Ombudsman
New South Wales

Special report by the NSW Ombudsman on the **Public Interest Disclosures Bill 2021**

19 October 2021

ISBN: 978-1-925885-30-9

NSW Ombudsman
Level 24, 580 George Street
Sydney NSW 2000

Phone: 02 9286 1000
Toll free (outside Sydney Metro Area): 1800 451 524
National Relay Service: 133 677

Website: www.ombo.nsw.gov.au
Email: nswombo@ombo.nsw.gov.au

ABN 76 325 886 267
Level 24, 580 George Street, Sydney NSW 2000
T 02 9286 1000
Tollfree 1800 451 524
www.ombo.nsw.gov.au

Ombudsman
New South Wales

The Hon Matthew Mason-Cox MLC
President
Legislative Council
Parliament House
SYDNEY NSW 2000

The Hon Jonathan O'Dea MP
Speaker
Legislative Assembly
Parliament House
SYDNEY NSW 2000

Dear Mr President and Mr Speaker

Pursuant to section 31 of the *Ombudsman Act 1974* and section 31A of the *Public Interest Disclosures Act 1994*, I am providing you with a report titled *Special report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021*.

I draw your attention to the provisions of s 31AA of the Ombudsman Act 1974 in relation to the tabling of this report and request that you make the report public forthwith.

Yours sincerely

Paul Miller
NSW Ombudsman

19 October 2021

Contents

Foreword

The willingness of public servants and employees at all levels to report serious wrongdoing when they see it is essential to maintaining the integrity of the public sector.

Twenty seven years ago, New South Wales was among the first jurisdictions in the country to enact a public interest disclosures regime – known then as the 'Protected Disclosures Act'. The Act has been subject to numerous changes since that time, including in 2010 when, following recommendations of the NSW Ombudsman, the title of the Act changed to the *Public Interest Disclosures Act 1994 (NSW)* (***PID Act***).

The new *Public Interest Disclosure Bill 2021* (NSW) (***PID Bill***) will replace the PID Act in its entirety. The Bill represents a significant enhancement to 'whistleblower' protections in NSW.

Public interest reporting will not happen unless there is both a sound legislative structure to facilitate and protect public interest disclosures, and positive 'speak-up' cultures that encourage and support those who do come forward.

In 2017, the Parliamentary Committee undertook a comprehensive review of the PID Act, concluding that: 'on the whole, the public interest disclosures regime works well'.

However, it identified numerous elements of the system that could be improved. It also recommended a complete re-write of the legislation to address the 'complicated and technical language, which makes it difficult for potential reporters and public and investigating authorities to understand'.[1]

We now welcome the introduction of this Bill, which will give effect to the Parliamentary Committee's suggested reforms.

I am also pleased to advise Parliament that, alongside the NSW Ombudsman, all members of the Public Interest Disclosures Steering Committee have indicated their support for the new Bill.

The primary aim in this report is to provide Parliament with the NSW Ombudsman's detailed assessment of the Bill against recommendations made by the Parliamentary Committee, which the Government says the Bill intends to implement.

I am very pleased to confirm that the Bill substantially implements all but one of those recommendations. (The recommendation not implemented relates to the threshold for public interest disclosures to the media or to a member of Parliament – see Annexure D).

We are confident that the Bill will better ensure that reports of wrongdoing are acted upon, and that reporters will be safer and feel more encouraged to come forward.

On behalf of the PID Steering Committee, I thank the Department of Premier and Cabinet for its genuine engagement and consultation with us and the Steering Committee throughout the process of developing the PID Bill.

1 Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* (2017). Chairs' forward and summary, at iv-v.

I also thank the other members of the Steering Committee for their contributions to the Government consultation process.

While this report has been informed by those consultations with other members of the Steering Committee, the views expressed in this report are those of the NSW Ombudsman and do not necessarily represent the views of any other Steering Committee members except where otherwise stated.

It is now four years since the Parliamentary Committee recommended that this Bill be enacted. While I acknowledge that the process of drafting the Bill has been complex for Government, and in recent years global events will have added to its challenges, it has taken longer for this Bill to reach Parliament than might have been hoped.

Nonetheless, it is important to appreciate that further time will now be required before it can commence if it is to be successfully implemented.

All public sector agencies, statutory bodies and local councils, as well as contracted service providers, will be affected by this new legislation, and will need to develop and implement new policies and training. Before that can happen, detailed regulations as well as comprehensive guidance material will need to be developed. At a minimum, an awareness campaign will be needed to reach every public servant across the State who may benefit from the new Bill, as well as more detailed training for managers who could find themselves receiving a public interest disclosure.

I therefore support the commencement clause in the Bill, which will allow for up to 18 months to prepare for the changes.

The Government is also aware that my office will require significant additional resources to prepare for that commencement, and to establish our ongoing enhanced oversight and reporting functions once the PID Bill is operational.

The PID Bill is a colossal improvement on the current PID Act. Of course, we will continue, with the Steering Committee, to monitor the operation of the regime and to continuously identify ways it can be further improved in the future.

Paul Miller
NSW Ombudsman

Executive Summary

This special report of the NSW Ombudsman examines the Public Interest Disclosures Bill 2021, which is currently before the NSW Parliament.

Our purpose is to provide advice to Parliament on the Bill as part of our role overseeing the NSW public interest disclosure (PID) regime (**section 1**).

Our assessment of the Bill – a significant improvement to the NSW PID regime

Although the Bill retains the broad substance of the current *Public Interest Disclosures Act 1994*, the Bill has been prepared by way of a complete re-write of that Act. In doing so the Bill also implements numerous substantive amendments and clarifications, as well adopting a clearer and more logical structure.

The new Bill addresses many of the weaknesses in the existing PID Act:

- it is simpler and easier to navigate
- it contains fewer trip hazards for would-be whistleblowers, including by expanding the permissible recipients of PIDs to include a person's manager, and by protecting PIDs even if they are made to the wrong agency
- it provides more comprehensive protections, including for witnesses and those involved in investigating PIDs
- there is a clearer duty on agencies to take appropriate steps to deal with the disclosures they receive
- it also introduces enhanced measures to encourage a 'speak up culture' within agencies, for example by enhanced requirements around policies and training
- it facilities more comprehensive and meaningful reporting of data about PIDs.

(See **section 2** for more detail).

Implementation of Parliamentary Committee recommendations

The Bill was prepared by the Government primarily in response to:

- the October 2017 report of the review of the *PID Act 1994* by the **Ombo-LECC Committee**
- the November 2017 ICAC Protections Report by the **ICAC Committee**.[2]

With one significant exception in relation to the treatment of external disclosures to members of Parliament and journalists (see **annexure D**), the Ombudsman is of the view that the recommendations of the PID Act Review and the ICAC Protections

2 The details of these reviews are in the Glossary at the end of Section 4.

Report have been implemented in substance (see **section 4** and **annexures A-D** for more detail).

Preparing for the Bill to commence

After the Bill is passed by Parliament, a considerable amount of work will be required before it can be commenced and come into force.

For this reason, the Bill provides for a commencement date up to 18 months after assent.

Our office will also require a significant commitment of additional resources to undertake preparatory work and to establish the enhanced oversight functions for which we will be responsible (**section 3**).

Avenues for future reseach and advice

The Bill represents a major enhancement to whistleblower protections in NSW. Nonetheless, as we explain in **annexure E**, there are other potential improvements that we think would benefit from further research and consideration. These include:

- whether the categories of 'serious wrongdoing' that can be the subject of a PID should be expanded or simplified
- whether the definition of 'maladministration' should be clarified and/or expanded
- whether greater clarity is required in respect of the definition of 'public official' when applied in the context of contracted-out services.

Following this report, we will recommend that these issues be considered further by the Steering Committee, which will then provide further advice.

However, given the significant benefits of the PID Bill, we would not like to see the passage or commencement of the Bill held up as these matters are considered.

1. Introduction

The new Public Interest Disclosures Bill

On 14 October 2021, the Special Minister of State, the Hon. Don Harwin MP, introduced the Public Interest Disclosures Bill 2021 (***the PID Bill***) into the NSW Legislative Council.[3]

The Bill follows a review of the current *Public Interest Disclosures Act 1994* (***PID Act***) by the Ombo-LECC Committee, which was completed in October 2017.[4] The Ombo-LECC Committee made 38 recommendations to reform the PID Act. Recommendations to amend the PID Act, and related legislation, were also made by the ICAC Committee in a 2017 report.[5]

The Bill embodies the Government's response to those Parliamentary Committees. It was prepared for the Government by Parliamentary Counsel on the instructions of officials from the Department of Premier and Cabinet (***DPC***). DPC consulted closely with members of the Public Interest Disclosures Steering Committee[6] throughout the process of drafting the Bill.

The role of the NSW Ombudsman

The Ombudsman oversights the operation of the PID Act and also chairs the Public Interest Disclosures Steering Committee.

Our functions include to promote public understanding of the PID Act and provide reports and recommendations to the Minister for legislative change.

The Ombudsman may make a special report to Parliament at any time in relation to our functions under or in connection with the PID Act, including systemic or other problems 'identified by the Ombudsman in connection with the operation of the Act': s 31A PID Act.

The Steering Committee is to 'receive, consider and provide advice to the Minister' on any reports provided by the Ombudsman under s31A: s 6A(2)(b) PID Act.

3 First Print of the *Public Interest Disclosures Bill 2021*.

4 Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* (2017).

5 Joint Committee on the Independent Commission Against Corruption, *Report on the Inquiry into Protections for People Who Make Voluntary Disclosures to the Independent Commission Against Corruption* (2017).

6 The PID Steering Committee includes representatives of the NSW Ombudsman, Department of Premier and Cabinet (DPC), Audit Office, Independent Commission Against Corruption (ICAC), Law Enforcement Conduct Commission (LECC), Information Commissioner, Public Service Commission, NSW Police Force, and Department of Planning, Industry and Environment (DPIE).

The purpose of this report

This report provides our advice to Parliament on the Bill. We:

- outline the key changes to be introduced by the new Bill (**section 2**)
- assess the Bill against the recommendations of the **Ombo-LECC Committee** (**section 4** and **annexure A**) and the **ICAC Committee** (**section 4** and **annexure B**)
- provide a comparative assessment of the Bill against recommendations made in the 2016 Moss Review of the corresponding Commonwealth legislation[7] (**annexure C**).

We have also taken this opportunity to raise a number of additional policy issues that remain ambiguous in the Bill, or where we suggest that future enhancements could be made (**annexure E**). These issues do not arise from recommendations of the relevant Parliamentary Committees. They are complex and require much more detailed consultation and analysis. Accordingly – and given the overwhelmingly positive reforms this Bill will make – we do not recommend that the passage of the Bill should be held up as these additional issues are considered. Instead, we refer these issues for more detailed consideration and advice by the Steering Committee.

7 Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Cth) (2016).

2. A step change in encouraging insiders to report wrongdoing, and protecting those who do

The Bill implements all but one of the Parliamentary Committees' recommendations

As noted above, the Bill has been prepared by Government to respond to both the PID Act Review and the ICAC Protections Report.

With one significant exception in relation to the treatment of external disclosures to members of Parliament and journalists (recommendation 11), we confirm that, in our assessment, the recommendations of the PID Act Review and the ICAC Protections Report have been substantially implemented.

It should be noted, however, that as the Bill is a complete re-write of the legislative scheme (something recommended by the Ombo-LECC Committee) some of the detailed recommendations of the Committees could not be implemented precisely in accordance with their terms. This has been the case where some recommendations of the Ombo-LECC Committee and the ICAC Committee refer to specific sections, concepts or wording in the current PID Act, in circumstances where the new Bill has a different structure or uses different concepts or wording. Nevertheless, in all such cases, we have assessed the PID Bill against the relevant recommendation and confirm that, in our view, the policy intent of the recommendations has been implemented.

Our assessment against the Committees' recommendations is set out in more detail in **section 4** and **annexure A** (Ombo-LECC Committee) and **annexure B** (ICAC Committee).

Recommendation 11 of the Ombo-LECC Committee's PID Act Review relates to the treatment of external disclosures – that is, disclosures to members of Parliament and journalists. The Bill has not implemented Recommendation 11 and retains the requirement that external disclosures be 'substantially true' (see **annexure D** for more information).

The Bill addresses numerous weaknesses in the current Act

The Bill makes significant enhancements to whistleblower protections in NSW – helping to ensure that people are encouraged to come forward to report wrongdoing, that they are protected when they do so, and such reports will be dealt with appropriately.

The Bill does so not only by responding directly to the recommendations of the Parliamentary Committees, but by making additional improvements that respond to gaps or flaws in the current PID Act that became apparent during the Bill-drafting process.

Less technicalities and a simple 'no-wrong door' approach

Under the current PID Act, there are strict procedural and substantive requirements that must be satisfied in order for a disclosure to constitute a public interest disclosure. Public officials making a public interest disclosure (**PID**) must navigate a complex legislative regime, with any trivial error in meeting the strict requirements (for example reporting to the wrong person within an agency, or reporting to the wrong agency for that particular kind of wrongdoing) meaning that the protections won't apply. An honest public official who discloses wrongdoing in good faith may fail to attract the protections of the Act due to a technicality.

For example: if a public official makes a disclosure of wrongdoing to their manager, but does not realise that that particular manager has not been specifically nominated in the agency's policy as a 'disclosure officer', then the disclosure may not be protected – regardless of the content of the disclosure. This is problematic, as research indicates managers are often the first port of call for many public officials seeking to report wrongdoing.

The Bill addresses this problem by applying a 'no wrong door' approach, which supports public officials to make disclosures in a way that is likely to be most natural and convenient to them. In particular:

- Without limiting the other people to whom a PID may be made, disclosures made to a public official's own manager will also now be protected, even if the manager is not designated as a 'disclosure officer' for the agency (cl 27(1)(c)). The Bill then makes it the manager's responsibility (not the person making the disclosure) to ensure that the disclosure ends up with an appropriate disclosure officer who is able to properly deal with it (cl 51).
- The Bill ensures that disclosures made to the 'wrong' agency will still attract protection. It explains (cl 56) how an agency that receives a voluntary PID that does not relate to the agency must deal with it. The responsibility is on the agency, rather than the whistleblower, to ensure that it is investigated or referred to the relevant agency, integrity agency, body or person.
- The Bill includes a safety-net provision that allows the head of an agency to 'deem' a disclosure to be a PID even if it might not otherwise meet all the technical criteria (cl 29). This means that if, for example, a public official makes a disclosure to a peer (who passes it on to a manager), it will be open to the head of agency to deem that the disclosure is a PID – ensuring the person is protected. The deeming provision will also allow a head of agency to provide certainty of protection to disclosers, and avoid disclosures being excluded from protections on technical grounds.

More comprehensive protections

The current PID Act protects public officials from detrimental action that is 'substantially in reprisal' for making a PID. However, the complexity involved in demonstrating that detrimental action is 'substantially in reprisal' for a PID or suspected PID deprives the protections of much of their practical force.

Under the Bill, the requirement to provide that detrimental action was taken 'substantially in reprisal' for the making of a PID is replaced with a more straightforward test of whether the PID was a 'contributing factor' to the detrimental action (cl 33 (1)(b)). The Bill also clarifies that it is not necessary to establish that a PID has in fact been made: the protections are triggered where a person 'suspects, believes or is aware' that another person 'has made, may have made, may make or proposes to make' a PID (cl 33(1)(a)(i)). The protections in the Bill are also more comprehensive, and extend beyond the official who made (or is suspected of having made) the disclosure to anyone that may suffer detrimental action because of the PID, or suspected PID (cl 33(1)(a)). For example, the protections will extend to prevent detrimental action being taken against a family member of the official.

In addition to protecting disclosures of wrongdoing by public official whistleblowers (referred to in the Bill as *voluntary PIDs*) the Bill also:

- protects people who disclose information at the request of an agency that is investigating serious wrongdoing. These are referred to in the Bill as *witness PIDs*. Protections for making witness PIDs are not limited to public officials (see cl 22).
- more clearly protects those who have reported wrongdoing as a requirement of their role (for example, internal auditors). These are referred to in the Bill as *mandatory PIDs* (cl 22).
- protects those who are involved in the investigation of serious wrongdoing, such as internal and external investigators, from detrimental action (cl 33(1)(a)(ii)).
- aligns the protections available under each of the integrity agencies' legislation (in respect of reports of complaints to that agency) to ensure that anyone who makes relevant disclosures under those Acts receive protections that are broadly equivalent to those provided to PID-makers under the PID Bill (Schedules 4-6).

Dealing with PIDs

The current PID Act mandates only how PIDs are to be acknowledged and, in some cases, when they must be referred to another agency. The Act does not contain any other requirements for how agencies must deal with PIDs.

By contrast, under part 5 of the PID Bill agencies will have an express statutory duty to decide how to deal with voluntary PIDs that relate to them. They may do so either by investigating themselves or by referring the disclosure to an integrity agency or another person or body with the power to investigate (cl 55).

There may be some circumstances where it is not appropriate for the agency to do either of those things – for example, if the disclosure relates to a matter that is extremely dated and of historic interest only, or if the disclosure is of a matter that has already been comprehensively investigated by an integrity agency. However, if an agency does decide not to investigate or refer a PID for investigation, it must provide the Ombudsman with a written explanation of that decision (cl 55(3)(a)).

In addition, under the Bill agencies are required to:

- tell the discloser how they propose to deal with the disclosure, provide updates on progress (cl 59(2)) and take steps to assess and minimise the risk of detrimental action (cl 61(2)).
- take corrective action if an investigation into a voluntary PID finds serious wrongdoing (cl 66). Agencies are required to inform disclosers of the corrective action they propose to take (cl 59(2)(f)(ii)) and to specify in their PID policy procedures for taking corrective action in response to findings of serious wrongdoing (cl 43(1)(f)).

Like the PID Act, the Bill does not provide for any special provisions or procedures for investigating a PID, other than obligations to keep the PID-maker informed about the progress and outcome of any investigation. We support this approach.

PIDs are one of many ways that wrongdoing may come to the attention of an agency (including to an integrity agency, like us). For example, an agency may become aware of wrongdoing by way of an internal audit or other monitoring, complaints from the public, or referrals from regulatory or integrity agencies, rather than through a PID. The decision whether and how to investigate should not necessarily turn on how the information came to the attention of the agency.

Stronger focus on practical prevention and strengthening 'speak up' cultures

The Bill contains a range of measures that focus on practical risk prevention and strengthening 'speak up' cultures. These include:

- *Risk assessments*
  Agencies are required to take steps to assess and minimise the risk of detrimental action being taken against both the PID-maker and any public official that the PID is about (cl 61(2)). These steps must be outlined in their PID policy (cl 43(1)(c)). Agencies are also required to assess the risk of detrimental action before they refer a PID to another agency (cl 57(2)).
- *Agency liability*
  Agencies are liable for injury, damage or loss as a result of a failure to take steps to assess and minimise the risk of detrimental action (cl 62(1)).
- *Training*
  Agencies must ensure that all public officials associated with the agency know how to make a PID and are aware of the agency's PID policy and what further action may be taken if they are dissatisfied with the agency's response (cl 48(1)). They are also required to ensure that specified people, including all managers, are provided with training on their responsibilities under the Bill (cl 48(2)).
- *Reasonable management action*
  The Bill confirms that reasonable management action is not to be considered detrimental action (cl 31).

Better reporting and accountability

The Bill enhances the role of the Ombudsman by:

- Specifying further information agencies are required to include in their annual report to us. This includes information about action they have taken to deal with voluntary PIDs in the reporting period (cl 78).
- Requiring agencies to notify our office:
  - if they decide not to investigate or refer a voluntary PID (cl 55(3))
  - of any arrangements that the agency enters into with another agency or entity (cl 81(4)(b))
  - of certain matters relating to allegations of a detrimental action offence (cl 34(4)).
- Making provision for our office to conciliate disputes arising under the Bill or an agency's PID policy (cl 74).
- Providing for more meaningful data to be collected and reported on agency and sector-wide PID information (cl 78 and draft Regulation in Schedule 3).

Obligation to specify PID requirements in agency contracts

Where agencies enter into contracts for services to be provided, or functions to be fulfilled, on behalf of the agency, the Bill requires the contract to include terms that highlight the application of the Bill to the service provider (cl 82).

Contracts must specify that individuals involved in providing services are considered public officials for the purpose of the PID Bill, and that the obligations around PID awareness and training apply to these service providers the same way they do to other public officials (cl 82(2)(a)). Contracts must require service providers to notify the contracting agency of a range of specific matters – including allegations of serious wrongdoing by the service providers themselves (cl 82(2)(b-c)).

Excluding the Commonwealth PID legislation from applying to state agencies

The Steering Committee has previously expressed concern that recent changes to Commonwealth legislation have meant that some public authorities may be subject to whistleblowing provisions under both the *Corporations Act 2001* Cth (***Corporations Act***) and the current PID Act.[8] This creates uncertainty and complexity, particularly in areas where the overlapping Commonwealth and state provisions may be inconsistent.

The Bill addresses many of the Steering Committee's concerns by excluding agencies that are covered by the PID Bill from the operation of the Corporations Act (cl 12).

We note, however, that there is still likely to be some overlap between the two regimes. This may arise, for example, where a corporation (covered by the Corporations Act) provides services on behalf of a NSW Government agency. In that case, relevant staff of the corporation will also fall within the extended definition of 'public officials' in the PID Bill (cl 14). The coverage by the PID Bill of staff employed by private sector contractors to government agencies is one of the issues that warrants further consideration by the Steering Committee.

There may be scope for further simplification

The Ombo-LECC Committee was of the view that the current PID Act was overly complex and should be simplified.

The new Bill is more than twice as long as the current Act. Of course, the mere fact that it is longer does not necessarily mean that it is more complex. For public officials wishing to report wrongdoing, the new PID Bill is significantly more straightforward to navigate than the existing PID Act. In many cases, the greater detail also provides greater clarity.

Nevertheless, we think there may be ways the legislation could be further simplified in future. The argument for a more principles-based approach in some areas is discussed in **annexure E** and should be considered further by the Steering Committee.

In the meantime, we will work with the Steering Committee to ensure that our guidelines and other collateral material is as simple as possible to help both agencies and prospective whistleblowers understand the Bill.

8 NSW Ombudsman, *Public Interest Disclosure Steering Committee Annual Report 2018-19 - NSW Ombudsman*.

3. Implementation: work is needed before the Bill can commence

A considerable amount of work must be done before the new Act can be commenced and come into force.

The Bill provides for a commencement date no later than 18 months after assent, but it may commence on an earlier date if so proclaimed (cl 2). We have advised Government that we need this time in order to adequately prepare both ourselves and agencies for its operation.

This time is required to allow our office to a) establish a team, b) develop and issue comprehensive new public and agency guidelines, reporting tools and templates and c) roll out new reporting, notification and conciliation functions. The Ombudsman's training material will require complete revision, including the manner of delivering training to ensure greatest efficiency and reach.

These new resources will also need to be available to agencies with a sufficient lead time to allow them to prepare for the Bill's commencement.

For example, the 'no wrong door' approach of the new Bill (referred to in **section 2** above) means that anyone who manages or supervises public officials will need to be made aware of their responsibility to recognise and appropriately deal with disclosures that may be made to them (cl 48(2)(c)). Given a person does not need to use any particular form of words (such as 'I want to make a public interest disclosure') for the PID Bill to be triggered, all managers will need to be alert to the criteria for a PID and their obligations should they receive one.

Resource implications

The commencement timetable outlined above relies on the timely allocation of additional resources. Our office will require significant new funding to undertake the work necessary to prepare for commencement of the Bill, and to establish the enhanced oversight functions for which the office will be responsible once the Bill is operational.

We are engaging with Government about the required funding.

There will also be resource implications for agencies. Agencies will need to develop new policies and templates, and ensure that the necessary training has been provided, including training to all managers within their organisation. They will also need to review arrangements for reporting to our office, and review agency service contracts.

Continued operation of the PID Act

It is important to note that, while preparations are underway for the commencement of the new PID Bill, the current PID Act will continue to operate.

For our office, this likely means that we will need to temporarily run two teams – one to continue to oversight and assist agencies as they comply with the current Act, and another to undertake the work to prepare for and implement the new Bill.

For agencies and public officials, the period between passage of the Bill and its commencement is also likely to be a time of potential confusion as they come to understand and prepare their internal policies, procedures and training for the new Bill, while continuing to be subject to the current Act. We will support agencies and public officials as best we can through this transition phase.

4. Supplementary information

Bill objects and overview

The Bill establishes a new framework for protecting public officials who make public interest disclosures, and for making and dealing with PIDs in New South Wales. On commencement, it will replace the PID Act.

The Bill has been prepared in response to relevant reports of the Ombo-LECC Committee and the ICAC Committee.

As outlined in the Bill's explanatory note, the Bill:

- defines the categories of public interest disclosure
- specifies conditions under which a disclosure is a voluntary public interest disclosure
- enables a public official to make a voluntary public interest disclosure to an agency whether or not the agency has jurisdiction to investigate it
- makes it an offence to take detrimental action against a person based on the suspicion, belief or awareness that a person has made a public interest disclosure
- protects people who make public interest disclosures from detriment and liability in relation to making the disclosures
- requires agencies to adopt policies specifying their procedures for dealing with voluntary public interest disclosures
- requires agencies to carry out training in relation to the public interest disclosure scheme
- specifies how agencies should deal with voluntary public interest disclosures and respond to findings of serious wrongdoing or other misconduct, and
- requires agencies to provide the NSW Ombudsman with an annual return about the public interest disclosures they receive.

The Bill also amends certain other Acts to align the protections in the Bill with the protections available under those other Acts to people who complain or make disclosures to integrity agencies, or who otherwise assist those agencies to investigate wrongdoing or misconduct. These other Acts are the *Independent Commission Against Corruption Act 1988* (***ICAC Act***), the *Ombudsman Act 1974* and the *Law Enforcement Conduct Commission Act 2016*.

Implementation of Parliamentary Committee recommendations

Ombo-LECC Committee: Review of the *Public Interest Disclosures Act 1994*

In 2017, the NSW Parliament's Ombo-LECC Committee conducted a review of the PID Act including the effectiveness of amendments introduced after a review conducted by the ICAC Committee in 2009.

The Committee heard evidence that, on the whole, the public interest disclosures regime works well and the 2010 amendments had achieved their aims. Its recommendations focused on simplifying the disclosure process, improving remedies for detrimental action, refining reporting requirements, and clarifying the PID Act.[9]

The Committee found that there were gaps or technicalities in the PID Act that could mean that people who make disclosures are not protected; that the PID Act should protect disclosures to a wider range of people and bodies; and that the protections relating to detrimental action as a result of a public interest disclosure should be strengthened. It also made recommendations to address unnecessary administrative burdens on public authorities, and to increase the data provided to the NSW Ombudsman to allow for more comprehensive and meaningful monitoring of the scheme.[10]

The Committee heard that the PID Act is written in complicated and technical language, and that it is difficult for those using it to understand. It recommended that it be redrafted in simpler language and with a clearer structure, while maintaining its substance. It identified several matters that should be considered as part of the redrafting process, including possible civil, employment and administrative remedies for detrimental action; the findings of the *Whistling While They Work 2* research project;[11] and the reviews of public interest disclosure legislation in other jurisdictions.[12]

The Committee considered that this would make the PID Act more accessible and would remove the technicalities and uncertainties that weaken it.

The NSW Government response to the report was tabled in Parliament on 19 April 2018.[13] It stated that the NSW Government supported making it simpler for public officials to make public interest disclosures, and improving protections and remedies for those who suffer detrimental action. It noted that, in doing so, it would be important to continue to protect individuals' reputations against defamation and to discourage the public disclosure of confidential information. It stated that the Government would prepare a Bill to reform the scheme in accordance with these principles, and the Committee's recommendations.

9 Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* (2017), iv.
10 Ibid, iv-v.
11 *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*
12 Above n 9, v.
13 Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* (2017), Government Response

The NSW Government also stated that the Public Interest Disclosures Steering Committee would be asked to examine, in detail, the implementation issues arising from the recommendations; and to consider the draft Bill once it had been prepared.

Annexure A to this report outlines the Committee's recommendations and the extent to which they have been implemented in the Bill. As noted above, in the Ombudsman's view, the Bill implements all but one of the recommendations of the Committee.

ICAC Committee: Report on the Inquiry into protections for people who make voluntary disclosures to the ICAC

In 2017, the NSW Parliament's ICAC Committee conducted an inquiry into protections for people who make voluntary disclosures to the ICAC. The Committee examined whether the law should be amended to protect people from criminal, civil or disciplinary liability if they voluntarily disclose information to the ICAC for the purposes of its functions.

The Committee found that the protections for people who made disclosures to the ICAC were too narrow and unclear in their application. It found that there was significant public interest in increasing the protections available to people who make these voluntary disclosures; and that the absence of such protection deterred people from making them—which stopped the detection, exposure and prevention of corrupt conduct.[14]

The Committee recommended that the ICAC Act be amended to protect people who make voluntary disclosures to the ICAC against criminal, civil and disciplinary liability for doing so.[15] It also made recommendations to protect the identity of people who make voluntary disclosures in certain circumstances, and to provide a limited protection against self-incrimination for people who make voluntary disclosures to the ICAC.

The NSW Government response to the report was tabled in Parliament on 18 April 2018.[16] It noted that the Government supported providing protections to people who make voluntary disclosures to the ICAC in appropriate circumstances; and that in doing so, it is important to continue to protect people from reputational damage as a result of the public disclosure of vexatious or untrue corruption allegations. It recognised that the Committee had identified that some of the recommendations could lead to overlap with the public interest disclosure regime under the PID Act, and this could lead to different treatment of a disclosure by a public official under the PID Act and the ICAC Act.

The Government stated that it would prepare a Bill in relation to voluntary disclosures to the ICAC, taking into consideration the review of the public interest disclosures regime. In preparing the Bill, it would consult with, and consider the views of, the ICAC in relation to voluntary disclosures to the ICAC and their relationship with public interest disclosures.

14 Joint Committee on the Independent Commission Against Corruption, *Report on the Inquiry into Protections for People Who Make Voluntary Disclosures to the Independent Commission Against Corruption* (2017), iv.
15 Ibid.
16 Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission, *Review of the Public Interest Disclosures Act 1994* (2017), Government Response.

Annexure B to this report outlines the Committee's recommendations and the extent to which they have been implemented in the Bill.

The Australian Government response to the Review of the Public Interest Disclosure Act 2013 (Cth)

In 2016, Mr Philip Moss AM conducted a review of the effectiveness and operation of the Commonwealth public interest disclosure regime in the *Public Interest Disclosure Act 2013* (Cth) (***Cth Act***).

In the review, Mr Moss was asked to consider:

- the impact of the Cth Act on individuals seeking to make disclosures in accordance with its provisions
- the impact of the Cth Act on agencies, including any administrative burdens imposed by investigation and reporting obligations in the Cth Act
- the breadth of disclosable conduct covered by the Cth Act, including whether disclosures about personal employment-related grievances should receive protection under the Cth Act
- the interaction between the Cth Act and other procedures for investigating wrongdoing, including Code of Conduct procedures under the *Public Service Act 1999* (Cth) and the Commonwealth's fraud control framework.[17]

The review's recommendations are summarised in the review report. They aim to improve the Commonwealth Act by:

- strengthening the pro-disclosure culture in the Commonwealth public sector
- increasing the capacity of relevant Commonwealth agencies to oversee the Cth Act
- including specialist statutory officeholders who monitor integrity and accountability in the Commonwealth public sector as additional investigative agencies
- focussing disclosable conduct towards fraud, serious misconduct and corrupt conduct
- making it easier for potential disclosers, witnesses and those who administer the Cth Act to get help and support.[18]

The Australian Government response to the Review of the *Public Interest Disclosure Act 2013* (Cth) was released on 16 December 2020.[19] The Government agreed, agreed in part or agreed in principle to 30 recommendations, noted one recommendation and disagreed with two recommendations. It also announced that it was considering additional options for reform to complement the implementation of its response to the Moss Review.

17 Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Cth) (2016), 2.
18 Ibid, 7.
19 Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Cth) (2016) Government response

Annexure C to this report outlines the Moss Review recommendations, and the extent to which they are reflected in the Bill. As the Moss Review dealt with Commonwealth legislation, a number of those recommendations are either not relevant to the NSW framework, or otherwise reflect different policy positions between the jurisdictions.

Glossary

Term	Definition
ICAC Committee	Joint Parliamentary Committee on the Independent Commission Against Corruption
ICAC Protections Report	ICAC Committee *Report on the Inquiry into Protections for People Who Make Voluntary Disclosures to the Independent Commission Against Corruption* (2017)
Ombo-LECC Committee	The Joint Parliamentary Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission
PID Act	*Public Interest Disclosure Act 1994* (NSW)
PID Act Review	Ombo-LECC Committee *Review of the Public Interest Disclosures Act 1994* (2017)
PID Bill or Bill	*Public Interest Disclosure Bill 2021* (NSW)
Public Interest Disclosure (PID)	A disclosure that meets the requirements of the PID Act (or, once commenced, the PID Bill)
Moss Review	Philip Moss AM *Review of the Public Interest Disclosure Act 2013* (Cth) (2016)
Steering Committee	The PID Steering Committee established by s 6A of the PID Act and comprising representatives of the NSW Ombudsman, Department of Premier and Cabinet (DPC), Audit Office, Independent Commission Against Corruption (ICAC), Law Enforcement Conduct Commission (LECC), Information Commissioner, Public Service Commission, NSW Police Force, and Department of Planning, Industry and Environment (DPIE).

Annexure A

Review of the PID Bill against the recommendations of the Ombo-LECC Committee PID Act Review

Recommendation 1

That the *Public Interest Disclosures Act 1994* be amended to require public authorities to nominate in their internal reporting policies an adequate number of officers to receive public interest disclosures on behalf of the authority.

Authorities should take into account the number of public officials they employ, and include at least one person in each major worksite.

Implemented, in the following way:

The Bill broadens the categories of people who are to be treated as disclosure officers and ensures that there is one at each work site that is permanently maintained by the agency (cl 18(1)). It also deems managers to be disclosure officers if the agency does not have a public interest disclosure policy (''PID Policy''), or the policy does not include enough information to enable the disclosure officers to be contacted (cl 18(2)).

Clause 18(1) defines a ''disclosure officer'' as a person responsible for receiving voluntary public interest disclosures ('PIDs') on behalf of the agency, including:

- the head of the agency
- for each work site that the agency permanently maintains and at which more than 1 person is employed—the most senior ongoing employee who ordinarily works there
- if the agency has an unelected governing body—a member of the governing body
- a person specified in the agency's PID Policy as responsible for receiving voluntary PIDs on behalf of the agency
- a member of a class of persons, or a person employed in a position or role, specified in the agency's PID Policy as a class, position or role responsible for receiving voluntary PIDs on behalf of the agency.

Clause 43(4) requires an agency's PID Policy to prominently include or be accompanied by information that enables disclosure officers for the agency to be contacted.

Clause 51 also provides that any manager to whom a voluntary PID is made must, as soon as reasonably practicable, communicate the disclosure to a disclosure officer for an agency with which either the manager or the public official who made the disclosure is associated.

Recommendation 2

That the *Public Interest Disclosures Act 1994* be amended to enable public interest disclosures to be made to a public authority's governing body or to the Minister responsible for an authority.

Implemented.

Clause 18(1)(c) provides that if an agency has an unelected governing body, a disclosure officer for that agency includes a member of that governing body.

Clause 27(1)(d) provides that a disclosure may be made to a Minister or a member of the Minister's staff (provided that it is made in writing, cl 24(3)(c)). Note that the Bill does not limit this to the Minister responsible for a particular agency, but cl 52 provides that a Minister (or their staff) must communicate a disclosure to the disclosure officer for an agency that is responsible to the Minister or an integrity agency.

Recommendation 3

That s 15 of the *Public Interest Disclosures Act 1994* be extended to misdirected disclosures received by a public authority, if the public official who made the disclosure honestly believed that it was the appropriate public authority to deal with the matter.

Implemented, in the following way:

The Bill avoids the concept of 'misdirected disclosures' by ensuring that disclosures that are made to the 'wrong' public authority will still attract protection.

In particular, cl 56 outlines how an agency that receives a voluntary PID that does not relate to the agency must deal with it—which is by dealing with it under another Act or law that authorises it to investigate the relevant serious wrongdoing (if not an integrity agency); referring it to the relevant agency, an integrity agency, or a person or body that is otherwise authorised to investigate it; or by dealing with it in accordance with an arrangement (if referred by the relevant agency under an arrangement).

Recommendation 4

That the *Public Interest Disclosures Act 1994* be amended to 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 Committee's recommendation has been **addressed** in the Bill, as the structure of the Bill now allows disclosures to be made to any agency (see recommendation 3 above) and the Bill provides for principal departments to deal with PIDs relating to agencies within the cluster, by agreement.

The Bill provides that:

- the head of an agency may, by agreement, delegate the exercise of any of his or her functions under the Act to the head of another agency (other than specified functions) (see cl 80), and
- an agency may enter into an arrangement with another agency to exercise the other agency's functions under the Act on behalf of the other agency (cl 81(2)).

The Bill also allows for agencies to enter into arrangements with other kinds of entities to exercise certain functions on behalf of the agency, including receiving PIDs dealing with PIDs by investigating relevant serious wrongdoing, or training (cl 81(3)).

It is noted that clusters are not legal concepts or entities, and it is not a term used elsewhere in NSW legislation.

Recommendation 5

That the *Public Interest Disclosures Act 1994* be amended to omit s 26(1A), which requires a public official to refer a disclosure to the authority to which the disclosure relates, or to the relevant investigating authority.

Implemented, by making broader provision in relation to referrals.

Ombo-LECC Committee's comments

The Committee considered that the requirement for a public official to refer a PID to the authority to which the disclosure relates should be repealed. It considered that it was inconsistent with other provisions in the PID Act, and that a referral may be inappropriate in some cases (eg, in clusters, or where an agency is very small). It also considered that the requirement impedes the possibility of more centralised PID handling.

The Bill's approach

The Bill does not replicate s 26(1A) but it does generally retain the principle that a voluntary PID should be handled by the agency to which it relates, or a relevant integrity agency. However, it also allows for another agency to deal with a voluntary PID where it is authorised to do so under another Act or law; or under an arrangement or delegation from the relevant agency.

As noted above, the Bill outlines how an agency that receives a voluntary PID not relating to the agency must deal with it (see cl 56).

Unless the referral is mandatory under another Act or law, an agency is not to refer a voluntary PID without considering the following:

- whether the disclosure would more appropriately be dealt with by the person to whom, or body to which, the disclosure is to be referred
- the risk of detrimental action being taken as a result of the referral of, or failure to refer, the disclosure (see cl 57(2)).

Recommendation 6

That the *Public Interest Disclosures Act 1994* be amended to 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 *Public Interest Disclosures Act 1994*.

Authorities should be required to record oral disclosures in writing as soon as practicable.

Implemented.

Clause 24(2) provides that a disclosure may be a voluntary PID whether or not: it is made orally or in writing; it is anonymous; or the maker states that the disclosure is a PID or is made under the Act. However, cl 24(3)(c) provides that a disclosure made orally to a Minister or a member of a Minister's staff is not a voluntary PID. In that case, cl 52(c) provides that the Minister or member of a Minister's staff must direct the maker of the disclosure to a disclosure officer for the agency that is responsible to the Minister or to an integrity agency for the purpose of remaking the disclosure.

Clause 53 requires a person receiving an oral PID (other than a Minister or a member of a Minister's staff) to make a written record of the disclosure.

Recommendation 7

That the *Public Interest Disclosures Act 1994* be amended to enable disclosures concerning serious privacy contraventions to be made to the Privacy Commissioner.

Contraventions would involve serious breaches of the *Privacy and Personal Information Protection Act 1998*, or *Health Records and Information Privacy Act 2002,* or *Data Sharing (Government Sector) Act 2015,* or *State Records Act 1998.*

Implemented, except in relation to the *Data Sharing (Government Sector) Act 2015.*

Clause 13 defines 'serious wrongdoing' to include 'a privacy contravention' and 'a government information contravention'.

The Dictionary defines a 'privacy contravention' as a failure, other than a trivial failure, by an agency or public official to exercise functions in accordance with the *Privacy and Personal Information Protection Act 1998* or the *Health Records and Information Privacy Act 2002*.

The Dictionary defines a 'government information contravention' as a failure, other than a trivial failure, by an agency or public official to exercise functions in accordance with the *Government Information (Information Commissioner) Act 2009*; the *Government Information (Public Access) Act 2009; or the State Records Act 1998*.

The Government has advised that the *Data Sharing (Government Sector) Act 2015* has few substantive or operative provisions; and that if there was a relevant breach of that Act, it would be a breach of one of the other Acts above, or would otherwise fall into other existing categories of serious wrongdoing. For this reason, it has not been included in the definition of 'government information contravention'.

Recommendation 8

That the *Public Interest Disclosures Act 1994* be amended to add the Privacy Commissioner as an investigating authority.

Implemented.

Clause 19(h) includes the Privacy Commissioner in the definition of an 'integrity agency'.

Recommendation 9

That the *Public Interest Disclosures Act 1994* be amended to add the Privacy Commissioner to the membership of the Public Interest Disclosures Steering Committee.

Implemented.

Clause 67(2)(j) includes the Privacy Commissioner as a member of the Steering Committee.

Recommendation 10

That the *Public Interest Disclosures Act 1994* be amended to enable a person to be deemed to be a public official under the Act, to provide protection to those who report wrongdoing but do not fall within the definition of public official.

Implemented, in the following way:

Clause 29 provides that the head of an agency may determine that a disclosure made by another person is a voluntary PID even if the disclosure would not otherwise be one. In practice, this would allow the head of the agency to deem a disclosure to be a voluntary PID even if the person making the disclosure technically falls outside the definition of a public official.

Also, cl 14(2) provides that the regulations may declare a person to be a public official for the purposes of the Act.

Schedules 4–6 also deals with protections for people who are not public officials (ie, members of the public) making disclosures to an integrity agency.

Recommendation 11

That s 19 of the *Public Interest Disclosures Act 1994* be amended to:

- **Omit subsection (4) and provide instead that the public official must have an honest belief on reasonable grounds that they have information that shows or tends to show conduct covered by the Act (corrupt conduct, maladministration, serious and substantial waste, government information contravention, or local government pecuniary interest contravention).**
- **Omit subsection (5), which provides that the disclosure must be substantially true.**

Not implemented.

Under the current PID Act (section 19), public officials who disclose serious wrongdoing to an MP or a journalist will only be protected if:

- s 19(2): substantially the same disclosure was made previously under the PID Act to a relevant public authority or investigating authority (note: in order for this to be the case, the official must have an 'honest belief on reasonable grounds' that the information shows or tends to show corrupt conduct, etc);
- s 19(3): an investigation of that previous disclosure was not completed within 6 months;
- s 19(4): the public official has reasonable grounds for believing that the disclosure is substantially true; and
- s 19(5): the disclosure is 'substantially true'.

The Ombo-LECC Committee recommended that s 19(5) be removed.

(The Committee also recommended that s 19(4) be re-drafted as a requirement that the person have an honest belief on reasonable grounds that the information shows or tends to show relevant wrongdoing. That requirement is already an implicit requirement of s 19(1), and in any event is not materially different in effect to the existing 'reasonable grounds for believing.. substantially true' requirement. As such, the change to s 19(4) which the Committee has recommended (and which the Bill does implement) is merely a drafting change.)

The substantive recommendation of the Ombo-LECC Committee is the deletion of s 19(5). The Bill does not implement that recommendation.

Ombo-LECC Committee's comments

The Committee considered that the threshold for external disclosures to a member of Parliament or journalist is too high. It noted that these disclosures are a valuable part of the PID regime, particularly after all internal avenues have been exhausted. It considered that the requirement for an external disclosure to be substantially true, in addition to the reporter having reasonable grounds for believing it to be substantially true, may discourage external disclosures after initial processes have failed.

The Committee agreed with the Ombudsman and supported the approach which requires disclosures to be made to public authorities or an investigating authority in the first instance, before being made to the media or an MP.

However, the Committee noted that the requirements (to prove allegations are substantially true) are higher than those for disclosures to public authorities or investigating authorities; are the highest in any Australian jurisdiction; and that no other jurisdiction has different standards for external disclosures and internal disclosures. It noted the PID Steering Committee's concerns that lowering the threshold for external reports could undermine or prejudice investigations. It considered that the other requirements dealing with external disclosures provide sufficient safeguards against this.

The Committee recommended aligning the current threshold for external disclosures with the requirements for internal disclosures; that is, that a public official must hold 'an honest belief on reasonable grounds' that they have information that shows or tends to show conduct covered by the PID Act.

The Bill's approach

The Bill does not implement Recommendation 11.

Clause 28 of the Bill deals with voluntary PIDs to members of Parliament or journalists. Except as discussed in Annexure D, it effectively retains the existing provision (s 19) in the current PID Act.'

Clause 28 of the Bill continues the requirement that the disclosure be substantially true.

The Ombudsman's position on cl 28 is discussed further in Annexure D to this Report.

Recommendation 12

That the *Public Interest Disclosures Act 1994* be amended to provide that the authority or officer who receives and/or investigates a report should inform the person who made the report about:

- **the report being received**
- **the referral of the report to another public or investigating authority**
- **the assessment of the report and whether it will be treated as a public interest disclosure**
- **if the public interest disclosure is investigated, the progress of the investigation at least once every 3 months**
- **the outcome of the investigation, including any action taken.**

This requirement should not apply to anonymous disclosures or where the person who made the disclosure has requested not to be informed about action taken as a result of the disclosure.

Implemented.

Clause 43 provides that an agency's PID Policy must specify the agency's procedures for (among other things) acknowledging receipt of voluntary PIDs and providing information to the makers of them.

In addition, cl 59(2) provides that an agency that is dealing with a voluntary PID must inform the maker as soon as reasonably practicable of specified matters, including how the agency is dealing with, or proposes to deal with it; the reasons for the decision if the agency decides not to investigate or refer it, or to cease investigating it; details of any referral to another agency; updates on the progress of any investigation (at least every 3 months during the investigation); and if an investigation is completed, a description of the results, and details of any corrective action taken, proposed or recommended.

Clause 59(5) provides that these requirements do not apply to an anonymous disclosure, or to the extent the maker of the disclosure waives, in writing, the right to receive the information.

Recommendation 13

That the *Public Interest Disclosures Act 1994* be amended to require public authorities to publish the authority's public interest disclosures policy on the authority's website.

Implemented.

Clause 47 provides that an agency's PID Policy must be published on its website, and intranet. If it does not have these, it must ensure that it is readily accessible to all public officials associated with the agency.

Recommendation 14

That the *Public Interest Disclosures Act 1994* be amended to provide that public officials who make a disclosure:

- **in the course of their day-to-day functions,**
- **under a statutory or other legal obligation,**
- **or while assisting an investigation by a public authority**

that otherwise meets the criteria set out in the legislation, are considered to have made a public interest disclosure, but only for the purpose of the protections of the Act.

Implemented.

Clause 21(1) defines a 'public interest disclosure' to mean all of the categories of PID in the Bill (ie, a voluntary public interest disclosure, a witness public interest disclosure or a mandatory public interest disclosure).

Clause 30 provides that Part 3 (Protections) applies to a 'public interest disclosure' from the time the disclosure is first made.

Recommendation 15

That the *Public Interest Disclosures Act 1994* be amended to provide that the head of a public authority is responsible for ensuring that the authority establishes procedures for assessing the risk of detrimental action against a reporter, and takes appropriate action when allegations of detrimental action are made.

Implemented.

Ombo-LECC Committee's comment

The Committee commented that the head of an agency already has a number of responsibilities outlined in s 6E of the PID Act. It considered that the proposed amendment would emphasise the importance of an agency acting proactively and improve protections for people who make PIDs. The Committee recognised that it can be implied that agencies have these responsibilities, but it believed that it should be clearly provided for in the PID Act.

The Bill's approach

The Bill does not include a specific provision stating that the head of a public authority is responsible for ensuring these matters, and that it takes appropriate action.

However, cl 6(2) provides that the head of an agency is responsible for ensuring agency compliance with the Act and the agency's PID Policy. Clause 43 provides that a PID Policy must specify the agency's procedures for taking steps to assess and minimise the risk of detrimental action being taken, and dealing with allegations that a detrimental action offence has been committed.

In addition, cl 61 provides that a responsible agency (as defined) must take steps to assess and minimise the risk of detrimental action being taken against any person; and cl 62 deals with agency liability if a person suffers injury, damage or loss a as result of the agency's failure to do so. In addition, cl 36 deals with employer liability for detrimental action by an employee.

Recommendation 16

That the *Public Interest Disclosures Act 1994* be amended to 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.

Implemented.

Clause 34(4) provides that an agency must notify the Ombudsman as soon as reasonably practicable after:

- becoming aware of an allegation that a detrimental action offence has been committed by a public official associated with the agency
- referring evidence of a detrimental action offence to the Commissioner of Police, and the ICAC or LECC
- becoming aware of the outcome of a prosecution against a public official for the commission of a detrimental action offence, or
- becoming aware of any other detrimental action offence that is committed or alleged and arises from a PID relating to the agency.

Also, cl 74(9)(b) provides that the Ombudsman's powers to deal with a dispute under that s includes a dispute about conduct or proposed conduct that constitutes or may constitute a detrimental action offence.

Recommendation 17

That the *Public Interest Disclosures Act 1994* be amended to include the resolution of disputes arising as a result of a public official making a public interest disclosure as part of the Ombudsman's oversight functions.

Implemented.

Clause 74 provides that, if a dispute arises under the Act or a PID Policy in connection with a disclosure that is or may be a voluntary PID, an agency that is dealing with the disclosure may request that the Ombudsman deal with the dispute. The Ombudsman may deal with it by conciliation, and may arrange for a mediator to assist.

Recommendation 18

That the *Public Interest Disclosures Act 1994* be amended to provide that a manager is not prevented from taking reasonable management action in relation to an employee who has made a public interest disclosure, if the action taken was reasonable and justifiable, carried out in a reasonable manner and was not taken on a belief or suspicion that the person has made a public interest disclosure.

Implemented.

Clause 31 provides that Part 3 (Protections) does not prevent reasonable management action from being taken in relation to a public official. However, cl 31(4) provides that action taken in relation to a public official is not reasonable management action if:

- the way of taking the action is not reasonable
- the action is taken corruptly or fraudulently
- the action is taken to conceal, or avoid the consequences of, serious wrongdoing, or
- the person taking the action has a suspicion, belief or awareness (whether correct or mistaken) that a PID has been made, may have been made, may be made or is proposed to be made; the suspicion, belief or awareness is a contributing factor to the taking of the action; and the action is not taken for the purpose of reducing the risk of detrimental action being taken against the public official or another person.

Recommendation 19

That the *Public Interest Disclosures Act 1994* be amended to omit s 20A(3), and enable public officials to claim for any remedy, including exemplary damages, when seeking compensation for loss they have suffered as a result of detrimental action.

Implemented, noting that the Bill refers to 'exemplary damages' but not 'aggravated damages'.

Section 20A(3) of the current Act provides that damages recoverable under the section do not include exemplary or punitive damages, or aggravated damages.

Clause 35 of the Bill provides that a person who takes detrimental action against another person is liable in damages under the section for injury, damage or loss suffered as a result by the other person or any third person if certain conditions are met. Clause 35(6) states that damages recovered may include exemplary damages.

See also:

- cl 36 which deals with employer liability for detrimental action by an employee
- cl 62 which provides that a person who suffers injury, damage or loss as a result of an agency's failure to comply with its obligations in relation to risk management may recover damages under the section for the injury, damage or loss; and that this may include exemplary damages.

Ombo-LECC Committee's comment

The Committee noted that removing the restrictions on damages that can be claimed by PID makers will deter people taking detrimental action against them in the first place. The Committee also heard that limits on damages were causing difficulties for people seeking legal representation in public interest disclosure cases. The Committee heard that the Ombudsman supported the proposed changes as likely to have a positive effect on preventing detrimental action. It also noted that the corresponding ACT legislation, which it considered to be best practice, also allows for exemplary damages.

Recommendation 20

That Part 3 of the *Public Interest Disclosures Act 1994* be amended to provide 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.

Implemented.

Clause 38 provides that a person who institutes proceedings under cl 35 (Detrimental action—recovery of damages) or cl 37 (Injunctions relating to detrimental action) is not liable to pay costs incurred by another party unless the person instituted the proceedings vexatiously or without reasonable cause; or the person's unreasonable act or omission caused the other party to incur the costs.

Recommendation 21

That s 20 of the *Public Interest Disclosures Act 1994* be amended to omit the words 'substantially in reprisal' and provide instead that a public official takes detrimental action against another person if the making of a public interest disclosure by that person was a contributing factor for the detrimental action.

Implemented.

Clause 33(1) provides that a person must not take detrimental action against another person if:

- the person suspects, believes or is aware, when taking the detrimental action, that the other person or a third person: has made, may have made, may make or proposes to make a PID; or is, has been or may be investigating, or proposes to investigate, serious wrongdoing, whether or not the investigation relates to or arises from the making of a voluntary PID or constitutes dealing with a voluntary PID; and
- the suspicion, belief or awareness is a contributing factor to the taking of the detrimental action.

Recommendation 22

That the *Public Interest Disclosures Act 1994* be amended to omit the term 'reprisal' from ss 20, 20A and 20B, and replace it with 'detrimental action'.

Implemented.

The Bill uses the term 'detrimental action' in all relevant clauses, rather than 'reprisal'; and this has been applied in other NSW legislation that had adopted the term 'reprisal' from the PID Act (see Sch 7).

However, note that Sch 6 (Amendments to the *Police Act 1990*) retains the term 'reprisal' in the heading to the new cl 206 (Protection against reprisals).

Recommendation 23

That a note be added to s 20B of the *Public Interest Disclosures Act 1994* to make it clear that a court may grant an injunction to issue an apology, restrain termination or mandate reinstatement.

Implemented in a substantive provision.

Clause 37(4) provides that, to avoid doubt, an injunction granted under the clause may require a formal apology to be made to a person against whom detrimental action has been taken; restrain detrimental action comprising an attempt to terminate a person's employment in a particular position or role; or require the reinstatement in the same or a substantially similar position or role.

Recommendation 24

That s 6CA of the *Public Interest Disclosures Act 1994* be amended to require public authorities to provide a report to the Ombudsman for each 12 month period (ending on 30 June in any year).

Implemented.

Clause 78(1) provides that an agency must provide an annual return to the Ombudsman in relation to each period of 12 months ending on 30 June.

Recommendation 25

That s 31 of the *Public Interest Disclosures Act 1994* be repealed and replaced with a requirement on the Ombudsman to prepare and provide a report to Parliament based on information received from public authorities under s 6CA of the Act.

Implemented.

Clause 76 provides that the Ombudsman must report to Parliament on specified matters in relation to each period of 12 months ending on 30 June. The report is to be based on information provided by agencies, including annual returns provided for that return period (cl 76(3)).

Recommendation 26

That the *Public Interest Disclosures Regulation 2011* be amended to require public authorities to provide the following information to the Ombudsman about every public interest disclosure they receive:

a. **whether the public interest disclosure was made directly to or referred to the authority**
b. **the type of conduct alleged**
c. **what action was taken in response to the public interest disclosure**
d. **whether the allegations were wholly or partly substantiated**
e. **whether the public interest disclosure resulted in systemic or organisational changes or improvements**
f. **when the public interest disclosure was received and finalised.**

Implemented.

Clause 5 of the draft Regulation in Sch 3 of the Bill outlines the information to be provided in agency annual returns, which covers all of the Committee's recommended content in relation to *voluntary PIDs.* Note that agencies are not required to provide information in relation to mandatory PIDs or witness PIDs.

Clause 5(1) of the draft Regulation provides that agencies must include the following information in relation to each voluntary PID received or dealt with by the agency during the return period:

- how the agency received the disclosure, including the date on which it was received
- whether the disclosure was a 'purported PID'
- the nature of the serious wrongdoing the disclosure was about
- the relationship between the maker of the disclosure and any public official whose serious wrongdoing the disclosure was about (if applicable)
- whether the serious wrongdoing involved one public official, or more than one
- action taken by the agency to deal with the disclosure, including the date on which the agency ceased to deal with the disclosure
- if the agency investigated the serious wrongdoing, a description of the results of the investigation
- if applicable, the corrective action taken, proposed to be taken or recommended to be taken by the agency (noting corrective action definition includes any reform taken, see cl 65(4))

Recommendation 27

That the *Public Interest Disclosures Regulation 2011* be amended to require public authorities to provide information to the Ombudsman about the number of purported public interest disclosures they receive, the number of public officials who made them, and the broad reasons why each purported public interest disclosure did not meet the criteria in the *Public Interest Disclosures Act 1994.*

Implemented.

Clause 5(2) of the draft Regulation in Sch 3 provides that an agency must include the following information in an annual return in relation to 'purported PIDs' that were not in fact PIDs:

- the number of the disclosures received by the agency during the return period
- the number of disclosures that were made by public officials, and
- the reasons the agency did not deal with, or ceased dealing with, any of the disclosures as a PID.

This requirement refers to the number of disclosures made by public officials, rather than the number of public officials who made them.

Recommendation 28

That the *Public Interest Disclosures Act 1994* be amended to provide that the annual report of the Public Interest Disclosures Steering Committee's activities and any recommendations made to the Minister be included in the Ombudsman's annual report on its oversight of the Act.

Implemented.

Clause 76(1) provides that the Ombudsman must report to Parliament on specified matters in relation to each 12 month period ending 30 June—including the Steering Committee's activities (which include any recommendations made to the Minister) during the reporting period.

Recommendation 29

That s 4 of the *Public Interest Disclosures Act 1994* be amended to include Local Aboriginal Land Councils in the definition of public authority.

Implemented.

Clause 16(1)(h) defines an 'agency' to include a Local Aboriginal Land Council constituted under the *Aboriginal Land Rights Act 1983*.

Recommendation 30

That the definition of local government investigating authority at s 4 of the *Public Interest Disclosures Act 1994* be amended by omitting 'Director General' and replacing it with 'the Departmental Chief Executive of the Office of Local Government'.

This recommendation has been addressed in the Bill by correcting the reference from 'Director General' to 'Secretary'.

Ombo-LECC Committee's comments

The Office of Local Government raised with the Committee an inconsistency between the definition of 'local government investigating authority' under the current PID Act, and the *Local Government Act 1993* ('LGA'). The current PID Act refers to the Office's Director General, while the LGA refers to the Departmental Chief Executive.

The Dictionary to the LGA states that the 'Departmental Chief Executive' means the Chief Executive of the Office of Local Government. The current term for the head of the Office of Local Government appears to be the Deputy Secretary, Local Government, Planning and Policy.

The Committee recommended that the definition of 'local government investigating authority' be updated to reflect the current terminology used in the *Local Government Act 1993* and to prevent any confusion due to inconsistency between the two Acts.

The Bill's approach

The Bill has replicated the current approach by replacing the Director General with the Secretary of the Department. Clause 19(g) defines an 'integrity agency' to include the Secretary of the Department of Planning, Industry and Environment when exercising functions under specified provisions of the *Local Government Act 1993.*

Recommendation 31

That the *Public Interest Disclosures Act 1994* be amended to provide that the obligations on public authorities under the Act do not extend to authorities without any staff.

Addressed by the following:

The Bill allows for regulations to be made to declare that a body is not an agency for the purposes of the Act (see cl 16(3)) and to exempt specified agencies or classes of agencies from any specified provisions of the Act (cl 88(3)).

In addition, cl 80(1)(b) provides that the head of an agency may, by agreement, delegate the exercise of any function of the head of the agency to the head of another agency (with some exceptions); and cl 81(2) says that an agency may arrange for another agency to exercise the agency's functions under the Act on behalf of the agency.

Recommendation 32

That s 17 of the *Public Interest Disclosures Act 1994* be amended to clarify that a disclosure that principally involves 'a disagreement in relation to a policy about amounts, purposes or priorities of public expenditure' is not protected under the Act.

Implemented.

Clause 26(2) provides that a disclosure does not comply with the s (Content of voluntary PIDs) to the extent that the information disclosed relates to a disagreement with a government policy, including (among other things) a government decision concerning amounts, purposes or priorities of public expenditure.

Recommendation 33

That the *Public Interest Disclosures Act 1994* be amended to provide that disclosures based solely or substantially on an individual employment related grievance or other personal grievance, including a decision to take reasonable management action in relation to a reporter (other than a grievance about detrimental action), are not public interest disclosures.

Implemented.

Clause 26(3) provides that a disclosure does not comply with the s (Content of voluntary PIDs) to the extent that the information disclosed:

- concerns a grievance about a matter relating to the employment or former employment of an individual, and

- either does not have significant implications beyond matters personally affecting or tending to personally affect the individual; or relates to a disagreement with the taking or proposed taking of reasonable management action.

Clause 26(4) provides that the above will not apply if the grievance arises from a decision made by an agency in dealing with a previous voluntary PID, or alleged detrimental action relating to a previous voluntary PID.

Recommendation 34

That s 12D of the *Public Interest Disclosures Act 1994* be amended to provide that, to be protected under the Act, a disclosure to the Information Commissioner must show or tend to show a serious government information contravention.

Implemented.

Clause 13(b) defines 'serious wrongdoing' to include a government information contravention. 'Government information contravention' is defined in the Dictionary as a failure, other than a trivial failure, by an agency or public official to exercise functions in accordance with the *Government Information (Information Commissioner) Act 2009;* the *Government Information (Public Access) Act 2009;* or the *State Records Act 1998*.

Recommendation 35

That the *Public Interest Disclosures Act 1994* be amended to require public officials to use their best endeavours to assist an investigation under the Act.

Implemented.

Clause 65 provides that a public official must use the official's best endeavours to assist in an investigation of serious wrongdoing if asked to do so by a person dealing with a voluntary PID on behalf of an agency. A Note makes clear that a public official is entitled to protections under Part 3 if he or she makes a witness PID.

Recommendation 36

That the *Public Interest Disclosures Act 1994* be amended to enable investigating authorities to share information for the purpose of fulfilling their responsibilities under the Act.

Implemented, and applied to all agencies (rather than integrity agencies only).

Clause 83(1) provides that an agency may provide information relating to a PID to another agency if doing so is reasonably necessary for the exercise of either agency's functions under the Act. Clause 83(2) extends this to providing information to a person or body investigating misconduct or wrongdoing under a law in another Australian jurisdiction. Clause 83(3) says that these provisions apply in addition to any authorisation the agency may have to provide information under the Act, or another Act or law.

Recommendation 37

That the *Public Interest Disclosures Act 1994* be amended to provide for a review of the Act and the effectiveness of any amendments five years after the amendments commence.

Implemented.

Clause 89 provides that a joint parliamentary committee must review the Act as soon as possible after 5 years from the date of assent; and report to both Houses of Parliament as soon as practicable after the review is completed.

Recommendation 38

That the *Public Interest Disclosures Act 1994* be redrafted to simplify its provisions and structure, while retaining its substance. The simplified Act should set out:

- **how and to whom a disclosure can be made,**
- **obligations on agencies,**
- **protections for disclosers, and**
- **oversight of the public interest disclosure scheme by the Ombudsman.**

Implemented.

The Bill provides a new framework that clearly sets out these matters. It is more prescriptive in some aspects than the current PID Act.

Annexure B

Review of the PID Bill against the recommendations of the ICAC Committee ICAC Protections Report

Recommendation 1

That the ICAC Act be amended to protect people who make voluntary disclosures to the ICAC against criminal, civil and disciplinary liability, and reprisal action for doing so.

Implemented.

Schedules 4-6 to the Public Interest Disclosures Bill 2021 (**the Bill**) amend the following Acts to introduce protections, modelled on the protections available for a public official who makes a public interest disclosure (**PID**) under the Bill, for persons assisting the Independent Commission Against Corruption (**the ICAC**), the Ombudsman, and the Law Enforcement Conduct Commission (**the LECC**):

- *Independent Commission Against Corruption Act 1988* (***ICAC Act***) (see Sch 4)
- *Ombudsman Act 1974* (see Sch 5)
- *Law Enforcement Conduct Commission Act 2016* (***LECC Act***) (see Sch 6).

Broadly speaking, under the amendments, a 'protected person' is a person who takes the following 'protected action':

- complying with an obligation to disclose information to a primary agency (relevantly to the ICAC, the ICAC or the Inspector)
- disclosing information to the primary agency about a matter that concerns relevant wrongdoing or misconduct
- appearing as a witness before the primary agency
- assisting a primary agency in some other way.

However, a protected action excludes making a public interest disclosure, or wilfully making a false statement to, or misleading or attempting to mislead, a primary agency or person acting on behalf of one.

Schedules 4–6 provide the following protections for people who assist integrity agencies, based on the protections for PID-makers in Part 3 of the Bill:

- creating a detrimental action offence punishable by 5 years imprisonment and a $22,000 fine
- providing that a person who takes detrimental action against a protected person is liable in damages, and providing that an employer can be liable for the detrimental action of an employee in connection with the employee's position or role
- enabling the making of an injunction relating to the commission or possible commission of a detrimental action offence
- providing an immunity from costs orders for instituting proceedings to recover damages or seek an injunction unless the proceedings were instituted vexatiously or without reasonable cause, or the person unreasonably caused the other party to incur costs
- providing a protection from civil and criminal liability, and disciplinary action
- providing that information tending to identify a person as a protected person is not be disclosed.

ICAC Act application

Schedule 4 to the Bill amends the ICAC Act, with modifications.

New section 79D defines 'protected action' to mean complying with or performing a protected obligation, or making a complaint or disclosure of information to a primary agency about a matter that concerns or may concern corrupt conduct, or another matter that the primary agency may deal with under the Act; appearing as a witness before a primary agency otherwise than by complying with or performing a protected obligation; and assisting the primary agency in some other way.

New section 79E provides that 'protected obligation' means a duty arising under s 11 of the ICAC Act (duty to notify ICAC of possible corrupt conduct); a requirement arising from a notice served on a person under s 21 (power to obtain information) or 22 (power to obtain documents etc); and a requirement arising under s 35 (power to summon witnesses and take evidence) or 57D (inquiries).

Some of the protections will be unavailable for the following protected actions ('limited protected actions'):

- the making of a complaint or disclosure of information to a primary agency about a matter that concerns or may concern corrupt conduct if the maker is a public official, and does not honestly, and on reasonable grounds, believe that it shows or tends to show corrupt conduct
- the making of a complaint or disclosure of information to a primary agency about another matter the primary agency may deal with under the Act, or
- assisting a primary agency in some other way.

Recommendation 2

That increased protections for people who make voluntary disclosures to the ICAC not be conditional upon those people meeting threshold requirements.

Implemented.

There is no threshold requirement for protection under the amendments to the integrity agency legislation.

Recommendation 3

That the ICAC examine whether more could be done to deter people from making false complaints to the ICAC, and to limit the damage caused where this does occur, including whether the ICAC Act should be amended to provide that it is an offence for a person to disclose or threaten to disclose to a third party or parties that they have made or intend to make a disclosure to the ICAC.

Implemented through increased penalties for existing offence.

Committee's comments

The Committee was concerned about the potential for a complainant to publicly air the fact they have made (or will make) a complaint to the ICAC where they have no suspicions regarding corrupt conduct, and simply wish to weaken a political opponent or induce an elected person to decide a matter in a particular way.

The Committee noted that prosecutions for making a false complaint to an oversight body appear to be rare; and the ICAC Chief Commissioner's evidence that, to his knowledge, there had not been any prosecutions under section 81 of the ICAC Act.

The Committee noted possible options for consideration, including educational campaigns; creating an offence to deal with people who publicise or threaten to publicise the fact that they have made a disclosure to the ICAC; considering whether there are barriers to prosecutions under s 81 and, if so, how to address them; and considering whether more could be done to limit any damage where people do make false complaints, particularly in politicised circumstances (noting the possibility of special powers allowing the ICAC to intervene early to limit damage in certain circumstances).

The Bill's approach

The ICAC has advised that it is comfortable with the deterrence provided by the offence provisions contained in the ICAC Act, which include that a person shall not, in making a complaint, wilfully make any false statement to, or mislead, or attempt to mislead, the Commission or an officer of the Commission (see section 81).

Item 7 in Sch 4 increases the maximum penalty for the offence in s 81 of the ICAC Act to 100 penalty units or imprisonment for 2 years.

Recommendation 4

That any amendments to increase protections available to people who make voluntary disclosures to the ICAC not operate to negate legal professional privilege.

Implemented.

Clause 79O(4) of sch 4 to the Bill (amending the ICAC Act) provides that, if a person who is not a public official takes protected action that breaches a privilege arising from a legally privileged communication, cl 79O(1) (protections from liability) protects the person from the consequences of the breach only to the extent that:

- the protected action was taken to comply with or perform a protected obligation
- a provision of the ICAC Act protects the person from the consequences of the breach, or
- the privilege was waived by a person who was authorised to do so.

In sch 4, new s 79H says that this clause does not apply in relation to a protected person who takes protected action consisting only of limited protection action, namely:

- the making of a complaint or disclosure of information to a primary agency about a matter that concerns or may concern corrupt conduct if the maker is a public official, and does not honestly, and on reasonable grounds, believe that it shows or tends to show corrupt conduct
- the making of a complaint or disclosure of information to a primary agency about another matter the primary agency may deal with under the Act, or
- assisting a primary agency in some other way.

In addition, new cl 79O(5) says that cl 79O does not limit the operation of section 26 (self-incrimination) or 37(3) or 37(5) (privilege as regards answers, documents etc) of the ICAC Act.

Recommendation 5

That the ICAC Act be amended to protect the identity of people who make voluntary disclosures to the ICAC, where appropriate.

Implemented.

Clause 79Q of sch 3 provides that information tending to identify a person as a protected person is not to be disclosed by a primary agency—but this does not prevent the disclosure of identifying information in the circumstances specified in cl 79Q(2).

Recommendation 6

That any legislative amendment to protect the identity of people who make voluntary disclosures to the ICAC not fetter the ICAC's ability to investigate properly in the public interest, or to provide natural justice to accused persons.

Implemented.

As noted above, the prohibition on disclosing identifying information in cl 79Q of sch 4 is subject to specified exceptions in cl 79Q(2) including:

- if it is necessary that the identifying information be disclosed to a person whose interests are affected by the relevant protected action
- the identifying information is disclosed in accordance with a direction of the Commission or Inspector, who certifies that it is necessary to disclose the information in the public interest
- the disclosure is necessary to effectively investigate or deal with a complaint or disclosure of information under the Act, or
- the protected person took the relevant protected action to comply with or perform a protected obligation.

Recommendation 7

That increased protections for people who make voluntary disclosures to the ICAC, be drafted to provide immunity to people against adverse consequences for the act of disclosing, not against liability for their own wrongdoing.

Implemented.

Clause 79O(1) of sch 4 to the Bill (amending the ICAC Act) provides that the protections from liability apply 'in relation to protected action taken by the person that is or involves the disclosure of information'; and cl 79O(3) says that the clause does not protect a protected person against liability for their own past conduct that they disclose while taking protected action. However, note that cl 79P gives the Attorney General a discretion to give an undertaking to a protected person in relation to a disclosure of the person's past conduct while taking protected action.

New section 79H says that these clauses do not apply in relation to a protected person who takes protected action consisting only of limited protection action, namely:

- the making of a complaint or disclosure of information to a primary agency about a matter that concerns or may concern corrupt conduct if the maker is a public official, and does not honestly, and on reasonable grounds, believe that it shows or tends to show corrupt conduct
- the making of a complaint or disclosure of information to a primary agency about another matter the primary agency may deal with under the Act, or
- assisting a primary agency in some other way.

Recommendation 8

That the ICAC provide readily available, plain English information on its website about its policies and procedures for managing disclosures made to it by wrongdoers.

Not a matter for legislation.

Recommendation 9

That the ICAC be required to warn a person where it has reason to believe the person is about to make a voluntary disclosure involving his or her own wrongdoing, that they will not necessarily be granted immunity from adverse consequences for doing so.

Not addressed in the Bill.

This is not addressed because this recommendation is not amenable to legislative drafting. The Ombudsman supports this being addressed in the ICAC's policies and procedures published on its website.

Recommendation 10

That the ICAC Act be amended to extend a very limited protection against self-incrimination to people who make voluntary disclosures to the ICAC.

- **The provision should not apply so as to protect all people who make voluntary disclosures about their own wrongdoing to the ICAC.**
- **However, there should be discretion to grant a person protection against self-incrimination to the extent that his or her voluntary disclosure reveals s/he has engaged in wrongdoing that is a consequence of making the disclosure. This discretion could be vested in the ICAC; or in the Director of Public Prosecutions, following the ICAC's recommendation.**

Implemented (although the Bill confers discretion on the Attorney General, rather than ICAC to decide whether to grant a person protection against self-incrimination).

As noted above, cl 79P of sch 4 to the Bill (amending the ICAC Act) gives the Attorney General a discretion to give a protected person who makes (or proposes to make) a disclosure of the person's past conduct while taking protected action an undertaking that it will not be used in evidence against them, other than proceedings relating to the falsity of the disclosure. A primary agency may recommend to the Attorney that a person be given an undertaking, and it may be given conditionally or unconditionally.

New section 79H says that these clauses do not apply in relation to a protected person who takes protected action consisting only of limited protection action, namely:

- the making of a complaint or disclosure of information to a primary agency about a matter that concerns or may concern corrupt conduct if the maker is a public official, and does not honestly, and on reasonable grounds, believe that it shows or tends to show corrupt conduct
- the making of a complaint or disclosure of information to a primary agency about another matter the primary agency may deal with under the Act, or
- assisting a primary agency in some other way.

Annexure C

Review of the PID Bill against the recommendations of the Moss Review of the *Public Interest Disclosure Act 2013 (Cth)*

Recommendation 1

That the *Public Interest Disclosure Act 2013* (Cth) be reviewed every three to five years to enable its operation to be assessed and regard to be given to new research and developments in similar state and territory legislation.

The Bill provides for one review after 5 years.

Clause 89 provides that a joint parliamentary committee must review the Act as soon as possible after 5 years from the date of assent; and report to both Houses of Parliament as soon as practicable after the review is completed.

Recommendation 2

That the Australian Public Service Commissioner, the Merit Protection Commissioner, the Integrity Commissioner, the Parliamentary Services Commissioner, the Parliamentary Services Merit Protection Commissioner, and the Inspector-General of Taxation be prescribed as investigative agencies to simplify the PID Act's interaction with other investigative and complaint schemes and to strengthen the investigative capacity under the PID Act.

Not relevant to the NSW PID Act as the recommendation refers to Commonwealth agencies.

Recommendation 3

That the PID Act be amended to require a Principal Officer to provide the Commonwealth Ombudsman or the IGIS (Inspector-General of Intelligence and Security) with a copy of the investigation report within a reasonable period of time.

Not in the Bill as NSW takes a different approach. However, the Bill makes other provision for notifications to the Ombudsman.

Under cl 55(3), if an agency makes one of the following decisions in relation to a voluntary public interest disclosure (**PID**), it must give the Ombudsman reasons explaining the decision as soon as reasonably practicable:

- a decision neither to investigate the relevant serious wrongdoing nor to refer the disclosure, or
- a decision to cease investigating the relevant serious wrongdoing without either completing the investigation or referring the disclosure.

In addition, cl 78 deals with information that an agency must provide in its annual return to the Ombudsman. This includes information about voluntary PIDs received by the agency during the return period; and action taken by the agency to deal with voluntary PIDs.

Recommendation 4

That the Commonwealth Ombudsman share information about the handling of or response to a PID with relevant investigative agencies.

Not in the Bill, but Bill provides for information sharing between agencies. An agency may consult the Ombudsman or another integrity agency in relation to action or proposed action to deal with a voluntary PID (cl 54(2)).

Agencies may provide information relating to a voluntary PIDs if doing so is reasonably necessary for the exercise of agency's functions under the PID Act, or other legislation (cl 83).

Recommendation 5

That the definition of 'disclosable conduct' in the PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless the Authorised Officer considers that it relates to systemic wrongdoing. Other existing legislative frameworks are better adapted to dealing with and resolving personal employment-related grievances.

The Bill is generally consistent with this recommendation.

Clause 26(3) provides that a disclosure does not comply with the section (Content of Voluntary PIDs) to the extent that the information disclosed:

- concerns a grievance about a matter relating to the employment or former employment of an individual, and
- either does not have significant implications beyond matters personally affecting or tending to personally affect the individual; or relates to a disagreement with the taking or proposed taking of reasonable management action.

Clause 26(4) provides that this does not apply if the grievance arises from:

- a decision made by an agency in dealing with a previous voluntary PID; or
- alleged detrimental action relating to a previous voluntary PID.

Recommendation 6

If Recommendation 5 is adopted, that the PID Act be amended to include reprisal within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.

The Bill is generally consistent with this recommendation.

The Bill deals with reprisal action as a detrimental action offence. However, it is possible to make a voluntary PID about alleged detrimental action relating to a previous voluntary PID (see cl 26).

Recommendation 7

That disclosable conduct which constitutes 'disciplinary action' be amended to include only conduct which the Authorised Officer considers would, if proven, be reasonable grounds for termination or dismissal.

Not implemented as NSW takes a different approach.

The purpose of this recommendation was to exclude some less serious disclosures of wrongdoing from the scope of 'disclosable conduct' under the Cth Act. The Bill already limits the matters that may be the subject of a PID to 'serious wrongdoing' (as defined).

Recommendation 8

That the external and emergency disclosure provisions be considered in a future review of the PID Act, when further evidence about how they are being used is available.

Not a matter for legislation.

The Bill does not include emergency disclosure provisions. The provisions for external disclosures will be reviewed as part of the 5 year review of the Act.

Recommendation 9

That the PID Act be amended to include situations when an Authorised Officer failed to allocate an internal PID, or a supervisor failed to report information they received about disclosable conduct to an Authorised Officer, as grounds for external disclosure.

Not necessary, as the Bill addresses external disclosures in other ways.

Clause 28(1) provides that a disclosure made to a member of Parliament or a journalist is a voluntary PID only if, in addition to complying with other requirements, either:

- the maker of the previous disclosure (ie, a voluntary PID that was substantially the same) has not, at the end of the investigation period, received from an agency the required information in relation to the previous disclosure; or
- the maker of the previous disclosure has been notified by an agency that it has made a decision neither to investigate the relevant serious wrongdoing nor to refer the disclosure; or a decision to cease investigating the relevant serious wrongdoing without either completing the investigation or referring the disclosure.

Clause 28(2) outlines the relevant 'investigation period'.

Recommendation 10

That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.

Not necessary, as the Bill already largely reflects a principles-based approach to procedural requirements.

The Review also noted that the current NSW Act reflected a principles-based approach in relation to confidentiality and procedural fairness.

Recommendation 11

That the effectiveness of the principles-based approach to regulation be evaluated periodically to assess the experience of individuals, agencies and investigative agencies.

Not a matter for legislation.

Recommendation 12

That the PID Act be amended to include statutory recognition of guidance material provided by the Commonwealth Ombudsman, similar to the recognition of guidance material in section 93A of the *Freedom of Information Act 1982.*

This is consistent with the NSW approach.

The current NSW Act already provides for the NSW Ombudsman to prepare guidelines.

The Bill also provides for the Ombudsman to prepare guidelines for agencies (cl 72, 73), and states that an agency must have regard to them in relation to action or proposed action to deal with a voluntary PID (cl 54(1)), and in preparing its PID Policy (cl 44).

Recommendation 13

That the Commonwealth Ombudsman and the IGIS be appropriately resourced to enable them to monitor and scrutinise compliance with the PID Act by agencies within their remit.

This is not a matter for legislation.

Recommendation 14

That the PID Act be amended to include a discretion for the Principal Officer or Authorised Officers of an agency to allocate a PID, or delegate a PID investigation, to the agency's portfolio department with the consent of that department.

The Bill is generally consistent with this.

The Bill provides several ways to do this:

- the head of an agency may, by agreement, delegate the exercise of any of his or her functions (subject to exceptions) under the Act to the head of another agency (cl 80)
- an agency may arrange for another agency to exercise the other agency's functions under the Act on its behalf (cl 81(2)).

In addition, an agency may engage an entity that is not an agency to exercise specified functions on behalf of the agency (cl 81(3)).

Recommendation 15

That the PID Act be amended to recognise the Principal Officer's obligation to provide procedural fairness to a person against whom wrongdoing is alleged before making adverse findings about that person.

Not in the Bill, but the NSW Ombudsman could address this in guidelines.

The Bill also facilitates procedural fairness by providing an exception to the prohibition on disclosing information that tends to identify a person as the maker of a voluntary PID if it is necessary that it be disclosed to a person whose interests are affected by the disclosure (cl 64(2)).

Recommendation 16

That the secrecy offences relating to the use or disclosure of information about a PID (protected information) be repealed as these offences unnecessarily limit agencies' ability to respond to alleged wrongdoing.

Not implemented, as NSW takes a different approach.

The Review's recommendation addressed section 65 of the Cth Act which is concerned with the treatment of information obtained through a disclosure investigation or the exercise of a power or function ('protected information'), as opposed to section 20 which is concerned with protecting the identity of disclosers. The Bill does not contain equivalent provisions to section 65.

Recommendation 17

If Recommendation 16 is accepted, that the PID Act be amended to clarify that existing secrecy offences, such as those in the *Crimes Act 1914*, the *Australian Security and Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*, continue to apply to the disclosure or use of information, unless it is a public interest disclosure under section 26 of the PID Act, for the purposes of the PID Act, or to perform a function or exercise a power of the PID Act.

Not relevant to the NSW Act, as the recommendation addresses other Commonwealth legislation.

Recommendation 18

That the PID Act be amended to simplify the offence about use or disclosure of identifying information by including within its exemptions: explicit reference to the protections for good faith actions or omissions by a public official exercising powers or performing functions under the PID Act (as in section 78); lawyers or other trusted professionals who disclose the information to provide professional advice or assistance to a discloser or potential discloser (as in section 67); and other existing exemptions.

Not necessary, as the Bill takes a less prescriptive approach.

Clause 64(2) provides that the prohibition on disclosing information that tends to identify a person as the maker of a voluntary PID does not prevent the disclosure of the identifying information if (among other things):

- the identifying information is disclosed to a medical practitioner or psychologist for the purposes of providing medical or psychiatric care, treatment or counselling to the individual disclosing the information
- the disclosure is necessary to deal with the disclosure effectively, or
- it is otherwise in the public interest to disclose the identifying information.

Recommendation 19

That the PID Act be amended to recognise implied consent as an exemption to the secrecy offence relating to identifying information.

The Bill is consistent with the objective of this recommendation.

The Review noted that several agencies reported instances of disclosers identifying themselves within their workplace, or publishing information about their disclosure. Under the Cth Act, the agency is still required to maintain confidentiality of such a discloser's identifying information and other information about the disclosure. The Review considered that the protection is not needed if the discloser has chosen to identify himself or herself.

Clause 64(2) provides that the prohibition on disclosing information that tends to identify a person as the maker of a voluntary PID does not prevent disclosure if (among other things) it is generally known that the person is the maker of the voluntary PID as a result of the person's voluntary self-identification as the maker.

Recommendation 20

That the PID Act be amended to include a positive obligation upon a Principal Officer to support disclosers and witnesses involved in the PID process, in the same way they already have an obligation to protect disclosers from detriment.

Not in the Bill, but the NSW Ombudsman could address this in guidelines.

Clause 72 provides that guidelines published by the Ombudsman to assist agencies may relate to any aspect of agencies' functions under the Act, including (among other things) supporting persons who make voluntary PIDs.

Clause 61 and 62 provide that an agency must take steps to assess and minimise the risk of detrimental action and an agency is liable for injury, damage or loss as a result of failure to do so.

Recommendation 21

That the obligation on public officials to assist a Principal Officer in conducting a PID investigation should be broadened to include assisting an agency or public official to perform a function or role under the PID Act.

The Bill is generally consistent with this.

Clause 65 provides that a public official must use the official's best endeavours to assist in an investigation of serious wrongdoing if requested to do so by a person dealing with a voluntary PID on behalf of an agency.

The term 'investigation' is not defined in the Bill, but cl 55(2) provides that an agency may decide to deal with a voluntary PID by investigating the serious wrongdoing by (among other things) conducting an audit, inquiry or assessment or taking other action of an investigative nature, whether on a preliminary or formal basis. This would suggest a broad interpretation of the term 'investigation'.

Recommendation 22

That the PID Act be amended to include a positive obligation on Principal Officers to provide ongoing training and education to public officials who belong to their agency about integrity and accountability, incorporating the PID Act's protections and mechanisms to report concerns. This training should become more rigorous as a public official takes on supervisory role or is promoted.

The Bill is generally consistent with this.

The objects of the Act (in cl 3) include to promote a culture in which PIDs are encouraged; and an agency's annual return to the Ombudsman must include information about the measures the agency has taken to promote such a culture (cl 78(3)(c)).

An agency must ensure that all public officials associated with it are made aware of how to make a voluntary PID; the agency's PID Policy; and the fact that a person who is dissatisfied with the way in which a voluntary PID has been dealt with may be entitled to take further action (cl 48(1)).

In addition, an agency must ensure that each person with a specified role (ie, the head of the agency, other disclosure officers and managers) receives training on their responsibilities under the Act and the agency's PID Policy (cl 48(2)).

Clause 4 of the draft Regulation in Sch 3 says that an agency must:

- give each public official associated with it access to the PID Policy as soon as reasonably practicable after they become associated with the agency, and
- ensure that a person whom the agency is responsible for training is given the training within a reasonable time after they become associated with the agency, and in any event by specified timeframes; and ensure refresher training at least every 3 years.

Recommendation 23

That the PID Act be amended to include an obligation for supervisors who receive information from a public official about disclosable conduct to explain their existing obligation to report that information to an Authorised Officer.

Not in the Bill, but the NSW Ombudsman could address this in guidelines.

A manager to whom a voluntary PID is made must, as soon as reasonably practicable, communicate the disclosure to a disclosure officer (cl 51). However, the Bill does not require the manager to explain this obligation to the public official.

Recommendation 24

That the PID Act be amended to permit disclosures of security classified information (other than intelligence information) to a lawyer for the purpose of seeking legal advice about a public interest disclosure, without requiring the lawyer to hold the requisite security clearance.

Not relevant to the NSW PID Act.

The Bill does not deal with 'security classified information'.

Recommendation 25

That the PID Act be amended to protect disclosures for the purpose of seeking professional advice about using the PID Act.

Not relevant to the NSW PID Act.

The Cth Act differs from the NSW Act in that it provides that a public official's disclosure of information to a lawyer will be a PID if it is made for the purpose of obtaining legal advice, or professional assistance, in relation to a proposed or actual PID. The Review recommended expanding this to others who provide professional advice (eg, unions, EAPs and professional associations).

The Bill reflects the NSW approach, which does not deal with the disclosure of information to lawyers or other professionals as a 'public interest disclosure'.

Recommendation 26

That the PID Act be amended to clarify that its provisions do not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them.

Not implemented as NSW takes a different approach.

The Bill reflects the NSW approach, which is to allow for voluntary PIDs about alleged wrongdoing by MPs and their staff. The definition of a 'public official' (cl 14) includes a member of Parliament (including a Minister), and a person employed under the *Members of Parliament Staff Act 2013*.

Recommendation 27

That consideration be given to extending the application of the PID Act to members of Parliament or their staff if an independent body with the power to scrutinise their conduct is created.

Not relevant, as these are already covered in the Bill.

Recommendation 28

That a witness receives the same protections from reprisal, civil, criminal and administrative liability as a discloser. These protections should not affect a witness' liability for their own conduct and should apply regardless of whether the formal investigation of a PID had commenced when the witness provided information.

The Bill is consistent with this.

The Bill provides for a 'witness public interest disclosure' (cl 22). This is a disclosure of information in an investigation of serious wrongdoing in response to a request or requirement by the person or agency investigating it. A public official who makes a witness PID is entitled to protections under Part 3 from the time the disclosure is first made (cl 30)).

As noted above, the term 'investigation' is not defined in the Bill but cl 55(2) suggests a broad interpretation of the term.

Recommendation 29

That the definition of 'agency' in the PID Act be replaced with the Public Governance, Performance and Accountability Act 2013 term 'entity' while retaining treatment of intelligence and security agencies as entities separate from their portfolio department.

Not relevant to NSW legislation.

Recommendation 30

That the definition of 'contracted service provider' be amended to ensure that grant recipients are not subject to the PID Act.

Not implemented as NSW takes a different approach.

The Bill focuses on whether an entity is providing services on behalf of an agency, rather than the nature of the funding arrangement (eg, grant or service agreement).

Clause 14 defines a 'public official' to include:

- a person providing services or exercising functions on behalf of an agency, including a contractor, subcontractor or volunteer, and
- if an entity, under a contract, subcontract or other arrangement, is to provide services on behalf of an agency or exercise a function of an agency in whole or in part—an employee, partner or officer of the entity who is to be involved in providing the services in whole or in part, or who is to exercise the function.

Recommendation 31

That the PID Act be amended to provide a discretion not to investigate disclosable conduct under that legislation if it would be more appropriately investigated under another legislative or administrative regime.

The Bill is consistent with this, as the Bill provides for referrals.

Clauses 55 and 56 deal with an agency's handling of a voluntary PID that does, or does not, relate to the agency; cl 55(2)(a) provides for an agency to investigate in accordance with an applicable Act. Clause 57 deals with referrals of voluntary PIDs.

Recommendation 32

If Recommendations 5 and 31 are adopted, that section 53(5) of the PID Act be repealed since it will be redundant.

Not relevant as NSW takes a different approach.

Section 53(5) of the Cth Act requires a principal officer to comply with the procedures established under other specified legislation to the extent that an investigation relates to an alleged breach of the Code of Conduct.

The Bill takes a less prescriptive approach which allows an agency to determine how to deal with a voluntary PID, and includes a non-exhaustive list of ways in which it might do so (cl 55).

Recommendation 33

That section 56(2) of the PID Act be amended to exclude from the mandatory obligation to notify police of evidence of an offence punishable by at least 2 years in situations when the conduct relates to a corruption issue which has been notified to the Integrity Commissioner under section 19 of the *Law Enforcement Integrity Commissioner Act 2006.*

Not relevant as NSW takes a different approach.

The Bill only provides for mandatory referrals to the police for detrimental action offences (see cl 34).

Annexure D

PID threshold for disclosures to journalists and Members of Parliament

Section 28 of the PID Bill permits disclosures to be made (as PIDs) to journalists and members of Parliament (MPs) (referred to here as an ***external disclosure***) in limited circumstances.

1. The Bill retains the requirement that an external disclosure can only be made as a PID if the disclosure has previously been made to an agency

Under the current PID Act, a public official's disclosure to a journalist or MP can only constitute a public interest disclosure (PID) if they already made the disclosure to their agency or to a relevant investigating agency. This remains the case in the PID Bill.

The Ombo-LECC Committee supported retaining the requirement that a public official must have made the PID to an appropriate agency before making an external disclosure. This is a position the Ombudsman also supports.

The Ombo-LECC Committee's report stated:

> *'[T]he Ombudsman stated that while external disclosures 'are a vital integrity and accountability mechanism', public authorities should retain a primary role in dealing with matters relating to the conduct of staff. The Ombudsman argued that external disclosures in the first instance could undermine the application of secrecy and confidentiality provisions, lead to a higher risk of reprisals against the person making the disclosure and unreasonably damage the reputations of people against whom allegations are made. Finally, the Ombudsman pointed to the role of investigating authorities in the NSW public interest disclosures scheme, which provide an alternative reporting avenue for people fearing reprisals within their own organisation.*
>
> *The Committee agrees with the Ombudsman and supports the current approach which requires disclosures to be made to public authorities or an investigating authority in the first instance, before being made to the media or an MP.'* [footnotes omitted]'

2. The Bill retains the requirement that external disclosures be 'substantially true'.

Under both the PID Act (section 19) and the PID Bill (section 28), as well as meeting all the other usual requirements of PIDs, an external disclosure must also be 'substantially true' in order to qualify as a PID.

There is no case law in New South Wales on what 'substantially true' means in this context, but the Crown Solicitor's Office (**CSO**) has advised us that the public official would need to prove that the wrongdoing referred to, expressly or by implication, in their disclosure has in fact occurred.[20]

This represents a significant hurdle to public officials gaining whistleblower protections when making disclosures to the media. This stricter threshold applies only to external disclosures, and does not apply to internal disclosures or disclosures to investigating authorities such as the Ombudsman. For those other PIDs, the person making the disclosure need only hold an honest belief on reasonable grounds that their disclosure shows, or tends to show, serious wrongdoing.

20 For further discussion of the issue and the effect of the CSO's advice see our annual report *Oversight of the Public Interest Disclosures Act 1994 Annual Report 2019-20 (nsw.gov.au)*

The Ombo-LECC Committee recommended that the additional requirement that the person be required to prove their allegations are 'substantially true' should be removed. Instead, the usual threshold of 'honest belief on reasonable grounds' would be sufficient.

As discussed in Annexure A, this recommendation is not adopted in the Bill. Instead, the thresholds for an external disclosure to constitute a PID remain effectively the same as they are under the current PID Act, including the requirement that the disclosure be 'substantially true'.

3. A drafting improvement

There is, however, a drafting change in the PID Bill that addresses a different problem with the current section 19 of the PID Act.

Section 19 of the PID Act is problematic because the person making the disclosure may not necessarily know what the agency has decided, and so will not necessarily know whether the thresholds that might allow them to make an external disclosure (as a PID) have been triggered.

For example, paragraph (b) of section 19 states that a person may make an external PID if the relevant agency 'decided to investigate the matter but [has] not completed the investigation within 6 months of the original disclosure being made'. However, the person making the disclosure may not necessarily know whether or not the investigation has been completed. If they make an external disclosure under a false assumption that the investigation has not been completed (because no one has told them that it has) then they may be at risk, as their external disclosure will not constitute a PID.

In this respect, the new clause in the PID Bill is a significant improvement. Under the new Bill the relevant thresholds are based on the information received by the person who made the disclosure – that is, the relevant timing is based on when the agency gives notice of its decisions or actions to the person, rather than simply when it makes those decisions or actions.

However, the new drafting raises its own potential problem: what if the PID-maker is told by the agency that a proper investigation has been completed and corrective action has been taken, when in fact this is not the case (and the PID-maker, perhaps because of their position in the agency, knows that it is not the case)?

Under the current section 19, they would clearly be entitled (subject to the 6 month period) to make an external disclosure. However, under the new section 28 that does not appear to be the case. Instead, the provision of false information that an investigation had been completed might itself be serious wrongdoing (maladministration or corrupt conduct) and provide a basis for making a separate disclosure. However, the person would need to make a new disclosure to an agency of that allegation, and wait a further 6 months, before they could make an external disclosure of that wrongdoing.

This scenario seems unlikely, but is not completely fanciful. We doubt that it was intended that the new section would have the effect described above. The alternative drafting we suggest below would address this scenario more clearly.

4. Updating the definition of 'journalist'

The PID Bill also improves on the current PID Act by adopting a more modern definition of 'journalist' linked to the definition in the Evidence Act 1995.

The definition under the PID Act is:

> ***journalist*** means a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media.

The new definitions to be applied from the Evidence Act are:

> ***journalist*** means a person engaged in the profession or occupation of journalism in connection with the publication of information in a news medium.
>
> ***news medium*** means a medium for the dissemination to the public or a section of the public of news and observations on news.

5. Potential to extend the timeframes from 6 months to 12 months

Another change relates to the timeframes for the triggers that allow for an external disclosure to be made as a PID. Under section 19, the relevant timeframes within which the agency must have taken the relevant action is strictly 6 months.

Under the PID Bill, that timeframe can shift to 12 months. This will occur if the agency has (i) informed the person that the agency will not, or will cease to, deal with their disclosure as a PID, and (ii) the person has asked for an internal review of that decision, or the decision not to investigate or to cease an investigation

This change does not appear to us to be unreasonable, as it would not be realistic to expect an agency to undertake an investigation within 6 months if it first has to deal with an internal review into the threshold question of whether the original disclosure was a PID.

However, it is a difference from the current Act, and so we draw it to Parliament's attention.

6. No other changes intended

We understand that the Government's intention with respect to the drafting of section 28 is otherwise to replicate, and make no substantive change to the effect of, the existing provision (section 19) of the PID Act.

However, there are at least three scenarios we have identified where the ability of a person to make an external disclosure may be less certain under the drafting of the new section 28 (PID Bill) than it is under the current section 19 (PID Act):

1. A person makes an internal PID, and no investigation occurs within 6 months. However, a further three months passes and they are told (at that 9 month mark) that an investigation has been completed. Under section 19 of the PID Act it is clear that the person can make an external PID (subject to the other usual requirements), because the 6 month deadline was not met. It may be slightly less clear in the drafting of section 28 that they would still be able to do so under the new Bill.

2. A person who has made an internal PID is told (within 6 months) that an investigation has been completed but that no corrective action is or will be taken. Under section 19 of the PID Act it is clear they can make an external PID (again, subject to usual requirements). It is somewhat less clear in the new section, depending on whether 'details of the corrective action, taken, proposed or recommend' in the definition of 'required action' could be satisfied by an agency saying that *no* corrective action will be taken.[21]
3. A person who has made an internal PID is told (within 6 months) that an investigation has been completed and corrective action is being or will be taken. However, the person (perhaps because of their role in the agency) is aware that this is not true. Under section 19 of the PID Act they can make an external PID (subject to usual requirements). Again, it is not so clear in the new section – i.e. must the information provided by the agency be true in order to meet the definition of 'required information'?

Our suggested alternative drafting of section 28 (below) may help to clarify these potential drafting ambiguities.

7. Our suggested alternative drafting of section 28

We agree with the Ombo-LECC Committee that the current threshold of 'substantially true' before an external disclosure may be made as a PID is too onerous and puts public officials who are seeking to make disclosures that are genuinely in the public interest at risk.

However, while we support the recommendation of the Ombo-LECC Committee, we also understand some of the Government's reservations about removing the threshold entirely (see discussion in Annexure A).

In particular, if an agency has completed an investigation and made findings that the allegations are not substantiated, it would seem unfair (particularly to the person who was the subject of those allegations) if the original reporter could still make those allegations public on the basis of the much lower threshold of their own honest and reasonable belief.[22]

The reporter may honestly believe the investigation got it wrong, but if they decide to risk the reputation of others by disputing that finding publicly, it seems reasonable to require them to be able to demonstrate a very solid basis in fact for doing so.

However, as the Ombo-LECC Committee pointed out, in other cases (such as where an agency has simply ignored their report of wrongdoing) it seems obviously unfair that the reporter is put to that higher standard of proving the allegations are true in fact. An honest and reasonable belief should be sufficient in those circumstances. The reporter does not have the capacity to investigate the allegations themselves in order to establish truth with complete certainty – that is the agency's job.

The Ombudsman therefore suggests an alternative approach, which may represent somewhat of a compromise between:

a. the Ombo-LECC Committee's recommendation – that the threshold of 'substantially true' be removed entirely in favour of the standard 'honest belief on reasonable grounds' test, and

21 Noting that an agency is not required to take corrective action if no serious wrongdoing or other misconduct is found to have occurred within the agency, cl 66(3)

22 Of course, the fact the report now knows that an investigation found the allegations to be unsubstantiated may make it less likely that their belief, even if honest, continues to be reasonable. However, there may be details in the investigation that are not known, and cannot be known, by the reporter such that their belief may still be reasonable even if it is wrong.

b. the Government's concern that, at least in some circumstances, that lower threshold may be too low to avoid unfair damage to the reputation of those who are the subject of allegations.

The approach we suggest would be, in effect, to retain the substantially true threshold but only in one particular scenario: where the allegations have been tested through an investigation and found not to be substantiated. In that case, the higher threshold for an external disclosure would be required and the person wishing to air the allegations publicly would need not just to have an honest and reasonable belief in them, but would need to show that they are right (the allegations are true) and that the investigation was wrong.

In all other cases, the threshold would be the standard one under section 26(1): 'honestly, and on reasonable grounds believes' the disclosure shows or tends to show serious wrongdoing.

To enact this compromise position, we propose an amendment as follows:

Alternative drafting of section 28:

Replace section 28 with the following:

1. A disclosure made by a person to a member of Parliament or a journalist is a voluntary public interest disclosure if, in addition to complying with sections 25-27–
   a. the person previously made substantially the same voluntary public interest disclosure (the ***previous disclosure***) to a person or body mentioned in section 27(1)(a)-(c), and
   b. one of the following apply –
      i. an agency made a decision mentioned in section 55(3) in relation to the previous disclosure, or
      ii. an agency did not, before the end of the investigation period, complete an investigation of the relevant serious wrongdoing, or
      iii. any agency, before the end of the investigation period, completed an investigation of the relevant serious wrongdoing but did not take or propose to take corrective action, or
      iv. the maker of the previous disclosure is an identified discloser and did not, before the end of the investigation period, receive notice from an agency that the agency had completed an investigation of the relevant serious wrongdoing and that corrective action had been, was being or would be taken.
2. However, a disclosure made to a member of Parliament or a journalist is not a voluntary public interest disclosure if, at any time, all of the following apply –
   a. an agency has completed an investigation into the relevant serious wrongdoing, and
   b. if the person is an identified discloser – the person has received notice from an agency that it had completed an investigation into the relevant serious wrongdoing, and
   c. the results of the investigation include a finding that the relevant serious wrongdoing substantially did not occur, and
   d. it is true that the relevant serious wrongdoing substantially did not occur.

3. In this section-

   Member of Parliament does not include a Minister.

   Identified discloser, in relation to a previous disclosure, means the person who made the previous disclosure unless:

   a. the previous disclosure was anonymous, or
   b. the person has waived, in writing, the right to receive information under section 59 in relation to the previous disclosure.

   Investigation period, in relation to a previous disclosure, means-

   a. the period of 6 months from the making of the previous disclosure, or
   b. if the maker of previous disclosure applies within 6 months of making the previous disclosure for internal review of an agency decision in relating to the previous disclosure – the period of 12 months from the making of the previous disclosure.

   Note. Section 55(3) mentions a decision of an agency to neither investigate, nor to refer to another agency for investigation, a disclosure. Section 59 specifies information agencies must provide to the makers of voluntary public interest disclosures. Section 60 provides for the internal review of certain agency decisions, including a decision that an agency is not required to deal with a disclosure as a voluntary public interest disclosure.

Annexure E

Avenues for future research and advice

As noted above, the Bill represents a significant enhancement to the State's whistleblower protection and promotion regime.

Nonetheless, there are some aspects of the Bill that we consider may not have fully addressed all ambiguities or where it falls short of what appears to be best practice – some of these are outlined below.

We do not believe that consideration of these issues should hold up the passage, commencement or implementation of the Bill. Following this report, we will ask the Steering Committee to consider the issues in this section further and report back their advice to Government.

1. Should the definition of 'serious wrongdoing' be expanded to include additional categories, or otherwise simplified?

Both the current PID Act and the Bill cover a closed list of categories of wrongdoing (cl 13 outlines the 'serious wrongdoing' covered by the PID Bill). These categories were historically derived from the jurisdiction of relevant NSW investigating authorities (now referred to as integrity agencies).

Category of wrongdoing	Relevant integrity agency
corrupt conduct	ICAC (and/or LECC in the case of certain law enforcement bodies)
government information contravention	Information Commissioner
local government pecuniary interest contravention	Office of Local Government[23]
serious maladministration	Ombudsman (and/or LECC in the case of certain law enforcement bodies)
privacy contravention	Privacy Commissioner[24]
serious and substantial waste of public money	Auditor General

Mapping the categories of serious wrongdoing (about which a PID may be made) with the jurisdiction of external investigating bodies was a deliberate approach of the original 1994 Act. The central idea at that time was to ensure that public officials who reported matters to an external investigating agency (whether directly or internally within their own agency) should not face reprisal for doing so.

However, the approach means that some types of 'serious wrongdoing' (in its ordinary common-sense meaning) are not included in the Bill.

Should other serious wrongdoing and associated integrity agencies be included?

The Bill is narrower in some respects than legislation in other jurisdictions, as it does not cover some types of wrongdoing that are covered in those other jurisdictions.

For example, the definition of serious wrongdoing in the Bill does not extend to conduct that endangers health, safety or the environment (unless that conduct also happens to fall within one of the other stated categories, such as corrupt conduct).

23 Referred to in the Bill as the Secretary of the Department of Planning, Industry and Environment when exercising relevant functions under the *Local Government Act 1993*.

24 The Privacy Commissioner is included as an Integrity Agency in the PID Bill, but not in the PID Act.

Most other Australian jurisdictions provide protection for disclosures about danger or risk to public health, safety or the environment.[25]

That disclosures of dangers to health and safety are not covered by the Bill also means that disclosures about serious clinical issues in health care will generally not be protected. However, if serious clinical wrongdoing is later covered up, or if health agencies otherwise fail to take appropriate administrative action upon becoming aware of clinical issues, then that subsequent conduct could potentially be the subject of a PID under the Bill. This is because a 'cover up' or administrative non-action might constitute serious maladministration or even corrupt conduct, depending on the circumstances. However, a (mere) disclosure of clinical negligence, even where it might result in death or other significant outcomes, would not be a PID covered by this Bill.

In the Ombo-LECC Committee, the Ombudsman submitted that consideration could be given to including the Heath Care Complaints Commission as an investigating authority (or integrity agency, to use the language of the new Bill), and to extend the definition of serious wrongdoing to cover matters within the HCCC's jurisdiction.[26] This was not accepted by the Committee.

Disclosures of other types of serious wrongdoing, such as types of wrongdoing that might be reported to the Environment Protection Authority or SafeWork NSW, are also not disclosures that would generally attract PID protections under the Bill.

That said, there may be protections available to those who make reports or complain about other categories of wrongdoing under legislation other than the PID Act/Bill.[27] If those protections are considered to be inadequate (or out of step with the PID Bill protections) then an alternative approach would be to review and, if necessary, enhance them. There is an argument that this could be preferable to bringing those matters also under the umbrella of the PID Act, which may create a confusing overlap.

Could a simpler, more general definition of 'serious wrongdoing' be considered?

A more radical approach would be to adopt a more general, 'principles-based' definition of serious wrongdoing.

The Commonwealth Corporations Act takes such an approach, by permitting PIDs to be made in respect of any matter of 'misconduct' or 'improper state of affairs' affecting the corporation.

Likewise, the PID Bill could be amended to allow public officials to make PIDs about any 'serious wrongdoing' within or affecting an agency.

25 In 2016, NSW was the only jurisdiction in Australia not to provide such protections – see table at p 62, Review of the Public Interest Disclosures Act 1994, Submission 9, NSW Ombudsman, 9 August 2016 *Submission 9 - NSW Ombudsman.pdf*. Since then, South Australia has introduced a new *Public Interest Disclosure Act 2018* (SA) that includes the same protection as the legislation outlined in the previous table (s4). The Northern Territory has repealed the *Public Interest Disclosure Act 2008*, and introduced the *Independent Commissioner Against Corruption Act 2017*. The protections in the new ICAC Act (NT) are not directly equivalent to the PID Act (NT). There is no express reference to protecting disclosures of harm to the environment, health or public health except in that the definition of corrupt conduct includes providing false or misleading information in relation to an application for a licence, permit or other authority under legislation designed to promote or protect health and safety, public health, the environment or the amenity of an area. Instead, the ICAC Act (NT) protects communications involving information tending to show 'improper conduct'. This includes 'unsatisfactory conduct', which is conduct connected to public affairs that results in substantial detriment to the public interest: s 12(1).

26 Review of the Public Interest Disclosures Act 1994, Submission 9, NSW Ombudsman, 9 August 2016 page 29 *Submission 9 - NSW Ombudsman.pdf*.

27 Those who make a complaint directly to the Health Care Complaints Commission will, however, have some limited statutory protection under the *Health Care Complaints Commission Act 1993* (NSW): s 98(2).

The current list of serious wrongdoing types (corrupt conduct, serious maladministration and so on) could remain but be included merely as examples. For example, a revised definition might be:

Serious wrongdoing *means wrongdoing within or affecting an agency (other than conduct of a trivial nature), and includes the following:*

a. corrupt conduct
b. a government information contravention
c. a local government pecuniary interest contravention
d. serious maladministration
e. a privacy contravention
f. a serious and substantial waste of public money
g. conduct or a state of affairs that constitutes a significant danger to public health, safety or the environment.[28]

As a matter of principle, it seems hard to justify why it would not be in the public interest to encourage a public official to disclose any matter of 'serious wrongdoing' (within its ordinary meaning), why they should not be protected against detrimental action if they do so, and why an agency that receives such a disclosure should not be required to deal with it appropriately.

It should be noted that the PID Bill (as recommended by the Ombo-LECC Committee) expressly provides that a disclosure of information that 'concerns a grievance about a matter relating to the employment or former employment of an individual' and that 'does not have significant implications beyond matters personally affecting or tending to personally affect the individual' is not a PID. Accordingly, one of the previous objections to a more expansive definition of serious wrongdoing – that it may inadvertently capture matters that are not matters of genuine public interest – may arguably have been addressed, at least to some extent.

We also acknowledge that the desirability of expanding the definition of wrongdoing was canvassed during the Ombo-LECC Committee submissions and hearings and that the Committee did not at that time recommend any expansion of the categories of 'serious wrongdoing'. Our submission to the Committee also suggested that there were other more fundamental and operational reforms required to be made to the Act, which were more pressing than the question of whether the categories of serious wrongdoing should be added to or otherwise expanded.

Nonetheless, the Steering Committee should consider whether the definition of serious wrongdoing adequately covers all matters that public officials should be encouraged to report in the public interest and with assurance that they will be protected under the PID Act if they do so.

28 The term 'significant danger to public health or safety' is suggested given the discussion above, and may itself need to be defined.

2. Should the definition of 'maladministration' be expanded to include other workplace wrongdoing?

Related to the issue discussed above, the definition of 'serious maladministration', which is one of the categories of 'serious wrongdoing' in the Bill (cl 13(d), raises particular complexities. It is, in particular, unclear precisely when conduct is considered to involve a matter of *administration* (and therefore when wrong forms of such conduct could constitute *maladministration*).

In June 2021, our office sought advice from the Crown Solicitor's Office (**CSO**) about the meaning of maladministration for the purposes of the current PID Act. The CSO advised that to constitute maladministration, the relevant action or inaction must be 'administrative in nature'. To establish the necessary administrative character of the conduct:

- there must be a 'nexus' between the conduct and the public authority or public official's powers, function or duties in the performance of the executive function of government
- this is determined by assessing whether the action or inaction arises in the exercise of a power, function or duty of the relevant public authority or public official.

Beyond this, however, the CSO advised that there are no consistent factors that can be used to guide an assessment of whether conduct is maladministration. The assessment of whether particular conduct is administrative in character may be 'a collective impression due to a specific combination of factors in context, rather than simply a matter of reaching a certain threshold of independently conclusive indicators.' As a result, the assessment of maladministration can be complex and 'difficult questions may arise at the margins'.

This complexity makes it difficult for public officials and agencies to assess whether disclosures attract the protections of the PID Act.

The CSO also advised that some wrong conduct that may occur within a public sector workplace, such as sexual harassment, would likely fall outside the scope of maladministration under the current PID Act, and therefore would not constitute a category of serious wrongdoing about which a PID may be made.

If that is correct, then it follows that such conduct would also fall outside the definitions of maladministration and consequently serious wrongdoing in the PID Bill.

As noted above, even where conduct may fall within those definitions, the PID Bill provides that a disclosure will not be a PID to the extent that it is merely a personal grievance. However, in our view, an allegation of sexual harassment would not (or should not) be considered to be merely a 'grievance' that 'does not have significant implications beyond matters personally effecting the individual' (cl 26(3)). There is evidently a strong public interest in having sexual harassment reported and dealt with, in addition to the important interest of the individual who is most immediately affected.

The CSO advice means that a public official who experiences or witnesses and reports serious sexual harassment in the workplace is probably not protected under the PID Act and will not be protected under the new PID Bill.[29]

29 Similar to the example given above in respect of reports of clinical negligence, if an agency receives a report of sexual harassment and there is a 'cover-up' of that allegation, then the subsequent cover-up could potential be maladministration and the subject of a PID, even if the original disclosure (of the harassment) was not a PID.

We suggest that the Steering Committee consider these and other forms of workplace wrongdoing that the CSO has advised are outside the scope of maladministration, and therefore outside the scope of the Bill. In particular, the Committee should consider whether:

a. those who report this kind of wrongdoing are appropriately protected under other legislation (such as employment legislation or anti-discrimination laws), and
b. if not, whether additional protections should be provided either by bringing this conduct within the scope of the PID Bill, or by enhancing the protections that may be available under other relevant legislation.

3. Does the definition of 'public official' deal appropriately with contracted-out services?

The definition of 'public official' is central to the operation of the PID Act, as well as the new Bill (cl 14). It affects who can make, receive, and be the subject of a PID.[30]

Complex and technical arguments arise particularly in relation to reports made by, about, or received by, volunteers, contractors or subcontractors and non-Government organisations.

The Bill significantly improves on the current PID Act by allowing heads of agency to 'deem' a disclosure to be a PID, including in cases where there may be some technical uncertainty about whether a party involved meets the definition of 'public official' (cl 29). This means that, in legislative 'grey areas', certainty can be provided in practice.

Regulations can also be made to provide that a certain category of person is (or is not) a public official. Our guidelines will also seek to provide clear guidance relating to this issue.

Nonetheless, we think the definition of 'public official' should be considered further, particularly in relation to contracted-out services. Where, for example, a large, perhaps international corporation provides services to a NSW agency though a local business unit or subsidiary, questions arise as to which of its staff should be taken to be 'public officials' for the purpose of the Bill. Staff in the global head office, as well as its board and senior executive, could become aware of and need to report wrongdoing. The extent to which such people are, and should be, covered by the Bill may not be entirely clear.

There are also questions about whether the protections in the Bill should extend only to contracted entities that provide services 'on behalf of' the agency, being services that the agency would otherwise be providing itself, or whether they should also apply to entities that are funded by an agency in other ways.

We suggest these issues be considered by the Steering Committee, including in particular to advise Government whether regulations should be made under the Bill to clarify or extend the meaning of 'public official' in the case of contracted-out services.

30 Note, witness PIDS can be made by people who are not public officials (Cl 22)