

Submission to the Legal and Constitutional Affairs Legislation Committee inquiry into the Whistleblower Protection Authority Bill 2025 (No. 2)

This submission is focussed on providing information about the relevant elements of the NSW whistleblower protection scheme, as well as the role of the NSW Ombudsman, under the *Public Interest Disclosures Act 2022 (NSW) (the Act)*. It focusses on:

- a. the functions of the NSW Ombudsman under the Act, including how the office supports whistleblowers to make disclosures and agencies to implement the Act
- b. the protections for whistleblowers in NSW
- c. obligations on public sector agencies to deal with disclosures
- d. requirements to notify the NSW Ombudsman of certain reportable events.

The submission reflects the benefit of having a sufficiently funded whistleblower support function as part of the same body charged with overseeing the jurisdiction's public interest disclosures scheme.

We do not comment on the policy merits of the Bill.

The NSW Ombudsman's whistleblower support functions

The NSW Ombudsman oversees the operation of the Act and has several key functions, including functions designed to support whistleblowers.

Whistleblower support

The NSW Ombudsman established a whistleblower support function to provide general information and guidance to any NSW public official who has reported, or is thinking about reporting, serious wrongdoing. Whilst a specific whistleblower support function is not a separately stated function in the Act¹, the Ombudsman considered such a function is required to achieve the objects of the Act. The new function commenced in November 2024.

The whistleblower support function is intended to complement, not replace, the duty of an agency dealing with a Public Interest Disclosure (PID) to provide information and support to the PID maker. While such support from the relevant agency is essential, we consider it is also important for a public official to have access to support that is independent of the PID process and available prior to making a PID, as well as afterwards.

Whistleblower support is available regardless of the agency to which a public official has reported or plans to report serious wrongdoing. Support is offered primarily by phone and by email and can be made available after business hours with prior notice. Our website has a page dedicated to supporting whistleblowers, available at: www.ombo.nsw.gov.au/complaints/whistleblower-support.

Any information shared by the public official with the whistleblower support function is strictly confidential. There is an ethical wall in place between this function and others in the NSW Ombudsman, such as the complaint handling function, which can receive and investigate PIDs, and

¹ The Act states the Ombudsman's functions including providing information, advice, and assistance to public officials on matters relevant to the Act (s 72(1)(b)).

the general PID advice function, which is outlined below. This means a public official can speak freely to the whistleblower support function with no risk of making a PID unintentionally.

We do not advocate or act for on behalf of individuals. The objective of the information and support provided is to empower the public official to make their own informed choices throughout the process.

We have had 48 whistleblower support cases since the function commenced, and we are expecting this to increase as a result of several upcoming activities aimed at raising awareness.

Additional support schemes

There will be some public officials contacting the NSW Ombudsman about the PID process who may need additional support in the form of legal advice and/or mental health support. Given that such professional help can be costly and difficult for an individual to access, and cannot be provided by the NSW Ombudsman, we are working to develop a scheme to allow referrals for legal advice or counselling services that will be free to the public official and which they can access quickly and easily when they need it.

As a result of developing those referral options, it has become clear that it is equally important to ensure public officials are protected when seeking legal advice and/or mental health support. This is particularly critical when it becomes necessary, for the purpose of seeking such support, for the public official to disclose information to a lawyer or mental health practitioner about the wrongdoing and/or about the workplace environment. Where such official information is not already in the public domain, regardless of its sensitivity, it is likely the legal or mental health professional will be subject to some form of obligation to maintain its confidentiality, unless there has been prior authorisation or legal requirement to disclose it.

However, it remains unclear if these professional confidentiality obligations will protect the public official from prosecution or disciplinary action. If public officials are at risk of disciplinary action or even criminal prosecution as a result of disclosing confidential information to a trusted professional when seeking essential support in relation to a PID, then they may not be able to meaningfully engage with those support services, and the support able to be provided may be limited in its scope and/or effectiveness. Such barriers to accessing professional support may have an adverse effect on the willingness of public officials to report serious wrongdoing in the first place. For these reasons, the NSW Ombudsman considers it is critical to consider how to protect a public official from the consequences of disclosing confidential information when that is done for the purpose of seeking legal advice and/or mental health support in relation to a report of serious wrongdoing.

Protections for whistleblowers in NSW

A public official who makes a PID in NSW has the following protections:

- **Detrimental action offence:** it is criminal offence for persons to take detrimental action on the basis that a person has or may make a PID.
- **Recovery of damages:** PID-makers who are the subject of unlawful detrimental action can seek compensation from individuals and public sector agencies.
- **Injunctions relating to detrimental action:** PID-makers affected by actual or potential detrimental action can seek injunctions from the Supreme Court of NSW.
- **Protection from civil and criminal liability and disciplinary action:** PID-makers do not incur civil or criminal liability for making a PID and are not liable to disciplinary action.

Agency obligations to deal with disclosures

Agencies that receive a PID have to:

- assess and minimise the risk of detrimental action being taken against a person as a result of the disclosure being made;
- investigate or otherwise appropriately deal with a PID;
- ensure that the identity of the PID-maker is not unlawfully revealed;
- keep the PID-maker informed about how their report is being dealt with and the outcome of any investigation;
- take appropriate corrective action where serious wrongdoing or other misconduct is found to have occurred; and
- provide information to the NSW Ombudsman about the report and how it was dealt with.

Agency obligations to notify the NSW Ombudsman

Public sector agencies are required to notify the NSW Ombudsman when a reportable event occurs. The notification must occur as soon as possible after the event. These obligations arise in the following circumstances:

- **Detrimental action offences:** an agency must notify the NSW Ombudsman in relation to detrimental action offences by, or against, persons associated with that agency or arising from a PID relating to that agency.²
- **Referring evidence of detrimental action offences:** an agency must notify the NSW Ombudsman if it refers evidence of a detrimental action offence to the NSW Police Force or other relevant agencies named in the Act.³
- **Decision to cease or to not investigate a disclosure:** if an agency decides to neither investigate or refer a disclosure to another agency, or if it decides to cease investigating a disclosure without either completing the investigation or referring it to another agency, it must provide written reasons to the NSW Ombudsman to explain its decision.⁴
- **Arrangements with another agency or entity:** an agency that enters into an arrangement with another agency or an entity that is not an agency to exercise any of its functions under the Act, must notify the NSW Ombudsman of the arrangement.⁵

From 1 October 2023 to 30 June 2024, the Ombudsman received:

- 19 notifications relating to detrimental action offences and the referring of evidence of detrimental action offences
- 40 notifications about decisions to cease or not investigate a disclosure
- 67 notifications about arrangements to exercise functions on behalf of an agency.

There appears some similarity between the notification requirements that relate to detrimental action offences under s 34(4) of the Act and that proposed under s 18 of the Bill. However, the

² The Act, s 34(4).

³ The Act, ss 34(1) and (2).

⁴ The Act, s 55(3).

⁵ The Act, s 81(4).

requirement proposed under the Bill appears to capture more conduct and extend the responsibility to notify the Authority to a broader range of people than the Act.

The Act's notification requirements allow the NSW Ombudsman to: request additional information; intervene when necessary; provide assistance and expertise to agencies in matters concerning detrimental action offences; and to monitor how disclosures are handled. Additionally, the NSW Ombudsman can intervene in matters where a decision to not investigate a disclosure, or to cease an investigation, is not adequately explained or appears to be misguided. The purpose of any intervention is to ensure that an agency is meeting its obligations under the Act.

Summary of the NSW Ombudsman's oversight functions

The NSW Ombudsman has several key oversight functions under the Act. These are, in summary:

- to promote public awareness and understanding of the Act, and to promote the objects of the Act
- to provide information, advice and assistance and training to agencies and public officials on matters relevant to the Act
- to publish guidelines and other materials for the assistance of:
 - agencies in connection with their functions under the Act, and
 - public officials and other persons in connection with the operation of the Act and the protections available to them under the Act
- to audit and monitor the exercise by agencies of their functions under the Act
- to provide reports and recommendations to the Minister about proposals for legislative and administrative change to further the objects of the Act
- other functions conferred on the NSW Ombudsman by or under the Act.⁶

Additionally, agencies must provide to the NSW Ombudsman an annual return containing information about:

- the voluntary PIDs received in the annual reporting period
- the measures taken by the agency to promote a culture in which PIDs are encouraged and public officials feel confident coming forward with reports of serious wrongdoing.⁷

The NSW Ombudsman is also an integrity agency and can receive and deal with PIDs relating to serious maladministration. The NSW Ombudsman may choose to deal with a PID it receives under the Act, or investigate a PID on its own motion, under the *Ombudsman Act 1974* (NSW).

Like the proposed function of the Whistleblower Protection Authority Commissioner (**the Commissioner**) to receive and facilitate the investigation of disclosures, the NSW Ombudsman may determine to refer a PID to another agency. If making a referral under the Act, the NSW Ombudsman (or another agency) must consider if the receiving agency is better placed to deal with the allegations contained in a disclosure and the risk of detrimental action against the PID maker if the referral is, or is not, made.⁸

⁶ The Act, pt 6, div 2.

⁷ The Act, s 78; cl 5, Public Interest Disclosures Regulation 2022 (NSW) sets out what must be included in the annual return.

⁸ The Act, s 57.

The NSW Ombudsman has a statutory function to provide information, advice, assistance and training to agencies and public officials on ‘matters relevant to the Act’.⁹ We note that there may be similarity to the proposed function of the Commissioner under ss 10(1)(a) and (e) of the Bill to provide advice and guidance to parties about making disclosures and whistleblower protection issues, respectively.

PID advice

The NSW Ombudsman’s PID advice function provides NSW public sector agencies with general guidance, advice and assistance about the Act and its operation. This includes advice about how to assess a disclosure, agency obligations about how to investigate or otherwise deal with a disclosure, and agency PID policies is provided in response to agency requests.

The Advice function also maintains guidelines published by the NSW Ombudsman to assist agencies in connection with their functions and obligations under the Act.

Importantly, the PID Advice function cannot provide specific advice or assistance in respect of how an agency should handle a particular disclosure and does not provide legal advice. In providing guidance, advice and assistance, the NSW Ombudsman must remain fair and impartial in relation to PID matters and must avoid giving rise to any conflicts that could prevent the NSW Ombudsman from exercising all its functions under the Act and other legislation. This might include receiving a complaint about how an agency has dealt with a disclosure, conducting an audit of an agency’s PID management system, or investigating the handling of a PID.

As the NSW Ombudsman cannot guide, direct or endorse decisions, it must ensure that it does not participate (or be perceived as participating) in the decisions and actions that agencies and public officials take in relation to specific PID matters. If someone (including an agency) seeks specific advice, the NSW Ombudsman may suggest that they seek independent legal advice.

Recommendations for change and public reports

The Ombudsman has a role to provide advice to the Minister responsible on the operation of the Act and recommendations for reform and on regulations to be made under the Act as a member of the PID Steering Committee.¹⁰ The Ombudsman can also report to Parliament under the *Ombudsman Act 1974* (NSW) on a matter arising in connection with the exercise of the Ombudsman’s functions under the Act.¹¹ This can include proposals for legislative change.¹²

We note this is similar to the power of the proposed Commissioner to report to Parliament on the need for legislative or administrative action on issues relating to whistleblower protection under s 10(1)(i) of the Bill.

Further information

Further information about the NSW Ombudsman’s oversight of the Act can be found in the most recent *Public Interest Disclosures Oversight Annual Report* available at: www.ombo.nsw.gov.au/reports/annual-report/oversight-of-the-public-interest-disclosures-act-2022-annual-report-2023-24.

⁹ The Act, s 72(1)(b).

¹⁰ The Act, s 68.

¹¹ The Act, s 77(1).

¹² The Act, s 77(2).