




# **Public Interest Disclosures Steering Committee**

Annual Report 2019–20

**11 December 2020**



The Public Interest Disclosures Steering Committee (the Committee) is established under section 6A of the *Public Interest Disclosure Act 1994* (PID Act). Under this section, the Ombudsman, as chairperson of the Committee, is required to prepare an annual report of the Committee's activities and any recommendations made to the Minister (the Premier and the Special Minister of State).

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 Committee are set out in sections 6A and 32 of the PID Act:<sup>1</sup>

- 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
- consult with and provide advice to a Joint Parliamentary Committee to inform their review of the PID Act.

## Membership

Membership of the Committee is prescribed by the PID Act.

During the reporting year, the members or their nominated representative were:

- Michael Barnes, NSW Ombudsman; Paul Miller NSW Ombudsman, Deputy Ombudsman
- Kate Boyd, Deputy Secretary, Department of Premier and Cabinet (DPC); Matt Richards, Director, Legal, DPC
- Barry Underwood, Director, Office of the Auditor-General, Audit Office of NSW; Chris Clayton, Executive Director, Professional Services, Office of the Auditor-General, Audit Office of NSW
- Roy Waldon, Executive Director, Legal Division, Independent Commission Against Corruption (ICAC)
- Michelle O'Brien, A/Chief Executive Officer and General Counsel, Law Enforcement Conduct Commission (LECC)
- Elizabeth Tydd, Information Commissioner
- Julia Carland, General Counsel, Public Service Commission (PSC)
- Gelina Talbot, Commander, Professional Standards Command, NSW Police Force
- Tim Hurst, Deputy Secretary, Local Government, Planning and Policy, Office of Local Government (OLG)

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

## Meetings

The Committee met in person twice during the reporting year. One other scheduled meeting was postponed to the next reporting period, as the purpose of that meeting was to consider and discuss the next draft of a new Public Interest Disclosures Bill, but the provision of that draft had been delayed – see below.

Members of the Committee also discuss issues out-of-session throughout the year.

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1. S 31B of the PID Act required the Committee to review any Commonwealth legislation 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. That review was completed and a report published in January 2014.

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 Committee that includes information about the number of PIDs reported to the Ombudsman by public authorities and key trends. This information is presented in the Ombudsman's *Oversight of the Public Interest Disclosures Act Annual Report*.<sup>2</sup>
- **Roundtable PID updates.** Members provide updates about PID-related activities.

The following matters were also considered by the Committee during the reporting period (either during formal meetings or out-of-session):

- Approval of the Committee's *Annual Report 2018–19*. The chairperson submitted the report to the Premier and it was tabled in the Legislative Council and the Legislative Assembly on 12 November 2019.
- The 2017 report of 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 (JPC).
- The encouraging of cultural change within public authorities by including wording and/or statements in their codes of conduct that explicitly recognises whistleblowing as ethical and appropriate conduct in the best interests of the organisation.
- The potential application of the new Commonwealth whistleblower protection provisions in the *Corporations Act 2001* (Cth) (Corporations Act), that commenced on 1 July 2019, to some NSW government entities.

These matters are expanded on in the section below.

## Matters of significance considered by the Committee

### Parliamentary review of the PID Act

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 clarifying the PID Act generally.

On behalf of the Premier, the NSW Government formally requested that the Committee examine in detail the implementation issues arising from the JPC's recommendations and, in due course, to consider the draft Bill prepared in response to the PID Act review.

The main activities of the Committee during this year have been to provide advice to the DPC and the NSW Parliamentary Counsel's Office in relation to their drafting of a proposed Bill.

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2. These reports are available on the NSW Ombudsman's website: [www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/public-interest-disclosures](http://www.ombo.nsw.gov.au/news-and-publications/publications/annual-reports/public-interest-disclosures).

## Recognising PIDs in codes of conduct

In the Committee's *Annual Report 2018-19*, the Committee reported on a proposal it had received from the National President of Whistleblowers Australia Inc that suggested cultural change within public authorities could be encouraged by including wording and/or statements in their codes of conduct that explicitly recognises whistleblowing as ethical and appropriate conduct in the best interests of the organisation.

In June 2019, the chairperson of the Committee wrote to the OLG and the PSC and requested they consider including reference to the importance of encouraging whistleblowing when the OLG's model code of conduct for local government and the PSC's model code of conduct for public officials in NSW are next revised.

In response:

- The OLG advised it would consider explicitly recognising whistleblowing in the model code of conduct for local government when it was next reviewed.
- The PSC advised its code of conduct for state government was due for review in 2020 and would consider referring to the importance of encouraging whistleblowing.

## New Commonwealth whistleblower protection legislation

On 1 July 2019, whistleblower provisions in the Corporations Act with potential relevance to NSW entities commenced. While the provisions mainly affect private sector corporations, the amendments are expressed to apply not only to any company, but also to "a corporation to which paragraph 51(xx) of the Constitution applies". This means that any entity that is a trading or financial corporation to which paragraph 51(xx) of the Constitution applies are subject to the new regime.

The scope of paragraph 51(xx) of the Constitution is not entirely clear. However, High Court<sup>3</sup> and especially Federal Court authorities<sup>4</sup> suggest that a significant number of entities established under NSW laws may be constitutional corporations, and therefore will be subject to the new Commonwealth whistleblower regime. This could potentially include a number of local councils, health bodies, state-owned corporations, universities, and transport agencies.

The Corporations Act is an unusual Commonwealth statute in that it expressly provides that it is intended to operate concurrently with State law. Particularly given that provision, we do not expect that the new Corporations Act provisions should be taken to have been intended to 'cover the field', in the sense of operating to the exclusion of existing State whistleblower laws.

Accordingly, any entity that is currently subject to the PID Act will continue to be required to comply with its requirements, even if the entity is also subject to the Commonwealth regime. This does not preclude that there could arise a direct inconsistency between the new Commonwealth Act and the PID Act or some other NSW law. For example, there may be particular circumstances in which it is impossible to comply with both the new Commonwealth law and a relevant NSW law. In such a case, section 109 of the Constitution (which generally provides that a Commonwealth law prevails to the extent of any inconsistency with a State law) may come into play.

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3. See, for example, *Communications etc and Allied Services Union of Australia v Queensland Rail* (2015) 218 ALR 1; *New South Wales v Commonwealth* (2016) 229 CLR 1 (the Work Choices case).

4. See, for example, *Quickenden v O'Connor* (2001) 109 FCR 243 (the University of Western Australia case); *United Firefighters Union v Country Fire Authority* (2015) 315 ALR 460.

The Ombudsman has encouraged agencies that may be subject to the concurrent operation of both Acts to seek legal advice on their obligations, and to make any required changes to internal policies to minimise the risk of inadvertent non-compliance.

In addition, as chairperson of the Committee, the Ombudsman wrote to Minister Harwin, NSW Special Minister of State to support a proposal for a Commonwealth regulation being made to exclude from the new Corporations Act provisions any NSW government entity that is a “public authority” under the PID Act and therefore subject to the whistleblower protection provisions of that State Act. The Ombudsman provided examples of the Committee’s concerns if the two regimes were otherwise to operate concurrently in respect of NSW government entities. The concerns raised included the following:

- a) The principles for determining what is a constitutional corporation, particularly in respect of statutory bodies established for a public purpose, remain uncertain and contested, with conflicting authority at both the High and especially Federal Court levels. This means that there is a challenge even to know which NSW government agencies may be covered by new Commonwealth laws.
- b) Where the two regimes do apply, the new Commonwealth laws are expressed to operate concurrently with the PID Act and other State laws, which creates further uncertainty and complexity regarding the interplay between the different protections and obligations.
- c) There are likely to be circumstances where the two regimes will be considered to be inconsistent, within the meaning of section 109 of the Constitution. The assumed result will be the disapplication of the relevant PID Act provisions. This could potentially have deleterious impacts on whistleblowers, for example where the PID Act would otherwise have provided a protection not provided by the new Commonwealth laws, such as in the case of certain disclosures to journalists.
- d) An effective whistleblower regime needs to ensure both that whistleblowers are protected and that serious wrongdoing is reported to appropriate investigating authorities and investigated. The interaction between the new Commonwealth laws and the legislation that governs the various investigating authorities in NSW has not been fully considered. For example, under section 11 of the *Independent Commission Against Corruption Act 1988*, the principal officer of a public authority must report to the ICAC any suspected corrupt conduct. However, if the new Commonwealth laws also apply to that public authority (as a constitutional corporation), then it appears that there could be circumstances in which the confidentiality provisions of the new Commonwealth laws may prevent either the recipient of a disclosure from reporting it to their principal officer or the principal officer reporting the matter to the ICAC.

The Committee was advised that Minister Harwin provided the chairperson’s correspondence to the Commonwealth. The Committee has been provided with correspondence from Minister Sukkar, Minister for Housing and Assistant Treasurer to Minister Harwin dated 12 August 2020. Minister Sukkar noted that the NSW Parliament may enact legislation in accordance with section 5 of the Corporations Act, to provide that the Commonwealth whistleblowing provisions do not apply to affected NSW entities.



## Recommendations to the Minister

The Committee did not make formal recommendations over the reporting year but provided advice to government in response to its proposed reform of the PID Act.

