles of:

- making it simpler for public officials to make PIDs
- improving protections and remedies for those who suffer detrimental action in reprisal
- continuing to protect the reputation of individuals against defamation and public disclosure of confidential information.

On behalf of the Premier, the government formally requested that the PID Steering Committee examine in detail the implementation issues arising from the PJC's recommendations and consider the draft Bill prepared in response to the PID Act review. We look forward to this consultation occurring in 2018-19.

Some of the JPC's recommendations and the views of the PID Steering Committee are highlighted in the next section.

Recommendations to the Premier

The PID Steering Committee supported the following amendments to the PID Act:

- The PID Act be redrafted in simpler language and with a clearer structure, while maintaining its substance.
- Require public authorities to nominate an adequate number of officers, reflective of the size and geographical location of the workforce, to receive public interest disclosures on behalf of the authority.
- Permit PIDs to be made to a public authority's governing body or to the Minister responsible for an authority, subject to Ministers only being responsible for referring reports received to the appropriate public authority or investigating authority.
- Clarify the PID Act to specifically provide that public interest disclosures 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.
- Include the Privacy Commissioner as an investigating authority.
- Modifying the reporting requirements in the PID Act, including:
 - moving from a system of six monthly reporting to annual reporting
 - authorities without any staff not being required to report
 - requiring agencies to provide the following information:
 - › whether the PID was made directly to or referred to the authority
 - › the type of conduct alleged
 - › what action was taken in response to the PID
 - › whether the allegations were wholly or partly substantiated
 - › whether the PID resulted in systemic or organisational changes or improvements
 - › when the PID was received and finalised.
- Require public authorities to notify the Ombudsman when an allegation of detrimental action is made, or when detrimental action is identified, so that the Ombudsman can intervene and assist the authority with determining an appropriate response. Concerns were raised about providing this information in instances when a covert investigation is underway. The Committee agreed it would be appropriate to exclude investigating authorities from this requirement in respect of their functions as investigating authorities, as per the Ombudsman's monitoring and audit functions in s.6B of the PID Act.

The PID Steering Committee supported the following amendments to the PID Act in principle but suggested further research or clarification was needed:

- Provide that conduct related to an agency within a cluster is taken for the purposes of the Act to relate to the principal department. The PID Steering Committee voiced concern about the reliance on the concept of a 'cluster,' giving the following reasons:
 - The 'cluster' is a purely administrative arrangement that is not legislated and is subject to change.
 - Within a cluster there will be some agencies that have special, independent status making it inappropriate for PIDs made about/or to them to be handled by the cluster's department.

- Replace the term ‘reprisal’ with ‘detrimental action’ in sections 20A and 20B. The PID Steering Committee suggested this recommendation requires further thought in relation to the implications for the criminal offence provided for in s 20. The following reasons were provided:
 - Simply replacing the term ‘reprisal’ with the expression ‘detrimental action’ would not fit with recommendation 21.
 - It will undermine recommendation 18 and public authorities will be less inclined to take reasonable management action.
 - The interpretation of the word ‘reprisal’ in *DPP v Kear*² (e.g. that for an action to be ‘in reprisal’ it requires an intention of revenge or retaliation) may not be supported.
- Reporters can be deemed to be a public official for the purposes of the Act so that protection can be afforded to people who become aware of public sector wrongdoing but are not covered by the Act – e.g. former public officials, subcontractors or public officials from other jurisdictions.

The PID Steering Committee agreed any implementation of this recommendation would require careful thought on the criteria to be considered for a person to be deemed a public official and when in the reporting process this ‘deeming’ should happen.

The PID Steering Committee noted there is an increasing number of government functions and services being provided by the private sector and the not-for-profit sector. Many of these organisations are funded directly or indirectly by public funds, but are not subject to oversight by external bodies and staff in these organisations are generally not afforded the protections of the PID Act. The Committee agreed research needed to be conducted to better understand the nature of government services that are currently being performed by non-state actors; the number of service providers performing government functions across NSW; and the amount of public money invested in the provision of these services. The secretariat will produce a discussion paper to inform the Committee’s further consideration of these issues.

2. *DPP v Murray Kear* (Unreported, Local Court of New South Wales, Grogin J, 16 March 2016), 26.

