



Submission by the  
Commonwealth Ombudsman

**REVIEW OF THE *PUBLIC INTEREST  
DISCLOSURE ACT 2013 (Cth)***

Submission by the Commonwealth Ombudsman, Colin Neave

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## EXECUTIVE SUMMARY

The statutory review of the *Public Interest Disclosure Act 2013* (the PID Act) is a valuable opportunity to reflect on the way the Act has operated in practice and whether it is serving its legislative objects.

The Office of the Commonwealth Ombudsman has a unique perspective on the operation of the PID Act. We receive direct feedback from the people administering the Act; from the people who have used it to make disclosures; and from senior agency officials who we meet with to discuss the way the PID Act is being administered and promoted in their agency. We are regularly approached for advice and assistance by public officials in agencies administering the PID Act. We aim to be a source of practical and reliable guidance to all of the people involved in the Commonwealth PID scheme.

Overall, we think the PID Act has been a valuable addition to the mechanisms that previously existed to report, investigate and remedy misconduct and systemic problems in the Commonwealth public sector. We have seen a number of agencies working to integrate the PID Act into their existing integrity frameworks. Some agencies have done excellent work to raise awareness with their staff about the PID Act and how they can make a disclosure. Others have been less enthusiastic.

In many cases, this lack of enthusiasm arises from a concern about the practical implications of administering the PID Act given the breadth of disclosable conduct and the procedural requirements for handling disclosures. In many cases, we think those concerns are overstated. However, there are some which we believe are valid.

Throughout this submission we have attempted to give a balanced picture of the way the PID Act is operating and some of the concerns raised by agencies and disclosers. In most cases, we simply highlight those concerns to be considered by the reviewer. In some cases, we consider changes may be needed to enhance and improve the effectiveness of the PID Act in delivering its legislated objects.

Throughout this submission we have suggested 24 changes to be considered in the statutory review of the PID Act. They are listed below.

### *Ombudsman's suggested changes:*

- 1 Review s 26(3) of the PID Act with the aim of expressing more simply and clearly the matters to be considered when determining if an external disclosure of information is not, on balance, contrary to the public interest.
- 2 Amend the PID Act to require principal officers to publish the PID procedures for their agency on the agency's website.
- 3 Prescribe in the PID Act a formula for working out the minimum number of authorised officers to be appointed for an agency, based on the number of public officials that belong to the agency.
- 4 Amend the supervisor's obligation in s 60A of the PID Act to:
  - (i) require a supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage which the supervisor has reasonable grounds to believe concerns one or more serious instances of disclosable conduct;

- (ii) require a supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage if that public official requests; and
  - (iii) permit the supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage which the supervisor has reasonable grounds to believe concerns one or more instances of disclosable conduct.
- 5 Modify s 51(4) of the PID Act to enable the agency to provide the discloser with a summary report of the PID investigation, where significant redaction of the s 51 report would otherwise be required.
  - 6 Include another exception in s 65 of the PID Act to permit the use or disclosure of protected information for the purposes of another law of the Commonwealth.
  - 7 Review s 65 of the PID Act to clarify whether it applies to a person performing a function under the Act other than by exercising a function or power delegated by the principal officer.
  - 8 Consider whether the good faith indemnity in s 78 of the PID Act should apply to a person performing a function under the Act other than by exercising a function or power delegated by the principal officer.
  - 9 Include another exception in s 65 of the PID Act to permit the use or disclosure of protected information in connection with the performance of a function conferred on the Ombudsman by s 5A of the *Ombudsman Act 1976*.
  - 10 Amend the PID Act to define or clarify the term 'disciplinary action' for the purposes of s 29(2)(b).
  - 11 Amend s 48 of the PID Act to introduce an additional discretionary ground for deciding not to investigate a disclosure, or to stop investigating a disclosure, to apply to disclosures about conduct for which there is another suitable investigative mechanism under another Commonwealth law, or procedures established under another law of the Commonwealth, and the principal officer is reasonably satisfied there are no further matters concerning the disclosure that warrant investigation.
  - 12 If suggestion 11 is adopted, amend the PID Act to require an agency to provide information to a discloser about the outcome of the other investigation within a reasonable period of it being completed, or at the point at which the agency decides no further action is warranted.
  - 13 Adjust the threshold for making a PID by introducing an additional seriousness (or public interest) test for disclosable conduct which is essentially a matter of personal grievance, including in relation to the employment of a public official.
  - 14 Make a rule under s 83 of the PID Act prescribing Commonwealth investigative agencies that can receive and investigate PIDs about subject matter within their jurisdiction.
  - 15 Amend s 56 of the PID Act to enable disclosure of information to ACLEI, rather than to a member of an Australian police force, where the information raises a corruption issue, or a significant corruption issue, that the Integrity Commissioner may deal with under the *Law Enforcement Integrity Commissioner Act 2006*.
  - 16 Amend s 70 of the PID Act to clarify that an authorised officer may determine in writing that a person is a public official entitled to make a disclosure if they are not satisfied that the person was a public official at the time they received the information to be disclosed.
  - 17 Amend s 70 of the PID Act to clarify that the requirement to provide a copy of the written determination that a person is a public official entitled to make a disclosure does not apply if contacting the discloser is not reasonably practicable.

- 18 Extend the discloser protections in the PID Act to apply to a public official who was the original source of a misdirected disclosure.
- 19 Clarify within the PID Act that a contract with the Commonwealth that gives effect to grant funding is not a Commonwealth contract for the purposes of the PID Act.
- 20 Clarify within the PID Act that documents relating to a public interest disclosure or a disclosure investigation are not automatically exempt from the operation of the FOI Act.
- 21 Amend the PID Act to require agencies to notify the Ombudsman/IGIS of the following information about their handling of an internal disclosure:
  - (i) when a disclosure investigation is completed
  - (ii) the categories of disclosable conduct that were found to have occurred, if any
  - (iii) whether a referral was made to an Australian police force under s 56 of the PID Act
  - (iv) any action recommended to address the investigation findings
  - (v) the date the discloser was provided with a copy of the investigation report.
- 22 Amend s 51 of the PID Act to require agencies to provide a copy of the investigation report to the Ombudsman/IGIS if contacting the discloser is not reasonably practicable.
- 23 Amend the PID Act to permit the Ombudsman to transfer a disclosure to the principal office of an agency if the conduct with which the disclosure is concerned relates to that agency and the Ombudsman is satisfied that it is appropriate for that agency to handle the disclosure in accordance with the PID Act.
- 24 Amend s 49 of PID Act to provide where a disclosure is allocated to an investigative agency that has a separate investigative power in relation to the disclosure, s 47 of the PID Act does not apply and instead, the investigative agency shall deal with the disclosure in accordance with the provisions of the relevant Act.

# INTRODUCTION

## Background

The Commonwealth Ombudsman safeguards the community in its dealings with Australian Government agencies by:

- correcting administrative deficiencies through independent review of complaints about Australian Government administrative action
- fostering good public administration that is accountable, lawful, fair, transparent and responsive
- assisting people to resolve complaints about government administrative action
- developing policies and principles for accountability, and
- reviewing statutory compliance by law enforcement agencies with record keeping requirements applying to telephone interception, electronic surveillance and like powers.

Complementing these functions, the Ombudsman also has a significant role supporting and monitoring the administration of the whistle-blower scheme established under the *Public Interest Disclosure Act 2013* (PID Act). The Ombudsman does this by:

- providing assistance
- promoting awareness
- receiving, allocating and investigating internal disclosures
- receiving mandatory notifications
- considering applications to extend the investigation period
- determining PID standards
- preparing annual reports
- receiving and investigating complaints about PID administration (under the *Ombudsman Act 1976*).

## Statutory review of the PID Act

The PID Act commenced operation on 15 January 2014. Section 82A of the PID Act requires a review of the Act's operation two years after it commenced. On 15 January 2016, the Government announced the appointment of Mr Philip Moss AM to conduct that review, which is to be informed by public submissions.

The review of the PID Act is an opportunity to reflect on the extent to which the Act has achieved its objects, and identify areas where the practical operation of the Act can be improved.

This submission draws upon the experience of the office of the Commonwealth Ombudsman in performing its multiple roles in the scheme established under the PID Act. Our comments are informed by the many conversations that we have had with Commonwealth officials seeking practical guidance about the operation of the PID Act, both in the lead up to its commencement and in the two years since.

Our submission discusses some aspects of the scheme which appear to be operating well, and identifies those aspects that agencies have found challenging. It also highlights some

parts of the scheme which we believe might benefit from reform. We trust our comments will be useful to Mr Moss in his review.

## **Terms of Reference**

The terms of reference (TOR) for the statutory review of the PID Act are:

TOR 1: the impact of the Act on individuals seeking to make disclosures in accordance with its provisions;

TOR 2: the impact of the Act on agencies, including any administrative burdens imposed by investigation and reporting obligations in the Act;

TOR 3: the breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act; and

TOR 4: the interaction between the Act and other procedures for investigating wrongdoing, including Code of Conduct procedures under the *Public Service Act 1999* and the Commonwealth's fraud control framework.

Part one of this submission includes some broad observations about each term of reference, and in particular, what appears to be working well. We also identify some problem areas and make some suggestions to address them.

In part two we discuss what would seem to be some unintended consequences of the PID Act, and some aspects that we consider could benefit from fine tuning, both to improve the operation of the PID Act and to make it easier for agencies to administer it. This part includes some suggestions to improve the Ombudsman's capacity to oversight the operation of the PID Act.

Part three is the conclusion, and includes a summary of the changes suggested in parts one and two.

## **Snapshot of the Ombudsman's PID work**

The Commonwealth Ombudsman has a monitoring, educative and oversight role for the PID Act for most of the agencies subject to it. The Inspector General of Intelligence and Security (IGIS) has oversight of the six intelligence agencies subject to the PID Act.

As at 30 June 2015, a total of 185 Commonwealth agencies were subject to the PID Act, which allows current and former public officials to make disclosures about the conduct of an agency and its officials (including the conduct of contracted service providers in relation to entering into, or performing the contract).

The principal officer of each Commonwealth agency must establish arrangements to facilitate and manage disclosures about their agency; to protect disclosers from reprisal; and remedy any wrongdoing detected. However, in some limited situations, the Commonwealth Ombudsman may receive and/or investigate disclosures about other agencies.

My office provides practical support and information about the PID scheme to potential disclosers and to agency officials administering the PID Act. We have a PID webpage with a range of guides and information sheets and a telephone hotline for agencies and disclosers. We run training and information sessions for agencies. We have also established PID communities of practice in most Australian states and territories, which meet several times a year.

Agencies must notify the Ombudsman whenever they allocate a disclosure for handling under the PID Act.<sup>1</sup> Agencies must also notify the Ombudsman when they decide not to investigate, or to stop investigating a disclosure.<sup>2</sup> The PID Act requires agencies to prepare a report of their investigation and give a copy to the discloser, but not to the Ombudsman.

The Ombudsman receives and investigates complaints under the *Ombudsman Act 1976* (Ombudsman Act) about the way that agencies have administered and applied the PID Act. The Ombudsman also prepares an annual report for the Minister to table in Parliament, on the operation of the PID Act across the Commonwealth.

The following statistics provide some context for the Ombudsman's observations and suggestions in this submission.

### ***From 15 July 2013 to 14 January 2016***

The PID Act became law on 15 July 2013, but did not commence until 15 January 2014. In the period leading up to implementation, the Ombudsman's office started to meet with agencies to promote PID awareness and support and encourage them to be ready when the PID scheme started. We have continued to engage with public officials in many agencies to promote and provide information and guidance about the PID Act.

Since 15 July 2013 we have delivered and attended 168 presentations and meetings aimed at increasing and promoting the PID scheme.

We have participated in, or run, 62 forums for PID practitioners. We now have PID communities of practice established in most Australian capital cities, which meet several times a year.

The Commonwealth Ombudsman collaborates and shares information with the major state and territory bodies with oversight responsibilities for public interest disclosure schemes throughout Australia. We host an annual meeting of these bodies (the PID Oversight forum), with the next due to take place in April 2016.

Our office is also a member of the steering committee for a current Australian Research Council project exploring organisational responses to whistleblowing.

### ***First two years of the PID scheme (from 15 January 2014 to 14 January 2016)***

Agencies notified us that they had received and allocated a total of 1336 disclosures.

The Ombudsman's office received 142 potential public interest disclosures under the PID Act, all about conduct that did not relate to the Ombudsman's office:

- 51 of those potential disclosures met the PID Act criteria for an internal disclosure to the Ombudsman. Of these:
  - 27 were allocated to the specific agency the disclosure was about (14 different agencies)
  - 24 were allocated to the Ombudsman's office for handling under the PID Act.

In addition, we received a total of 677 approaches from people seeking assistance or guidance about the operation of the PID Act:

- 493 approaches were requests for advice or guidance from agency officials administering the PID Act

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<sup>1</sup> Table 5 at appendix 1 of this submission shows the number of PIDs received by each agency (other than the intelligence agencies) in the first two years of the PID scheme.

<sup>2</sup> Table 1 on page 25 of this submission summarises the decisions made not to investigate PIDs in the first two years of the PID scheme (excluding decisions made by the intelligence agencies).

- 184 approaches were from people who had made, or were considering making a public interest disclosure (including 41 complaints about agency administration of the PID Act).

The Ombudsman prepared two annual reports for the Minister on the operation of the PID Act as required by s 76, covering the periods 15 January 2014 to 30 June 2014;<sup>3</sup> and 1 July 2014 to 30 June 2015.<sup>4</sup> These reports discuss PID themes and trends and include statistics about PID activity across the Commonwealth, including the work of the Ombudsman and IGIS.

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<sup>3</sup> The Ombudsman's 2014 report on the operation of the PID Act is at pp 66-101 of the Commonwealth Ombudsman's Annual Report 2013—14. An extract is available online at: [http://www.ombudsman.gov.au/data/assets/pdf\\_file/0027/36378/Annual\\_Report\\_1314\\_PID\\_Extract.pdf](http://www.ombudsman.gov.au/data/assets/pdf_file/0027/36378/Annual_Report_1314_PID_Extract.pdf).

<sup>4</sup> The Ombudsman's 2015 report on the operation of the PID Act is at pp 64-96 of the Commonwealth Ombudsman's Annual Report 2014—15. The full report is available online at: <http://www.ombudsman.gov.au/publications/annual>.

# PART ONE

## CURRENT OPERATION OF THE PID ACT

1.1 It is appropriate to quote the objects of the PID Act at the beginning of this discussion. They are (per s 6 of the PID Act):

- to promote the integrity and accountability of the Commonwealth public sector
- to encourage and facilitate the making of disclosures by public officials
- to ensure that public officials who make public interest disclosures are supported and protected from adverse consequence relating to those disclosures
- to ensure that disclosures by public officials are properly investigated and dealt with.

1.2 Each of these objects has equal weight, and the Act should be administered in a way that properly balances each of them. We have attempted to bear these four objects in mind as we discuss each of the four terms of reference below.

### TOR 1: Impact on individuals seeking to make a disclosure

1.3 The first term of reference for the review is ‘the impact of the Act on individuals seeking to make disclosures in accordance with its provisions’. Set out below are some of the significant aspects of the way the PID Act operates from the perspective of an individual seeking to make a disclosure.

1.4 We also discuss the PID Act’s operation from the perspective of a person who has made a disclosure under the PID Act, with a particular focus on the transparency of the agency’s handling of an internal disclosure, and the protections that the PID Act provides.

1.5 The discussion below makes reference to the points at which an agency must notify the Ombudsman of certain steps in their handling of a disclosure. In the case of the six intelligence agencies, that notification must be made to the IGIS instead.

#### ***How can an internal disclosure be made?***

##### *Internal disclosure to an authorised officer who is an authorised internal recipient*

1.6 The overall design of the PID scheme encourages public officials to disclose information about suspected wrongdoing to designated people. These are ‘authorised officers’<sup>5</sup> in their own agency (either directly or via their manager or supervisor), or alternatively, in the agency where that wrongdoing is suspected to have occurred.<sup>6</sup> This is consistent with the principle that, in general, the head of an agency is best placed to investigate and remedy wrongdoing within that agency, and to protect officials who identify suspected wrongdoing.

1.7 Authorised officers are the principal officer of each agency and any person the principal officer appoints in writing to be an authorised officer of that agency.<sup>7</sup> Principal officers have a legal obligation to ensure that the public officials belonging to their agency have ready access to an authorised officer. They must appoint sufficient numbers of

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<sup>5</sup> The term authorised officer is defined in s 36 of the PID Act.

<sup>6</sup> An authorised officer may only receive an internal disclosure if he or she is an ‘authorised internal recipient’ for that disclosure, as provided by s 34 of the PID Act.

<sup>7</sup> The principal officer may appoint any public official who ‘belongs to the agency’ an authorised officer, but must do so in writing (s 36). The agency to which various categories of public officials belong is worked out under s 69 of the PID Act.

authorised officers,<sup>8</sup> ensure their identities are known to the officials who belong to the agency,<sup>9</sup> and provide an effective means for potential disclosers to find out how to contact them.<sup>10</sup>

1.8 It is also possible for a public official to make an internal disclosure to an authorised officer in the Ombudsman's office if they believe on reasonable grounds that the Ombudsman should investigate it.<sup>11</sup> In most of the cases where a public official has contacted the Ombudsman's office to make a disclosure, the official's belief that the Ombudsman should investigate their disclosure is based on a fear that:

- the authorised officers in their agency are 'too close' to the subject matter of their disclosure
- their agency will not take their disclosure seriously
- their agency will not conduct a thorough investigation
- the agency will not protect their identity or protect them from reprisal action.

1.9 In most cases, we are able to allay the discloser's fears by explaining how the PID Act works and assisting them to identify an authorised officer in their agency they are comfortable to approach. In some cases, it becomes apparent that the agency concerned could improve the accessibility of authorised officers.<sup>12</sup>

1.10 Overall, we consider the PID Act provisions relating to the appointment and functions of authorised officers operates well, and is consistent with the PID scheme as originally conceived. Provided principal officers meet their obligations regarding the accessibility of authorised officers, a public official seeking to make a disclosure should not find it difficult to find an authorised officer in their agency to receive it. We make some observations under TOR 2 below about the number of authorised officers appointed, as well as the steps that agencies have taken to raise PID awareness.

#### *Internal disclosure to a supervisor or manager*

1.11 An official may make an internal disclosure by disclosing information to their supervisor or manager.<sup>13</sup> The supervisor/manager is obliged to pass the disclosed information to an authorised officer in their agency as soon as reasonably practicable, once they have reasonable grounds to believe that the information concerns, or could concern, disclosable conduct.<sup>14</sup>

1.12 The supervisor's obligation to pass disclosed information to an authorised officer significantly extends the reach of the PID Act. A public official who lacks the confidence to approach an authorised officer in their agency, or does not know how to contact one, should nevertheless be able to disclose information to their supervisor, and still receive the PID Act protections.

1.13 However, the intelligence we have gained through our contact with agencies indicates supervisors are generally unaware of their obligations or role under the PID Act. In part this is due to some agencies' reluctance to broadly promote the supervisor provisions in the PID Act. The likely reasons for this are the perceived administrative burden upon agencies (see

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<sup>8</sup> Section 59(3)(b) PID Act.

<sup>9</sup> Section 59(3)(c) PID Act.

<sup>10</sup> Section 5, Public interest *Disclosure Standard 2013* (the PID Standard).

<sup>11</sup> See table in s 34 of the PID Act, item 1, paragraphs (a) and (b) in column 2.

<sup>12</sup> Discussed below under TOR 2: Impact of the Act on agencies, from page 19.

<sup>13</sup> See table in s 26 of the PID Act, item 1, and definition of a supervisor in section 8 of the PID Act.

<sup>14</sup> Section 60A PID Act.

TOR 2 below), compounded by the fact that the supervisor provisions may be engaged in a range of common, and sometimes unintended, circumstances.<sup>15</sup>

1.14 In our view, the supervisor provisions are an important aspect of the Commonwealth PID Act, as they are intended to ensure that the PID Act protections will not be limited to public officials with detailed knowledge of the Act. However, we consider that the nature of the supervisor's obligation needs to be adjusted, to increase the likelihood that agencies will promote and enforce its application. We suggest a change to the PID Act to address this situation.<sup>16</sup>

#### *Unintentionally making an internal disclosure*

1.15 Apart from the requirement that an internal disclosure be made to an authorised internal recipient (or the disclosing public official's supervisor or manager) there are few formal requirements about the way information may be disclosed. The PID Act specifically states that a PID may be made in orally or writing, it may be made anonymously, and it is not necessary for the discloser to assert they are making a disclosure for the purposes of the PID Act.

1.16 These 'relaxed' formal requirements make it easier for public officials to disclose information in a way that attracts the protections of the PID Act and generally results in the information being allocated for handling in accordance with the PID Act. This reduces barriers for public officials who have formed an intention to make a disclosure under the PID Act. In turn, it reduces the likelihood that officials who are not familiar with the PID Act will miss out on the PID Act protections, and that their information will not be investigated by the agency. However, in many cases, the lack of formal requirements means an internal disclosure might not be recognised by the person who received it (be they an authorised officer or a manager or supervisor), and so it may not be dealt with in accordance with the provisions of the PID Act.

1.17 There is also the potential for some public officials to unintentionally make an internal disclosure in circumstances where they have no desire or need for protection, and they are confident that the subject matter is already being managed appropriately. This gives rise to some unintended consequences, which we discuss under TOR 2: Impact of the Act on agencies.<sup>17</sup>

#### ***Assurance that timely action will be taken on a disclosure***

1.18 One of the significant features of the PID Act is the onus placed on agencies to meet minimum standards for handling internal disclosures. This provides reassurance to any person contemplating making a disclosure that their information will be treated seriously. Agencies have told us that some disclosers have commented that the PID Act made them feel more comfortable about reporting suspected wrongdoing.

1.19 The PID Act has very clear procedural and timeliness requirements for agencies, as well as notification requirements at various points in the process. Once a disclosure is received by an authorised officer, they must use their best endeavours to decide an allocation within 14 days of receiving it (s 43(5)). If an allocation will take more than 14 days, the period should be justifiable, for example, because it was necessary to make inquiries to decide the allocation (s 43(4)).

1.20 Once the allocation is made, the discloser is entitled to be informed:

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<sup>15</sup> See discussion commencing on page 21 'Technical disclosures made in the ordinary course of business'.

<sup>16</sup> Ombudsman's suggestion 4 on page 23.

<sup>17</sup> See discussion commencing on page 21 'Technical disclosures made in the ordinary course of business'.

- when the disclosure is allocated for handling under the PID Act (s 44(2))
- if the disclosure is to be investigated, the estimated length of the investigation (s50(1A))
- if the disclosure is not to be investigated, the reasons for that decision and advice about any other course of action available to the person under other Commonwealth laws (s 50(2)).

1.21 The discloser has the additional assurance that the investigation will be completed in a timely manner. The usual investigation period allowed for an internal disclosure is 90 days, unless the Ombudsman grants an extension (s 52(3)).<sup>18</sup> The Ombudsman must notify the discloser when an extension is granted and the reasons for that extension (s 52(5)(a)). The agency conducting the investigation is obliged to give the discloser information about the progress of the investigation as soon as reasonably practicable afterwards (s 52(5)(b)).

1.22 A discloser may complain to the Ombudsman if an agency fails to meet any of these notice or timeliness requirements in the PID Act. When investigating complaints of this type, our office generally focuses on ensuring the agency understand the requirements, has processes in place to encourage and monitor compliance with their PID Act obligations and remedies the deficiency in the individual case.

### ***Advice about the outcome of a PID***

1.23 Section 48 of the PID Act provides a range of discretionary grounds upon which an agency may decide not to investigate a disclosure. If an agency decides not to investigate on one of those grounds, it must provide written notice to the discloser of that decision (s 50(1)(b)). The agency must also tell the discloser the reasons for that decision and other courses of action that may be available to them under other laws of the Commonwealth (s 50(2)).

1.24 Absent a decision under s 48, an agency is obliged to investigate each disclosure allocated to it. The PID Act investigation is not completed until the agency prepares a written report of the investigation with mandated content (s 51(2) and (3), also s 13 of the PID Standard). Within a reasonable time of the report being written, the agency must give the discloser a copy (s 51(4)), with redactions permitted in accordance with s 51(5). The discloser is therefore able to form his or her own views about whether the agency's investigation was adequate.

1.25 Our comparison of the provisions of the Commonwealth, NSW and Queensland PID legislation indicates that the Commonwealth PID Act provides a significantly higher level of transparency for the discloser.

1.26 In Queensland, s 82 of the *Public Interest Disclosure Act 2010 (Qld)* entitles the discloser to 'reasonable information' in writing about their disclosure, which includes confirmation that their disclosure was received, a description of the proposed action to be taken and a description of the results of that action when taken. However, the Qld PID Act does not set any time limits for that advice, and nor does it provide guidance about how much information should be provided.

1.27 In NSW, the discloser is entitled to receive an acknowledgement of their disclosure within 45 days of making it (s 6D, *Public Interest Disclosures Act 1994 (NSW)*); and the investigating authority, public authority or officer must notify the discloser of the action taken or proposed to be taken in response to the disclosure within six months of receipt (s 27, *Public Interest Disclosures Act 1994 (NSW)*).

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<sup>18</sup> IGIS may grant an extension if the disclosure investigation is being conducted by an intelligence agency (s 52(4)).

### ***Independent oversight of PIDs by the Ombudsman***

1.28 The Commonwealth Ombudsman has various responsibilities under the PID Act which combine to provide a level of independent oversight of the way that the PID Act is administered by agencies individually and more generally across the Commonwealth. The IGIS performs this function in respect of the intelligence agencies. The discussion below deals only with the Ombudsman's PID oversight role for Commonwealth agencies other than the intelligence agencies.

1.29 The PID Act requires agencies to notify the Ombudsman of certain steps in the handling of a disclosure:

- whenever an authorised officer allocates an internal disclosure to the principal officer (or delegate) for handling under the PID Act (s 44(1A))
- whenever a decision is made to not investigate a disclosure, or to stop an investigation (s 50A)
- if an agency is not able to complete a PID investigation within 90 days of allocation, the agency may apply to the Ombudsman for an extension of the investigation period (s 52(3)).

1.30 There is no requirement for an agency to inform the Ombudsman when an investigation is completed, or to provide the Ombudsman with a copy of the investigation report, or details of the findings or recommendations. The Ombudsman does not review the adequacy of investigations as a matter of course.

1.31 However, under the Ombudsman Act, the Ombudsman can receive and investigate complaints made by disclosers (and others) about the outcome of PID investigations and other action taken by agencies under the PID Act.<sup>19</sup> It is also open to the Ombudsman to conduct an investigation under the Ombudsman Act on his 'own motion', in the absence of a complaint.<sup>20</sup>

1.32 The Ombudsman is therefore able to review a cross-section of PID administration across the Commonwealth, selected on the basis of a complaint from a person dissatisfied with the action, or on the basis of intelligence gained elsewhere, such as by analysing agency notifications under the PID Act (i.e. of allocations, decisions not to investigate, or applications for extension of time).

1.33 The Ombudsman is not authorised to investigate action taken with respect to a person's employment in an agency or prescribed authority.<sup>21</sup> This limits the Ombudsman's capacity to comprehensively review how agencies deal with public interest disclosures about most employment-related conduct.<sup>22</sup> In such cases, the Ombudsman can generally only investigate whether agencies applied the procedural requirements of the PID Act in dealing with the disclosure. The Ombudsman is precluded from investigating and/or forming a view about the adequacy or outcome of the agency's investigation of the substantive disclosure.

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<sup>19</sup> Sections 5(1)(a) and s 5A(2) of the Ombudsman Act.

<sup>20</sup> Section 5(1)(b) of the Ombudsman Act.

<sup>21</sup> Section 5(2)(d) of the Ombudsman Act provides that '(t)he Ombudsman is not authorized to investigate ... action taken by anybody or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person'.

<sup>22</sup> This limitation does not apply to the service of members of the Australian Defence Force because of the Defence Force Ombudsman jurisdiction under Part IIA of the Ombudsman Act. The Ombudsman also has jurisdiction to deal with certain complaints related to the service of Australian Federal Police appointees (see Part V of the *Australian Federal Police Act 1979*).

In our view it is sensible to preserve this ‘carve out’ of the Ombudsman’s traditional jurisdiction.

### ***Support and protection from detriment and reprisal action***

1.34 The PID Act requires the principal officer of each agency to establish procedures for assessing the risk of reprisal action<sup>23</sup> against officials who make public interest disclosures (s 59(1)(a)), and to provide for the confidentiality of investigations (s 59(1)(b)).

1.35 The principal officer must take reasonable steps to protect public officials belonging to their agency from detriment, or threats of detriment relating to public interest disclosures (s 59(3)(a)). Section 7 of the PID Standard requires each agency’s PID procedures to outline the support that will be made available to officials who make disclosures relating to the agency.

1.36 These protective measures are strengthened by the fact that reprisal action is a criminal offence (s 19). Regardless of whether a prosecution is brought, disclosers have access to the Federal Court and Federal Circuit Court for a range of orders and injunctions to remedy or prevent reprisal (ss 14-16, and s 19A).

1.37 Making a public interest disclosure is also treated as a workplace right under the *Fair Work Act 2009* (per s 22 of the PID Act). This gives an employee access to the Fair Work Commission for remedies in the case of adverse action by their employer linked to them having made a public interest disclosure.

1.38 We are not aware of any case where a prosecution has been brought under the PID Act for alleged reprisal action. Nor are we aware of any case where a discloser, or person suspected to be a discloser, has taken civil action in the Federal Court or Federal Circuit Court under any of the reprisal provisions in the PID Act. However, we have received several complaints from disclosers who believe they have suffered reprisal but consider court action beyond their means. We have also received queries from agencies about whether the confidentiality and secrecy provisions in the PID Act prevent them from producing to a court information about a discloser that is relevant to the discloser’s claim for compensation for workplace injury (not directly related to a claim of reprisal). This is discussed in relation to TOR 2 below.

### ***Protecting the discloser’s identity***

1.39 The PID Act contains a range of measures aimed at protecting the discloser’s identity.

- A disclosure can be made anonymously (s 28(1)).
- A discloser may identify themselves to the authorised officer when they make their disclosure, but choose not to have their name and contact details provided to the principal officer when the authorised officer allocates the disclosure for handling under the PID Act (s 44(1)(d)).

1.40 It is also a criminal offence (s 20) for anyone who receives or otherwise deals with a public interest disclosure to disclose information to anyone else that might identify the person who was the source of the information without that person’s consent unless the identifying information has already been lawfully published, or is disclosed:

- for the purposes of the PID Act, or another Commonwealth law or
- to assist the Ombudsman or IGIS perform their PID functions.

1.41 Many of the enquiries and complaints that we receive from disclosers and potential disclosers reveal significant misunderstanding of the extent to which their identity is

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<sup>23</sup> Reprisal is defined in s 13 of the PID Act.

protected under the PID Act. In some cases, disclosers are under the impression that the investigation must be conducted without any reference to them or their circumstances, even when the subject matter of the disclosure is the way they were treated by another public official. However, s 20 does not prevent the discloser being approached by the investigator as a witness, or named in the investigation report as a person who provided evidence (both of which would be for the purposes of the PID Act).

1.42 Nonetheless the interaction between s 44(1)(d) which contains a specific provision relating to the disclosure of the identity of the discloser, with the more general provision in s 20(3)(a) that enables disclosure for the purposes of the PID Act, remains problematic from a statutory interpretation point of view.

1.43 Section 20 does not override the common law duty of the PID investigator to conduct their investigation in a procedurally fair manner. This obligation means that the investigator should not make an adverse finding about any person (or an agency) without providing them with an opportunity to know and comment on the evidence upon which that finding is based.

1.44 In many cases, the discloser's identity is likely to become apparent from the nature of the allegations made, and the conduct being investigated. That is why the reprisal offences and the protection obligations in the PID Act are so critical: they protect the discloser, and any person involved in the investigation from detriment arising from their co-operation with, or performance of that investigation.

1.45 Confusion about the operation of s 20 of the PID Act is not limited to disclosers. It also features as a significant theme in the enquiries that we receive from agency officials administering the PID Act. In some case, agencies appear to be overly conservative in their interpretation and application of the exceptions in s 20 that enable the use and disclosure of information that is likely to identify the discloser. This is discussed below in TOR 2.

### ***'Non-internal' PIDs***

1.46 The protections that apply to public officials who make internal disclosures under the PID Act also apply to officials who make any of the three other designated categories of public interest disclosures:

- external disclosures
- emergency disclosures and
- legal practitioner disclosures.

1.47 Section 26 of the PID Act describes the very limited situations in which these 'non-internal' public interest disclosures may be made. We do not propose discussing emergency disclosures or legal practitioner disclosures in detail. We do not know how common they are, and nor are we aware of any particular problems with these two categories of PIDs. There is no obligation for any person to notify the Ombudsman when an emergency disclosure or legal practitioner disclosure is made. We are rarely asked for guidance about either type of disclosure.

1.48 We are more frequently asked for guidance about external disclosures. However, we are unable to say whether external disclosures are common, because, as with emergency disclosures and legal practitioner disclosures, there is no obligation for any person to notify the Ombudsman, or anyone else, when an external disclosure has been made. In those few cases where we are aware that a public official proposes to make an external disclosure, or has made what they consider to be an external disclosure, we are not usually in a position to know whether they meet the very restricted multiple criteria set out in s 26 of the PID Act.

1.49 In our view, the multiple criteria may be quite difficult for a public official who is considering making an external disclosure to apply. We discuss some of the complexities below.

1.50 First, the information to be disclosed must tend to show one or more instances of disclosable conduct (or alternatively, the discloser must have a belief on reasonable grounds that the information tends to show one or more instances of disclosable conduct).

1.51 Second, the information that the person proposes to disclose cannot consist of, or include, intelligence information. Nor can the information to be disclosed concern the conduct of an intelligence agency.

1.52 Third, that same public official must previously have made an internal disclosure under the PID Act of information that consisted of, or included the information now to be disclosed externally.

1.53 Fourth, that same public official's internal disclosure must have been allocated for handling under the PID Act, and have reached one of the following stages:

- (i) the agency to which the internal disclosure was allocated must have completed an investigation under the PID Act **and** the discloser believes on reasonable grounds that the PID investigation was inadequate; OR
- (ii) a disclosure investigation has been completed, either under the PID Act, or by an investigative agency under separate investigative power (i.e. by the Ombudsman under the Ombudsman Act, or the IGIS under the *Inspector-General of Intelligence and Security Act 1986*) and the discloser believes on reasonable grounds that the response to the disclosure investigation was inadequate: OR
- (iii) a disclosure investigation that is required to be conducted under the PID Act has not been completed within the statutory time limit (i.e. within 90 days of allocation, or the extended time decided by the Ombudsman or IGIS under s 52 of the PID Act).

1.54 Fifth, making that external disclosure must not, on balance, be contrary to the public interest. There are 11 factors (many with sub-factors) to be considered in determining whether the external disclosure is on balance, contrary to the public interest (see s 26(3)(aa) to (f)).

1.55 Sixth, the person can 'publicly' disclose no more information than is reasonably necessary to identify one or more instances of disclosable conduct.

1.56 We have evidence that some public officials erroneously assume that they can make an external disclosure to the media, or a member of parliament in circumstances that are not covered by the PID Act. One common misconception is that once an internal disclosure has been made, that same information can be freely and lawfully disclosed elsewhere.

1.57 The public officials who contact our office for advice about the external disclosure provisions are usually seeking assurance that they will not be committing an offence by talking to the media, or to a Federal member of parliament. A plain reading of the PID Act suggests that the only person to whom an external disclosure may not be made is a foreign public official. However, the requirement that the disclosure not be, on balance, contrary to the public interest is likely to provide some control on who an external disclosure may be made to. This is not immediately apparent from the words of s 26 of the PID Act.<sup>24</sup>

1.58 The legal protection offered by the Commonwealth PID Act in the case of an external disclosure can only be properly understood if a person is aware of the legal consequences that would otherwise apply to them disclosing that same information to that same recipient.

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<sup>24</sup> Both the NSW and Queensland PID Acts allow a public official to make an external disclosure in limited circumstances. In NSW, an external disclosure may be made to a member of parliament or a journalist (s 19 *Public Interest Disclosures Act 1994 (NSW)*). In Queensland, external disclosures may only be made to a journalist<sup>24</sup> (s 20, *Public Interest Disclosure Act 2010 (Qld)*). However a member of parliament is one of the categories of people to whom an internal disclosure may be made under the Qld Act (s 14).

The Commonwealth Ombudsman is only able to give general guidance about the PID Act. We usually recommend that people seek legal advice about their situation before making an external disclosure (which is permitted by the legal practitioner disclosure provisions in the PID Act).

1.59 While we recognise that these criteria represent parliament's view of the reasonable limitations that should be placed on an official's ability to make an external disclosure, we are concerned about their workability. There is a risk that the complexity of these very restricted circumstances in which an external disclosure may be made will result in a lack of awareness or misunderstanding. As a consequence, people may make what they think is an external disclosure in circumstances when it is not.

1.60 If a public official makes what they erroneously believe is an external disclosure covered by the PID Act, they may have exposed themselves to prosecution or criminal action, or civil proceedings, such as defamation action. However, there is also a risk for the Commonwealth, in terms of taking appropriate action to correct the record to control the possible damage to the reputation of the official named, the agency or the Commonwealth more broadly.

1.61 We think that the most complex aspect of the definition of an external disclosure is the requirement that the disclosure is not, on balance, contrary to public interest, and in particular the application and balancing of the various considerations listed s 26(3). We suggest that there be an attempt to express them more clearly and simply.

*Ombudsman's suggestion 1*

Review s 26(3) of the PID Act with the aim of expressing more simply and clearly the matters to be considered when determining if an external disclosure of information is not, on balance, contrary to the public interest.

## **TOR 2: Impact of the Act on agencies**

1.62 The second term of reference for the review is ‘the impact of the Act on agencies, including any administrative burdens imposed by investigation and reporting obligations in the Act’. Set out below are some of the significant aspects of the way the PID Act operates from the perspective of an agency administering it.

1.63 Most Commonwealth agencies have made significant efforts to implement and administer the PID Act. Our office has been active in providing support and guidance to assist them to do so. In addition to our regular PID communities of practice and PID information sessions, we have a hotline for people to call or email with questions about the PID Act (be they disclosers or officials administering the PID Act in their agency).

1.64 We have developed an extensive range of information products which are published on our website [www.pid.ombudsman.gov.au](http://www.pid.ombudsman.gov.au). These products include guides for disclosers and for agencies; a PID reference guide featuring a flow chart showing the steps in handling an internal disclosure; information sheets focussing on single aspects of the PID scheme; and posters and artwork for agency to use when promoting the PID scheme. Our PID webpage was launched in October 2013. The landing page, from which all our PID information and products can be accessed, had more than 320,000 ‘unique page views’ by 25 February 2016.<sup>25</sup>

1.65 We continue to revise and expand our information products, based on the feedback we receive from agencies, and our analysis of the queries that we receive on our PID hotline. In the coming weeks, we expect to publish the second edition of our *Agency Guide to the Public Interest Disclosure Act 2013*.

1.66 The information in this section is based on our observations and interactions with agencies administering the PID Act. It also draws on the statistics we compile based on mandatory agency notifications, and to prepare the Ombudsman’s annual report on the operation of the PID Act.

1.67 In the period leading up to us preparing this submission, we convened a PID community of practice meeting in Canberra on 18 February 2016. We did this to ensure that agencies were aware of the review, but also to check that our information about how agencies experience the PID Act was balanced and up-to-date.

1.68 We invited PID practitioners attending the meeting to participate in discussion groups on five themes loosely based on the terms of reference for the statutory review of the PID Act.<sup>26</sup> There were approximately 80 participants at the meeting, from a range of Commonwealth agencies subject to the PID Act. We have drawn upon the intelligence we gained from these discussion groups throughout this submission.

### ***Developing PID procedures***

1.69 Section 59(1) of the PID Act requires each principal officer to establish procedures for facilitating and dealing with disclosures relating to their agency. Agency PID procedures must include arrangements for assessing the risk of reprisal against disclosers and for the confidentiality of investigations.

1.70 Each agency’s PID procedures should have been in place by 15 January 2014, when the PID Act commenced. In June/July 2015, when we surveyed the agencies subject to the

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<sup>25</sup> Each browsing session from a single computer during which the specified page was viewed at least once is counted as a ‘unique page view’.

<sup>26</sup> The five discussion themes were: Threshold for disclosable conduct; Procedural requirements arising from reporting and notification provisions; Confidentiality and secrecy; Gateway for making a PID; Interaction with other frameworks.

PID Act, 86% of agencies said they had PID policies and procedures in place. We expect close to 100% compliance when we conduct the survey for our 2015—16 annual report.

1.71 Even though 86% of agencies had written PID procedures in June/July 2015, only 68% had published those procedures on their websites. There is currently no clear legal requirement for agencies to publish their PID procedures on their external website.<sup>27</sup> However, we encourage this as good practice. An agency's website is accessible to all of the public officials belonging to the agency, including contracted service providers and former public officials, who are also able to make public interest disclosures. Those people are unlikely to have access to internal sources of information such as an agency's intranet. It is also possible that officials currently working in an agency will wish to access PID information away from their workplace, because of fear of discovery or reprisal.

1.72 We suggest that it be made mandatory for each agency to publish their PID procedures on their website, preferably via an amendment to the PID Act. We acknowledge that this may increase the number of people attempting to make a disclosure when they are not entitled to do so, however, we consider the greater risk is that without ready access to that information people who are entitled to make disclosures will find it difficult to find out how to do so, and what protections will be available to them. This is particularly the case for contracted service providers, as we discuss below.<sup>28</sup>

#### *Ombudsman's suggestion 2*

Amend the PID Act to require principal officers to publish the PID procedures for their agency on the agency's website.

### **Appointing authorised officers**

1.73 On page nine we discuss the principal officer's obligation to appoint sufficient authorised officers to receive disclosures relating to the agency, and to make sure their identities are known to the officials who belong to that agency (s 59(3)(b) and (c)). The PID Act does not contain a formula for working out how many authorised officers should be appointed for each agency. The Act simply requires the number appointed be sufficient to ensure they are readily accessible to the public officials who belong to the agency.

#### *Accessibility*

1.74 Authorised officers are the gatekeepers to the PID scheme. We have seen significant variation in the number of authorised officers appointed in each agency, with some very large agencies having very few authorised officers and some very small agencies having many. We have also noticed that some agencies that originally appointed quite large numbers of authorised officers in decentralised locations have reduced the numbers and centralised them.

1.75 Conversely, one very large agency that initially had only two appointed authorised officers recently informed us that it was expanding the pool of authorised officers and they would be at a range of less senior levels. This was a very positive outcome, after many discussions between our offices about accessibility.

1.76 Appointing very few authorised officers at very senior levels, and limiting them to central locations is one way to minimise the number of disclosures being made and/or

<sup>27</sup> Section 8(2)(j) of the *Freedom of Information Act 1982* requires agencies to publish 'operational information' on their website. This is defined in s 8A of the FOI Act as 'information held by the agency to assist the agency to perform or exercise the agency's functions or powers in making decisions or recommendations affecting members of the public (or any particular person or entity, or class of persons or entities)'. An agency's PID procedures are primarily for making decisions affecting officials who belong to the agency, so it is not clear whether they are caught by this definition.

<sup>28</sup> Refer TOR2: 'Awareness raising and training', paragraphs 1.83-86.

identified in each agency. We consider that there may be value in prescribing a minimum number of authorised officers to be appointed, depending upon the number of public officials that belong to an agency. However, we do not believe it would be practical to mandate the seniority of authorised officers, or where they should be located. We consider it is appropriate for those decisions to be left to the principal officer of the agency, based on the agency's structure and geographical presence, with further guidance from our office.

*Ombudsman's suggestion 3*

Prescribe in the PID Act a formula for working out the minimum number of authorised officers to be appointed for an agency, based on the number of public officials that belong to the agency.

***Awareness raising and training***

1.77 As mentioned earlier, the principal officer of each agency has a legal obligation to ensure that the public officials who belong to their agency are aware of the identity of each authorised officer. This obligation cannot be properly met unless the officials who belong to the agency have some general awareness of the way that PID Act works and the role of the authorised officer, in addition to knowing the identity of the authorised officers.

1.78 Many agencies conducted some PID awareness raising and training around the time the PID Act commenced. However, we consider it is vital that each agency to conduct ongoing activities to raise and maintain PID awareness for public officials who belong to the agency. It is important to note that the term 'public officials' is defined to include all employees and contractors, and people remunerated by an agency for being on boards and committees, as well as those people who provide goods or services to or on behalf of the agency.

*Staff / employees*

1.79 In June/July 2015, when we surveyed the agencies subject to the PID Act, 85% told us they had conducted PID awareness raising or training for their employees. This most commonly involved publication of information on the agency website and intranet (68%). Some agencies reported including PID scheme information in staff training and induction materials (58%) or in staff emails or circulars (47%). 18% of agencies said that PID information was delivered or distributed to employees via their managers or supervisors.

*Supervisors and managers*

1.80 Supervisors and managers play an important 'gatekeeper' role in the PID scheme. They should be able to provide general information to their staff about the PID scheme. They also have an obligation to pass to an authorised officer any public interest disclosure made to them by an official they supervisor or manage (s 60A).

1.81 To meet their obligations under the PID Act, supervisors require tailored information and support to ensure they are aware of those obligations and know how to recognise a disclosure and what to do when they receive one. Our office has developed an information sheet for that purpose. However, our discussions with many agencies have revealed a common reluctance to promote and enforce the supervisor's obligations under the PID Act, for fear of opening the 'floodgates' to an unmanageable number of disclosures. This fear is likely to be exacerbated by the breadth of disclosable conduct covered by the PID Act (see TOR 3 below) and the relatively informal requirements for making a disclosure.<sup>29</sup>

1.82 There are also some unintended consequences of s 60A of the PID Act, which unreasonably extend the supervisor's obligation beyond what is manageable, with little obvious benefit. Given the impracticality of the supervisor's obligation in variety of common

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<sup>29</sup> Refer TOR 1: 'How can an internal disclosure be made?' on page 9.

situations our office has had to promote the need for supervisors in specific roles and work areas to use judgement about what matters they pass to an authorised officer.<sup>30</sup>

#### *Contracted service providers*

1.83 In June/July 2015, only 28% of agencies had conducted any PID awareness raising or training for their contracted service providers. A further 6% of agencies that we surveyed said this question was not relevant to them (presumably because they considered they did not have any contracted service providers). The remainder said they had conducted no awareness raising activities for their contracted service providers.

1.84 We acknowledge that it may be challenging for some agencies to identify and reach all of the people who meet the definition of a contracted service provider for their agency. However, it remains a legal obligation for the principal officer to ensure that each of those public officials is aware of the identity of the authorised officers for the agency.<sup>31</sup> There must also be an effective means for those public officials to find out how to contact the authorised officers for their agency.<sup>32</sup>

1.85 Given the financial risks involved in procurement and contracting activity, we have found it difficult to understand the reluctance of many agencies to promote the PID Act with contracted service providers. We also note the significant reputational risks to the Commonwealth if contractors providing service to the public on behalf of an agency do so in an unacceptable manner. This is especially so when contractors are making decisions and taking action which may directly impact on an individual's liberty.

1.86 As the PID scheme matures, we will more closely scrutinise the arrangements that agencies have in place to receive and act upon public interest disclosures from and about contracted service providers. We will also be looking more carefully at the efforts agencies have made to promote the PID scheme with contracted service providers.

#### ***Technical disclosures made in the ordinary course of business***

1.87 Earlier in this submission we discussed the relatively informal arrangements for making a public interest disclosure. An internal disclosure can be made orally or in writing, and the discloser does not need to assert or even know that they are making a disclosure under the PID Act in order to do so. A discloser does not need to provide any 'proof' to support their information: all that is required is that the disclosed information tends to show, or the discloser believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct. We discuss the categories of disclosable conduct in some detail under TOR 3, but at this point, we observe that it is a relatively low threshold.

1.88 When a public official talks to their supervisor or an authorised officer about something that is part of their ordinary work, but nevertheless tends to show conduct that could be caught by one of the categories of disclosable conduct in the PID Act, they have met all of the legal requirements of an internal disclosure in the PID Act. That disclosure of information thus brings into play all of the legal protections and mandatory handling and notification requirements prescribed in the PID Act.

1.89 Agencies have told us, and we accept, that those protection, handling and reporting requirements are an unnecessary burden in the case of a 'technical' internal disclosure that was made by an official who is simply performing his or her role and dealing with matters that are an uncontroversial part of their ordinary work as a public official. For example, staff working in areas such as human resources, audit or internal complaints. In such cases, the official making the 'technical' internal disclosure is unlikely to have considered the possibility of reprisal action, or the need for protection of their identity, and if asked, would be likely to

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<sup>30</sup> Refer TOR 2: 'Technical disclosures made in the ordinary course of business'.

<sup>31</sup> Section 59(3)(c).

<sup>32</sup> Section 13, PID Standard.

say that it was not required. They may even already be involved in investigating or remedying the problem that they have made a technical disclosure about, so the idea that the matter should be allocated to the head of the agency to decide how to handle it would be inconsistent with their usual work practices.

1.90 However, there is no provision in the PID Act that allows for a 'technical' internal disclosure to be managed in a different way to other types of internal disclosures. The PID Act applies to all internal disclosures in the same way.

#### *Internal disclosures to an authorised officer*

1.91 To reduce the risk of 'technical' internal disclosures, we routinely advise agencies to carefully consider the placement of authorised officers, and if possible, avoid appointing them in positions where they are likely to receive significant numbers of technical disclosures. For example, officials working in human resources, or in an agency's internal audit or customer complaint areas are likely to be receiving information from a range of sources that is likely to tend to show disclosable conduct. It is not practical for those officials to view and deal with all of their work with the additional responsibility of considering whether it is also an internal disclosure.

1.92 Many agencies have revised their appointments of authorised officers after speaking to us. Some have done so after realising the practical impact of having authorised officers located in these 'high risk' areas. However, other agencies have decided that they prefer to keep the functions of receiving and acting upon certain types of misconduct in the one place. Where this happens, we suspect that the authorised officers in question are probably using some artificial (and impermissible) filtering mechanism to reduce the number of matters that they identify and allocate for handling under the PID Act.

1.93 Some of the impermissible filtering methods we are aware of include:

- an authorised officer deciding that they received the information in their 'ordinary' official capacity, rather than as an authorised officer. However, an authorised officer under the PID Act cannot 'step out' of that role when it is inconvenient. It should also be borne in mind that the principal officer is also an authorised officer for their agency, irrespective of the number of other authorised officers they appoint under s 36(b).
- applying a 'seriousness' test ('seriousness' can be considered at a later stage when deciding whether to investigate a disclosure, but not for the purposes of deciding whether a matter constitutes a public interest disclosure)
- encouraging the discloser to 'withdraw' their disclosure so it can be dealt with informally (the discloser's preference for something not to be investigated may be relevant when the agency later considers whether to investigate a disclosure, but only if the agency is satisfied that no investigation is warranted)
- choosing not to identify as a PID a matter that can be dealt with under an agency's other integrity processes (which is something that can be taken into account during a PID investigation, but not for the purposes of deciding whether a matter constitutes a public interest disclosure).

1.94 Although in most cases, we recognise the practical good intentions behind many of these 'shortcuts', we note they are not consistent with or permitted under the PID Act. If a disclosure of information meets all the legislative criteria for an internal disclosure, it must be allocated for handling under the PID Act.

#### *Internal disclosures to a supervisor*

1.95 Supervisors and managers have an obligation to pass to an authorised officer any public interest disclosure made to them by an official they supervisor or manage (s 60A). As with authorised officers, a supervisor or manager working in certain areas of an agency (for

example, human resources, legal services, internal complaints and review) is likely to receive a 'technical' internal disclosure from the officials they supervise simply by talking to them, or in the course of providing advice about how to do their work. It is impractical to expect a supervisor in this position to pass that information on to an authorised officer in every instance.

1.96 However, the problem of 'technical' internal disclosures to supervisors cannot be avoided or managed by strategic placement (as we recommend for authorised officers). Clearly, an agency cannot choose not to have supervisors or managers in specific parts of their business to avoid the unintended consequence of the supervisor's obligation in s 60A of the PID Act. Nor is it appropriate for supervisors and managers to discourage their staff from talking to them about matters that might be disclosable conduct, to avoid those unintended consequences.

1.97 In our discussions with agencies, we regularly acknowledge that it was not intended that s 60A of the PID Act would apply to matters of routine business that staff discuss with their managers. The Department of Prime Minister and Cabinet (which is the policy agency responsible for the PID Act) has endorsed a common sense approach to these unintended consequences of the supervisor obligation.

1.98 Our consistent message to agencies has been that certain supervisors or managers should not be subject to any adverse consequences for failing to pass information to an authorised office in circumstances where the information is a 'technical' internal disclosure arising from discussion in the ordinary course of business. However, we have found it difficult to satisfactorily delineate the intended and unintended consequences of s 60A.

1.99 We have also found it difficult to provide clear guidance to support supervisors and managers to use their judgement about when they need not do what the PID Act requires them to do. It is not unusual for public officials to comment along the lines of 'so it is OK for us not to follow the law.' This is clearly an undesirable situation.

1.100 Any legislative amendment adjusting the threshold for making a PID would also affect the obligation that s 60A imposes upon supervisors and managers. However, we believe it may also be appropriate to review s 60A to ensure that it does not require supervisors to refer information to an authorised officer that they do not believe concerns serious disclosable conduct, unless requested to do so by the public official who disclosed the information.

#### *Ombudsman's suggestion 4*

Amend the supervisor's obligation in s 60A of the PID Act to:

- (i) require a supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage which the supervisor has reasonable grounds to believe concerns one or more serious instances of disclosable conduct;
- (ii) require a supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage if that public official requests; and
- (iii) permit the supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage which the supervisor has reasonable grounds to believe concerns one or more instances of disclosable conduct.

1.101 While we recognise that this change would introduce an element of subjectivity into the supervisor's obligation, we think that is more workable than the current supervisor obligation under s 60A. More importantly, we consider the suggested change is preferable to repealing s 60A altogether, as has frequently been suggested by many agencies in our information sessions and discussions about PID.

1.102 This suggested change also recognises that supervisors have a pre-existing responsibility to personally take action to address matters affecting their staff. Furthermore,

public officials in many Commonwealth agencies already have an obligation to report suspected misconduct.<sup>33</sup> Where there are other established mechanisms for dealing with particular types of misconduct, it will not always be appropriate to automatically require that information about that type of misconduct be treated as an internal disclosure under the PID Act.

1.103 Although this suggested amendment will not entirely address the problem of 'technical' disclosures in particular areas of an agency's business (e.g. in HR, audit, fraud or internal complaints) we consider many of those matters can be managed by introducing a further discretionary ground for deciding not to investigate a disclosure (see Ombudsman's suggestion 11).

### **Mandatory notifications to the Ombudsman about PID handling**

1.104 Under TOR 1, we discussed the mandatory points at which an agency must notify the Ombudsman about its handling of a disclosure. These are:

- when the authorised officer allocates an internal disclosure to the principal officer (or delegate) for handling under the PID Act (s 44(1A))
- whenever the principal officer decides not investigate a disclosure, or to stop an investigation (s 50A).

1.105 There is no requirement for an agency to notify the Ombudsman when a PID investigation is completed. However, if it is not completed within 90 days of allocation, the agency may apply to the Ombudsman for an extension of time (s 52(3)). This is discussed below.<sup>34</sup>

1.106 Our office has developed forms for agencies to use to notify the Ombudsman when they allocate a disclosure for handling under the PID Act, or decide not to investigate it, or stop their investigation. Our forms ask the agency to summarise the nature of the disclosed information and identify the relevant category of disclosable conduct, based on the kinds of disclosable conduct listed in the PID Act.<sup>35</sup> We do not require agencies to send us a copy of the disclosed information or the notices sent to the discloser.

1.107 We recently replaced our PDF forms with Word documents, as some agencies told us they had trouble accessing the PDF forms using their agency's computer system. The forms are not compulsory, however, we find that they guide agencies to provide all the information required by the PID Act in a relatively consistent form. One agency provides us with notifications via a weekly spreadsheet that includes the same information that we require on the forms. Some agencies provide notifications via letter, which sometimes omit required information.

1.108 In February 2016, in preparation for the statutory review of the PID Act, we sought feedback from agencies about their experience of meeting the mandatory notification requirements to the Ombudsman. The responses were positive, with most saying they found our notification forms easy to find and use, and the amount of information required was 'about right'.

1.109 One agency said they would prefer to report once to the Ombudsman for each disclosure, when they had finished dealing with it. However, in most cases, this would mean a significant time lag in notifying the Ombudsman when a disclosure was received.

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<sup>33</sup> For example, clause 1.3(f) of the *Australian Public Service Commissioner's Directions 2013* requires all APS employees, having regard to their duties and responsibilities, to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way.

<sup>34</sup> Refer TOR 2: 'Conducting an investigation' on page 26.

<sup>35</sup> See table 3, under TOR 3.

1.110 Several agencies said that although the notification requirements for each disclosure are reasonable, they found our annual report survey to be a burden. They suggested that we should seek either real time reporting or end of year reporting, but not both. We discuss this further in part two.<sup>36</sup>

### ***Deciding not to investigate a PID***

1.111 Under TOR 1, we discussed the requirement for an agency to investigate a disclosure unless it makes a decision not to investigate under one of the grounds set out in s 48 of the PID Act, or to stop an investigation under one of those same grounds.

1.112 Table 1 below shows the frequency of use of each of the grounds in s 48 in the first two years of the PID Act, according to agency notifications to the Ombudsman under s 50A of the PID Act. The data is sorted from the most frequently used ground, to the least used.

*Table 1: Section 48 decisions*

First two years of the PID ACT: from 15 January 2014 to 14 January 2016<sup>37</sup>

<b>Reason for deciding not to investigate a PID, or to stop a PID investigation</b>	<b>No/%<sup>38</sup></b>	<b>PID Act reference</b>
The information does not, to any extent, concern serious disclosable conduct	110/ 29%	48(1)(c)
The information is the same, or substantially the same, as information the disclosure of which has been, or is being, investigated as a disclosure investigation	79/ 21%	48(1)(e)
It is impracticable for the disclosure to be investigated because the discloser refuses or fails, or is unable, to give, for the purposes of the investigation, such information or assistance as the person who is or will be conducting the investigation asks the discloser to give	54/ 14%	48(1)(i)(ii)
The discloser has informed the principal officer of an agency that the discloser does not wish the investigation of the internal disclosure to be pursued, and the principal officer is reasonably satisfied that there are no matters concerning the disclosure that warrant investigation	48/ 13%	48(1)(h)
It is impracticable for the disclosure to be investigated because the discloser's name and contact details have not been disclosed	34/ 9%	48(1)(i)(i)
The information concerns disclosable conduct that is the same, or substantially the same, as disclosable conduct that is being investigated under a law of the Commonwealth other than the PID Act; or the executive power of the Commonwealth; and it would be inappropriate to conduct another investigation at the same time	16/ 4%	48(1)(f)

<sup>36</sup> Refer to pages 49 to 52, under the headings 'Ombudsman notifications about handling individual disclosures' and 'Ombudsman's annual report on the operation of the PID Act'.

<sup>37</sup> The table reflects information received from agencies through their notification requirement under s 50A of the PID Act. We are, however, aware that there was significant under reporting by agencies, particularly in the first six months of the PID Act's operation.

<sup>38</sup> In some cases, agencies selected more than one ground for the decision not to investigate a disclosure. This could be because more than one reason was relevant, or alternatively, there was information about more than once instance of disclosable conduct in the disclosure and different grounds were used in respect of some of those instances of disclosable conduct.

Reason for deciding not to investigate a PID, or to stop a PID investigation	No/% <sup>38</sup>	PID Act reference
The information concerns disclosable conduct that is the same, or substantially the same, as disclosable conduct that has been investigated under a law of the Commonwealth other than the PID Act or the executive power of the Commonwealth; and the principal officer is reasonably satisfied that there are no further matters concerning the disclosure that warrant investigation	15/ 4%	48(1)(g)
It is impracticable for the disclosure to be investigated because of the age of the information	14/ 4%	48(1)(i)(iii)
The disclosure is frivolous or vexatious	8/ 2%	48(1)(d)
The discloser is not, or has not been, a public official	1/ <1%	48(1)(a)
Reason not specified in notification to the Ombudsman	5/ 1%	unknown

1.113 As stated earlier, the Ombudsman does not receive notice when a disclosure investigation is completed. We are therefore unable to accurately report the proportion of internal disclosures finalised under s 48, as opposed to being finalised by way of a PID investigation culminating in a report under s 51 of the PID Act.

1.114 However, we included questions about the outcome of PID investigation in our survey of agencies for the 2014—15 annual report. Agencies told us that during the reporting period they finalised 621 disclosure investigations. Of these, agencies:

- made 235 decisions not to investigate or stop investigating under s 48(1) and
- completed 386 disclosure investigations under s 51 of the PID Act.

1.115 Thus, around 38% of internal disclosures finalised in 2014—15 were finalised by way of a decision under s 48(1) of the PID Act.

### **Conducting an investigation**

1.116 The PID Act provides that a principal officer may conduct the disclosure investigation 'as the person thinks fit' (s 53(1)), making such enquires and obtaining information from such persons as the principal officer thinks fit (s 53(2)). This gives considerable leeway to an agency about how they respond to a disclosure and should enable the agency to conduct the investigation with as much or as little formality as is appropriate for the subject matter.

1.117 As discussed above, the Ombudsman does not receive notice when a disclosure investigation is completed. However, our survey of agencies in June/July 2015 revealed that around 62% of internal disclosures finalised in 2014—15 were finalised by way of a PID investigation that concluded with a report under s 51 of the PID Act.

#### *Considering whether to conduct a different sort of investigation*

1.118 Section 47(3) of the PID Act allows an agency to consider, in the course of conducting a PID investigation, whether a different type of investigation should be conducted under another law of the Commonwealth, or alternatively, under procedures established under another law of the Commonwealth (s 47(4)). That other investigation could be performed by the agency conducting the PID investigation, or by another suitable body (s 47(3)(b)).

1.119 Some of the types of other investigations that an agency can consider under s 47(3) include:

- a Code of Conduct investigation under the *Public Service Act 1999*
- a Code of Conduct investigation under the *Parliamentary Service Act 1999*

- an investigation under the *Fair Work Act 2009*
- an investigation under the *Work Health and Safety Act 2011*
- a Professional Standards investigation under the *Australian Federal Police Act 1979*
- a Code of Conduct investigation, or disciplinary or Redress of Grievance process under Defence Force legislation or regulations
- a fraud investigation under s 10 of the *Public Governance, Performance and Accountability Rule 2014*
- an investigation under the *Ombudsman Act 1976*
- an investigation under the *Inspector-General of Intelligence and Security Act 1986*.

1.120 In the Ombudsman’s 2013—14 annual report, we discussed the confusion that some agencies had experienced in applying s 47(3) of the PID Act. In some cases, agencies were incorrectly treating s 47(3) as another discretionary ground for deciding not to investigate an internal disclosure, rather than one of the matters to be considered in the course of a disclosure investigation. Since that time, we have reinforced the proper application of s 47(3) through our communities of practice and other interactions with agencies. However, many agencies have expressed the view that conducting an investigation and writing a report under s 51 of the PID Act that merely says another sort of investigation should be conducted is not an efficient use of resources.

1.121 Our survey of agencies in June/July 2015 asked for more detailed information about their use of s 47(3) of the PID Act. During the reporting period, 69% of the PID investigations completed were finalised with a recommendation that further investigation be conducted under another Commonwealth law, or procedure established under another Commonwealth law. This demonstrates that the PID Act is being used as an entry point for information about a broad range of suspected wrongdoing, with agencies choosing to divert many matters to be handled under other specialised investigative processes.

1.122 The following table shows the other types of investigations that were recommended at the conclusion of PID investigations in completed in 2014—15.

*Table 2: Use of s 47(3) in PID investigations completed in 2014—15*

<b>Other type of investigation recommended</b>	<b>%</b>
Defence Force legislation	64%
<i>Public Service Act 1999</i>	19%
Reference to an Australian police force under s 56 of the PID Act	7%
<i>Public Governance, Performance and Accountability Act 1999</i>	3%
Ombudsman Act 1976 or IGIS Act	3%
Other (including the <i>Australian Federal Police Act 1979</i> )	4%

*Some challenges for agencies conducting a PID investigation*

1.123 We have had some agencies contact our office seeking guidance about how they should conduct a PID investigation. In the main, these questions come from agencies, or from officers within those agencies, with little experience of conducting administrative investigations. Sometimes, the officer has experience conducting investigations into certain subject matter (such as fraud or code of conduct breaches) but not of the type of conduct the

disclosure is about. Often, the investigator is concerned about the interaction of the secrecy and confidentiality requirements of the PID Act with the common law rules about procedural fairness. In the coming weeks, we expect to release version 2 of our *Agency Guide to the Public Interest Disclosure Act 2013*, which includes expanded guidance about conducting administrative investigations under the PID Act framework.

1.124 Overall, we consider it is appropriate for an agency to have in place measures to investigate unusual issues concerning their administration, staff performance and integrity, contract management and procurement. In fact, we think the PID Act performs a useful function in these situations, as it places the onus on the agency to actively consider whether information about possible wrongdoing warrants investigation, and if so, to properly investigate it and prepare a report within a specified timeframe. At times, the agency may need to train staff or contract outside expertise.

1.125 The principal officer's power to delegate functions or powers under the PID Act facilitates the use of contracted investigators to conduct investigations of a type that is outside the agency's experience, or where the usual internal investigators may have unavoidable conflict of interest.

1.126 We are aware that some smaller agencies which generally rely on the services of their portfolio department to investigate possible fraud and/or code of conduct breaches have been unable to do so where the investigation is required in response to a disclosure under the PID Act. This situation arises because the PID Act requires the principal officer of the agency to conduct the investigation. While the principal officer may delegate their investigation function to another person, that person must also be a public official who belongs to the agency (s 77(1)). Someone who is contracted to the agency (including to deliver services) is a public official who belongs to that agency, whereas an officer who belongs to the portfolio department is not.

1.127 We have developed some workarounds for this situation,<sup>39</sup> but it may warrant some legislative amendment to assist smaller agencies to meet their obligations under the PID Act. However, we do not think it necessary to suggest a specific change to address this problem for smaller agencies. Instead, we propose this be considered as part of broader changes to the threshold and/or handling requirements for internal disclosures (see TORs 3 and 4).

#### *The investigation period*

1.128 The PID Act stipulates a mandatory investigation period for internal disclosures. The investigation must be completed within 90 days of the disclosure being allocated to the principal officer for handling under the PID Act (s 52(1)). Although a PID investigation is not invalidated if the agency fails to complete it within the legal time limit (s 52(6)), it will nevertheless be a breach of the PID Act (s 52(1)). It could also be a circumstance that would enable a discloser to make an external disclosure before the investigation is concluded.<sup>40</sup>

1.129 The Ombudsman may extend the investigation period if he considers appropriate, on application by the agency or the discloser (s 52(3)). We discuss the arrangements for requesting an extension below.

1.130 In preparing this submission, we sought feedback from agencies about the time permitted in the PID Act for an investigation. Most said they thought the 90 day period was

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<sup>39</sup> These workarounds include: secondment of an official from the portfolio department to conduct the investigation; or for the agency to conduct a short PID investigation that considers whether it is appropriate to refer the information to another agency (i.e. the portfolio department) to investigate a possible breach of the code of conduct.

<sup>40</sup> Subject to meeting the other criteria set out in paragraphs (e) to (i) in column 3 of the definition of a public interest disclosure in s 26 of the PID Act.

'about right' for most disclosures, and were comfortable with seeking an extension of time from our office if it was not possible to meet that timeframe.

1.131 Officials in some of the larger agencies said they found it difficult to meet the 90 day timeframe because of their internal processes. For example, one large agency has a central PID co-ordination team, which distributes matters to business lines for a 'fact-finding' investigation, which then forms the basis of the principal officer's report, prepared by that central team, and 'signed off' by the principal officer's delegate. A further problem that this agency identified was a lack of control and visibility of the business line investigation, however, this was said to be balanced by the quality control provided by the centralised preparation of the final report.

1.132 We consider the mandatory time period for investigating a PID is a valuable measure. In those Australian jurisdictions where no time period is specified for a PID investigation (e.g. NSW and Queensland), complaints about investigation delays and failure to keep the discloser informed are relatively frequent. Although we do receive some complaints about delays, most agencies appear to be aware of the required time period and endeavour to meet it, or seek an extension of time.

#### *Applying for an extension of time*

1.133 The Ombudsman can grant an additional period for an agency to conduct its PID investigation (s 52(3)). Once the Ombudsman makes an extension decision, the investigation is not required to be completed until the end of the extended period.

1.134 The Ombudsman may make an extension decision on the application of the agency conducting the investigation or the discloser. Most applications are made by the agency. In the first two years of the PID Act, we received 121 applications for an extension of time. There are several disclosures where agencies have requested more than one extension of time. However, the majority are single applications for a reasonably short extension of one or two months.

1.135 We have a form on our website that agencies may use to apply for an extension, although this is not mandatory. In the period leading up to this submission, we asked agencies for feedback on our forms. As for our notification forms, agencies told us the extension form was easy to find and use.

1.136 We ask agencies to make extension applications at least 21 days prior to the expiry of the investigation period. One agency said that 21 days was too long a lead time because they often don't know they will need an extension until much closer to the expiry date. We will still consider an extension request made closer to the expiry date, or even after the expiry date. However, the Ombudsman cannot retrospectively grant an extension of time. The extension will only have effect from the date of the Ombudsman's decision, and the agency will have failed to meet its legal obligations under s 52 of the PID act in respect of the days between the end of the original investigation period and the date that the Ombudsman granted an extension.

1.137 An agency should not assume that the Ombudsman will automatically grant an extension, or that it can be done immediately when the application is received. Wherever possible, we take into account the discloser's views in deciding whether to grant an extension of time. Contacting the discloser and obtaining his or her views can add several days to the time we take to make a decision on an extension application. We may also require the agency to provide further information about the steps already taken to progress the investigation and/or the action still required to complete it.

#### ***The investigation report***

1.138 Under TOR 1, we discuss the requirement for an agency to prepare a written report of its PID investigation (s 51(1)). The PID investigation is completed once the investigation report has been prepared (s 52(2)). The PID Act and PID Standard mandate the information

to be included in the investigation report (PID Act s 51(2) and (3); s 13, PID Standard). Within a reasonable time of the report being written, the agency must give the discloser a copy of the report (s 51(4)), with redactions permitted in accordance with s 51(5).

1.139 In preparation for this submission, we conducted discussion groups with PID practitioners in Commonwealth agencies to obtain their views on some aspects of the PID Act that have featured prominently in our communities of practice and calls to our PID hotline. The PID investigation report was one topic that provoked a lot of comments and debate. The main concern was the appropriate level of detail to include in the report, and the consequences of making redactions from the copy of the report given to the discloser.

1.140 In general, most agencies said they would be reluctant to include full details in the PID investigation report if the same report was to be provided to the head of the agency and the discloser. Agencies told us that they have little effective control over the discloser's subsequent use of the investigation report, and were concerned that the discloser might subsequently share sensitive information contained within an investigation report with other people, including, but not limited to the types of legitimate use anticipated within the PID Act (i.e. a complaint to the Ombudsman or IGIS; external disclosures, emergency disclosures and legal practitioner disclosures).

1.141 In most cases, the level of detail that an investigator would include in a report for internal use far exceeds what the agency believes is appropriate to convey to a discloser to explain the outcome of a PID investigation. Although s 51(5) permits redactions from the report, those agencies with experience of making redactions described this as unsatisfactory. Heavily redacted reports were said to unnecessarily create suspicion in the discloser's mind and were likely to impede the discloser's understanding of the outcome of the PID investigation.

1.142 Officials from those agencies who participated in the discussion groups told us they were using a variety of strategies to manage the requirement to provide a copy of the PID investigation report to the discloser. We have not considered in detail the extent to which these approaches conform to the requirements of the PID Act: they are included here to illustrate how agencies are dealing with what they see to be a problem with the legislation.

1.143 One agency told us it prepares two reports of each PID investigation: one for the principal officer and another for the discloser.

1.144 Another agency told us that it also prepares two reports for each PID Investigation. The first report is a detailed report prepared by an investigator who is an 'assistant' to the delegated public official that is exercising the principal officer's investigative function under the PID Act. This report contains the evidence (and perhaps draft findings of fact) and is directed to the delegate and forms the basis for the delegate's findings, which are then written up as a report under s 51 of the PID Act suitable for the discloser to read (with little or no redaction). This arrangement was considered to balance the requirement to provide the discloser with a report on the outcome of the investigation and allow for full reporting to the agency head (who receives both the delegate's s 51 report and the detailed report of the 'assistant' who gathered the evidence).

1.145 Another agency told us that its practice was to conduct a very brief investigation under the PID Act in order to assess how the agency should respond to the discloser's information. Once a course of action was decided upon, the agency would finalise the investigation and prepare a report recommending further 'agency action'. 'Agency action' was described as a full investigation of wrongdoing, with no need to report further to the discloser on the outcome. When we asked about the disclosers' reactions to these brief reports, we were told that disclosers were generally satisfied with the information provided to them in the report of the quick initial investigation under the PID Act.

1.146 Most agency representatives told us they considered it would be better to have a simplified investigation report for disclosers and a full report for agency heads.

1.147 As far as we are aware, the Commonwealth PID Act is the only Australian public interest disclosure legislation that gives a discloser the right to see a report of the investigation. For example the NSW and Queensland PID Acts give a discloser the right to receive only summary information about the action that has been taken in response to their disclosure.

1.148 The NSW PID legislation requires the investigating authority or agency to notify the discloser of the action taken, or proposed to be taken in respect of their disclosure within six months of receiving it (s 27, *Public Interest Disclosures Act 1994 (NSW)*).

1.149 In Queensland, the discloser is entitled to *reasonable information* about the disclosure in writing, which includes a description of the results of action taken by the public sector entity that received or was referred the disclosure, with no specified timeframe (s 32, *Public Interest Disclosure Act 2010 (Qld)*).

1.150 Although we consider that the NSW and Queensland provisions are less likely to provide a discloser with confidence that appropriate action has been taken in response to their PID, we nevertheless have some reservations about the effectiveness of s 51(4) and (5) of the Commonwealth PID Act as a means to provide the discloser with a suitable level of information.

1.151 Overall, our impression is that the PID Act requirement to provide a copy of the PID investigation report to the discloser has resulted in agencies being less likely to include all the relevant information in the report, or alternatively, devote significant resources to creating two separate reports, rather than provide a redacted report to the discloser.

#### *Ombudsman's suggestion 5*

Modify s 51(4) of the PID Act to enable the agency to provide the discloser with a summary report of the PID investigation, where significant redaction of the s 51 report would otherwise be required.

#### **Secrecy and confidentiality**

1.152 The PID Act contains offence provisions that are intended to protect the identity of a person who makes a public interest disclosure (s 20) and to ensure the confidentiality of information obtained in the course of conducting a disclosure investigation, or in connection with performing a function or exercising a power under the PID Act (s 65).

1.153 Under TOR 1, we discussed the confusion that many disclosers have about the extent to which s 20 of the PID Act protects their identity. Many agency officials administering the PID Act are confused about when they are permitted to use or disclose information that is likely to enable the identification of a discloser; or use or disclose information they have obtained through performing a function, or exercising a power under the PID Act (s 65).

1.154 Also problematic is the interaction between s 44(1)(d) and s 20(3)(a) of the PID Act. The former is a specific provision enabling the discloser to withhold consent for their identifying information to be provided to the principal officer. The latter is a more general provision that enables disclosure of information that is likely to identify the discloser.

1.155 Since the PID Act commenced, many agencies have sought guidance from our office about the extent to which s 20 and s 65 limit, or permit them to perform a range of everyday administrative functions. The fear of 'getting it wrong' is very real when the PID Act makes it a criminal offence of strict liability to use or disclose information in breach of s 20 or s 65. It is apparent from the range of enquiries that we receive that many agencies feel that the PID Act is a barrier to them responding to a range of otherwise quite commonplace situations.

1.156 Some of the scenarios that we have been asked to provide guidance about are listed below.

**Scenario 1**

May an agency's FOI officer view documents relating to a disclosure investigation so they can make a decision on an application for release of those documents to a discloser?

**Scenario 2**

Does the PID Act permit an agency to use information that might identify the discloser and that is protected information for the purposes of s 65 of the PID Act to brief a member of an agency's senior executive about the receipt of an internal disclosure, and the action taken to investigate it, so that person can decide how to respond to enquiries from a journalist who received an external disclosure under the PID Act?

What if the journalist received information other than by way of an external disclosure under the PID Act?

**Scenario 3**

May an agency brief its Minister about the subject matter of an internal disclosure under the PID Act?

**Scenario 4**

May an agency provide information about the subject matter of an internal disclosure, to members of its senior executive, in anticipation of a question being asked at a Senate estimate hearing?

**Scenario 5**

May an agency provide information to a court or tribunal about the subject matter and investigation of an internal disclosure where this is relevant to proceedings brought by the discloser other than under the PID Act (e.g., a claim for compensation for a workplace injury)?

**Scenario 6**

May an agency use or disclose information that might identify a discloser, or reveal protected information obtained in a disclosure investigation to respond to questions asked by a member of parliament (MP) making representations on behalf of a constituent who has made an internal disclosure, and who has subsequently approached their MP in circumstances that could not be an external disclosure?

**Scenario 7**

May a person other than an authorised officer or delegated PID investigator (i.e. a 'PID co-ordinator', which is not a specific function under the PID Act) have access to information about a discloser's identity, the disclosed information, or the disclosure investigation for the purposes of maintaining records about the agency's administration of the PID Act?

**Scenario 8**

May an agency confirm (or deny) that it is investigating an internal disclosure about an alleged criminal offence when asked by a member of an Australian police force who has received a direct report of that alleged criminal offence from the discloser?

**Scenario 9**

May an executive assistant or other support staff have access to information about a discloser's identity when performing their usual duties for an agency's senior executive staff?

**Scenario 10**

May a delegate of the principal officer know the identity of a discloser for the purposes of a PID investigation where the discloser has not consented to the Principal Officer being advised of their name and contact details under s 44(1)(d)?

1.157 These scenarios give a sense of the extent to which agencies feel constrained by the secrecy and confidentiality provisions in the PID Act. We are frequently able to reassure agencies that the particular circumstance they are concerned about fall within one of the exceptions in s 20 or s 65 of the PID. Often, in the case of the discloser's identifying information, use or disclosure of that information will be permitted because it is:

- for the purposes of the PID Act (s 20(3)(a))
- for the purposes of another law of the Commonwealth (s 20(3)(d)) or
- the discloser has consented to the use or disclosure of their identifying information (s 20(3)(e)).

1.158 However, one of the particular challenges that agencies face with the secrecy and confidentiality provisions in the PID Act is that there are different exceptions available for the use of information that might identify the discloser (s 20(3)) and for protected information that a person obtains in the course of conducting a disclosure investigation, or in connection with performing a function under the PID Act (s 65(2)).

1.159 The exceptions to the offences in s 65 of the PID Act include disclosure or use that is:

- for the purposes of the PID Act (s 65(2)(a))
- for the purposes of, or in connection with, the person exercising a power or performing a function under the PID Act (s 65(2)(b)) or
- for the purposes of, or in connection with, taking action in response to a disclosure investigation (s 65(2)(c)).

1.160 Understandably, there is no exception in the PID Act that permits the discloser to consent to the use or disclosure of protected information, as this information is not generally personal information about the discloser (and where it is, it is covered by s 20). However, it is not readily apparent why there is no exception in s 65 to enable use or disclosure of protected information for the purposes of another law of the Commonwealth (as is the case with information that might identify the discloser – see s 20(3)(d)).

*Ombudsman's suggestion 6*

Include another exception in s 65 of the PID Act to permit the use or disclosure of protected information for the purposes of another law of the Commonwealth.

1.161 There is also some complexity in working out who can commit an offence under s 65 of the PID Act, and how the immunity for acts done in good faith in the performance of a function under the PID Act will apply (see s 78). Unlike s 20, which creates an offence that can apply to 'any person', s 65 creates an offence that appears to apply only to a person who conducts a disclosure investigation, or performs a function or exercises a power under the PID Act (see s 65(1)(a)). This creates uncertainty for any other person who obtains information relating to a disclosure or a disclosure investigation other than by way of receiving a disclosure or conducting a disclosure investigation, or performing another function under the PID Act. For instance a principal officer in accordance with the obligation under s 59(4) of the PID Act may direct certain action be taken by officials in response to recommendations in a s 51 report. Could those officials be subject to s 65, even if they did not know that the information was connected with a PID investigation?

*Ombudsman's suggestion 7*

Review s 65 of the PID Act to clarify whether it applies to a person performing a function under the Act other than by exercising a function or power delegated by the principal officer.

*Ombudsman's suggestion 8*

Consider whether the good faith indemnity in s 78 of the PID Act should apply to a person performing a function under the Act other than by exercising a function or power delegated by the principal officer.

1.162 From the Ombudsman's perspective because s 65 applies to information obtained in the course of conducting a 'disclosure investigation', it applies to information obtained in the course of an investigation of a PID under the Ombudsman's separate investigative power. The obligation in s 65 conflicts with the provisions of the Ombudsman Act that deal with the Ombudsman's power to disclose information to agencies or individuals, or when it is in the public interest to do so (s 35A of the Ombudsman Act); and to report to an agency or Minister (s 15 of the Ombudsman Act). The Ombudsman's power in respect of making reports is an important aspect of his functions, and underpins the entire purpose and operation of the Ombudsman Act. It should not therefore be diminished by provisions in the PID Act. An exception in similar terms to s 20(3)(b) of the PID Act would address this issue.

*Ombudsman's suggestion 9*

Include another exception in s 65 of the PID Act to permit the use or disclosure of protected information in connection with the performance of a function conferred on the Ombudsman by s 5A of the *Ombudsman Act 1976*.

1.163 The secrecy and confidentiality provisions in the PID Act were one of the topics we explored in discussion groups with Commonwealth PID practitioners. Many practitioners expressed frustration at the time taken to work through all of the issues and try to apply the secrecy and confidentiality provisions to all matters, particularly to those matters that otherwise be dealt with through informal or formal employment processes (such as the code of conduct framework). It was suggested that the effort and time spent in applying s 20 and s 65 to all of the issues in a particular matter does not reflect the particular circumstances of a matter, nor is it proportionate to the level of risk to the discloser should that person's identifying or protected information be disclosed.

1.164 One participant told us they were concerned about what they considered very serious penalties in relation to breaches of ss 20 and 65, and that in the case of a prosecution, they would bear the evidential burden in relation to the exceptions or establishing good faith immunity. Other participants reflected the view that establishing good faith immunity could be extremely difficult where the Courts will take a strict view in interpreting beneficial legislation, and the immunity relies on evidence to establish the degree of care taken by the official at the time of the alleged offence.

1.165 Another participant said that many staff in their agency were unwilling to take on the role of authorised officer because receiving and handling PIDs would expose them to an uncomfortable level of risk, and as a result authorised officer positions are pushed to higher (SES) levels (it should be noted that these offence provisions would also apply to supervisors who receive PIDs, and most supervisors are relatively junior public officials).

1.166 Other officials told us that a significant problem they faced was dealing with disclosers who were confused about the extent of the protection of their identity and the confidentiality of the investigation.<sup>41</sup> While many participants had a good grasp of the rules of natural justice/procedural fairness, they said it was challenging for PID investigators to manage the discloser's expectations once an investigation starts, and the discloser loses 'control' of the process.

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<sup>41</sup> We discuss this confusion under TOR 1: 'Protecting the discloser's identity'.

1.167 One official suggested that there is a broader question about whether confidentiality and secrecy protections, like those used in the PID Act can and should be applied to the range of misconduct matters that may be captured by PID. A number of participants thought that the PID Act did not sufficiently address the discloser's mutual responsibility not to breach confidentiality and secrecy, and remarked upon the practical difficulties this causes.

1.168 Another official suggested that the secrecy/confidentiality requirements in the PID Act weighed too heavily in favour of the discloser, at the expense of a person subject to an allegation in a PID investigation.

1.169 Although we are frequently able to give practical guidance about how the exceptions in s 20 and s 65 of the PID Act would enable disclosure or use of information related to a public interest disclosure, many of the requests that we receive for guidance about the application of the offence provisions in s 20 and s 65 of the PID Act can only be answered after detailed research into the application of other Commonwealth laws and consideration of how these interact with and conflict with the PID Act. As we discussed earlier in this submission, it is not appropriate for our office to attempt to give legal advice to an individual, be they an agency official administering the PID Act or a person making, or considering making a public interest disclosure.<sup>42</sup>

1.170 Where we are unable to give clear guidance, we suggest that the agency seek its own legal advice about the particular set of circumstances. Agencies have told us that their legal advisors are often very conservative in advising when it is appropriate to use or disclose protected information about a disclosure investigation, given that a breach of s 20 or s 65 will be a criminal offence.

1.171 It would seem that the Commonwealth PID Act has significantly stronger secrecy and confidentiality provisions than the comparable legislation in some other Australian jurisdictions. For example, s 22 of the *Public Interest Disclosures Act 1994* (NSW) provides that an investigating authority, public authority or officer of a public authority is not to disclose information that might identify or tend to identify a person who has made a PID, but there is no criminal offence created for breaching that obligation. The *Public Interest Disclosures Act 1994* (NSW) does not impose any additional confidentiality requirements on the handling of the disclosure, beyond protecting the discloser's identity. However, the NSW legislation is also less prescriptive about the way that the disclosure must be handled and investigated, with that generally left to be determined according to the usual processes that apply to the subject matter of the disclosure, and/or the agency dealing with it.

1.172 In our view, the Commonwealth PID Act requirements about confidentiality and secrecy could do with further clarification, as they are leading to some undesirable consequences. The difficulty that we face in providing clear guidance about when an official might be committing an offence under s 65 of the PID Act has contributed to a situation where agencies are overly-cautious when dealing with matters relating to a disclosure. In some cases, this has undermined the reputation of the PID Act as an effective framework for receiving and responding to information about suspected wrongdoing. Ombudsman's suggestions 6 to 9 above are intended to address this situation.

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<sup>42</sup> See discussion in relation to external disclosures, TOR 1: 'Non-internal PIDs'.

### TOR 3: Breadth of disclosable conduct covered by the Act

1.173 The third term of reference for the review is ‘the breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act’.

1.174 In this section we make some observations based on the statistics we have available about the nature of disclosures receive by each agency, and the feedback that we have received from agencies though providing advice and in our PID community of practice meetings.

#### ***What is disclosable conduct?***

1.175 The categories of disclosable conduct are set out in the table in s 29(1) of the PID Act (reproduced below).

*Table 3: categories of disclosable conduct*

Disclosable conduct	
Item	Kinds of disclosable conduct
1	Conduct that contravenes a law of the Commonwealth, State or Territory
2	Conduct, in a foreign country, that contravenes a law that: <ul style="list-style-type: none"> <li>(a) is in force in the foreign country; and</li> <li>(b) is applicable to the agency, public official or contracted service provider; and</li> <li>(c) corresponds to a law in force in the Australian Capital Territory.</li> </ul>
3	Conduct that: <ul style="list-style-type: none"> <li>(a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or</li> <li>(b) involves, or is engaged in for the purpose of, corruption of any other kind</li> </ul>
4	Conduct that is an abuse of public trust.
5	Conduct that constitute maladministration, including conduct that: <ul style="list-style-type: none"> <li>(a) is based, in whole or in part, on improper motives; or</li> <li>(b) is unreasonable, unjust or oppressive; or</li> <li>(c) is negligent.</li> </ul>
6	Conduct that is: <ul style="list-style-type: none"> <li>(a) fabrication, falsification, plagiarism, or deception, in relation to:               <ul style="list-style-type: none"> <li>(i) proposing scientific research; or</li> <li>(ii) carrying out scientific research; or</li> <li>(iii) reporting the results of scientific research; or</li> </ul> </li> <li>(b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice.</li> </ul>
7	Conduct that results in the wastage of: <ul style="list-style-type: none"> <li>(a) relevant money (within the meaning of the <i>Public Governance, performance and Accountability Act 2013</i>); or</li> <li>(b) relevant property (within the meaning of that Act); or</li> <li>(c) money of a prescribed authority; or</li> <li>(d) property of a prescribed authority.</li> </ul>
8	Conduct that: <ul style="list-style-type: none"> <li>(a) unreasonably results in a danger to the health and safety of one or more persons; or</li> <li>(b) unreasonably results in, or increases a risk of danger to the health and safety of one or more persons.</li> </ul>

Item	Kinds of disclosable conduct
9	Conduct that: (a) results in a danger to the environment, or (b) results in, or increases, a risk of danger to the environment.
10	Conduct of a kind prescribed by the PID rules. <sup>43</sup>

1.176 Disclosable conduct is conduct of a kind mentioned in the table above that is:

- engaged in by an agency(s 29(1)(a))
- engaged in by a public official, in connection with his or her position as a public official (s 29(1)(b))
- engaged in by a contracted service provider for a Commonwealth Contract, in connection with entering into, or giving effect to, that contract (s 29(1)(c)).

1.177 Although s 29(1)(b) provides that disclosable conduct of a public official is conduct in connection with his or her position as a public official, this is expanded by s 29(2) of the PID Act. Section 29(2) provides that disclosable conduct ‘in connection with’ a public official’s position also includes conduct that:

- involves the abuse of the public official’s position, or is engaged in for the purpose of the public official abusing his or her position (s 29(2)(a))
- could, if proved, give reasonable grounds for disciplinary action against the public official (s 29(2)(b)).

1.178 We believe that s 29(2) is intended to capture conduct outside of the terms of employment that is nevertheless incompatible with the person’s position as a public official. However, s 29(2) is effectively a separate category of disclosable conduct, which captures conduct that may or may not already be captured by the items in the table in s 29(1).

1.179 Section 29(2)(b) has introduced a level of uncertainty into the categories of disclosable conduct, as there is no legislated definition of the term ‘disciplinary action’ for the purposes of the PID Act. We are also aware that the application of s 29(2)(b) is of significant concern to the Department of Defence, given the particular meaning of disciplinary action in relation to serving members of the Australian Defence Force.

1.180 Many APS agencies have taken the view that any behaviour that might breach the APS code of conduct could result in ‘disciplinary action’ and is therefore caught by s 29(2)(b). This is one of most common kinds of disclosable conduct alleged by public officials who wish to make a PID about a personal grievance related to their own employment. In providing guidance on this point, we routinely advise agencies that it is appropriate to view ‘disciplinary action’ as a more serious response than counselling or mediation. However, there has been some resistance to our guidance on this point, as it is not legal advice. We consider that it would be helpful for the term ‘disciplinary action’ to be defined or clarified within the PID Act.

*Ombudsman’s suggestion 10*

Amend the PID Act to define or clarify the term ‘disciplinary action’ for the purposes of s 29(2)(b).

1.181 Section 29(1)(c) provides that conduct on the part of a contracted service provider can be disclosable conduct, if it is conduct of a kind mentioned in the table in s 29 of the PID Act. However, it will not be disclosable conduct if that conduct is not in connection with entering into, or giving effect to the Commonwealth contact.

<sup>43</sup> There are currently no PID rules.

### **Frequency of disclosures about each kind of disclosable conduct**

1.182 Table 4 below sets out the number of times that agencies have reported receiving an internal disclosure that fell into each of the categories of disclosable conduct. The categories are listed in descending order of frequency. The data is drawn from the notices of allocation that agencies sent to the Commonwealth Ombudsman in the first two years of the PID Act (i.e. from 15 January 2014 to 14 January 2016).

1.183 We received 1,336 notices of allocation during this period, however, the total instances of disclosable conduct recorded was 1,570. This is because some disclosures were described as being about more than one category of disclosable conduct. This usually means that the discloser identified more than one instance of disclosable conduct, however, in some cases, the agency may have selected more than one category to describe the conduct in question.

*Table 4: What were internal disclosures made about?*

First two years of the PID ACT: from 15 January 2014 to 14 January 2016<sup>44</sup>

<b>Category of disclosable conduct (based on the information disclosed by the discloser)</b>	<b>Instances (% of total)</b>	<b>PID Act reference</b>
Conduct that contravenes a law of the Commonwealth, State or Territory.	796 (51%)	Item 1, table in s 29(1)
Conduct engaged in by a public official that involves the abuse of the public official's position, or is engaged in for the purpose of the public official abusing his or her position, or conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official.	300 (19%)	s 29(2)
Conduct that constitute maladministration, including conduct that: (a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent.	215 (14%)	Item 4, table in s 29(1)
Conduct that: (a) unreasonably results in a danger to the health and safety of one or more persons; or (b) unreasonably results in, or increases, a risk of danger to the health and safety of one or more persons.	89 (6%)	Item 8, table in s 29(1)
Conduct that results in the wastage of: (a) relevant money (within the meaning of the <i>Public Governance, performance and Accountability Act 2013</i> ); or (b) relevant property (within the meaning of that Act); or (c) money of a prescribed authority; or (d) property of a prescribed authority.	71 (5%)	Item 7, table in s 29(1)
Conduct that: (a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or (b) involves, or is engaged in for the purpose of, corruption of any other kind	65 (4%)	Item 3, table in s 29(1)
Conduct that is an abuse of public trust.	14 (<1%)	Item 5, table in s 29(1)

<sup>44</sup> The table reflects information received from agencies through their notification requirement under s 44(1A) of the PID Act. We are aware that there has been under reporting by agencies.

Category of disclosable conduct (based on the information disclosed by the discloser)	Instances (% of total)	PID Act reference
Conduct that is: (a) fabrication, falsification, plagiarism, or deception, in relation to: (i) proposing scientific research; or (ii) carrying out scientific research; or (iii) reporting the results of scientific research; or (b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice.	3 (<1%)	Item 6, table in s 29(1)
Conduct, in a foreign country, that contravenes a law that: (a) is in force in the foreign country; and (b) is applicable to the agency, public official or contracted service provider; and (c) corresponds to a law in force in the Australian Capital Territory.	3 (<1%)	Item 2, table in s 29(1)
Conduct that: (a) results in a danger to the environment, or (b) results in, or increases, a risk of danger to the environment.	2 (<1%)	Item 9, table in s 29(1)

1.184 As the table shows, by far the most commonly selected category of disclosable conduct is ‘conduct that contravenes a law of the Commonwealth, State or Territory’. The data reported to us is not sufficiently detailed to show what law the conduct in question may have breached. However, it is important to note that this category of disclosable conduct is much broader than alleged criminal conduct.

1.185 For example, the APS Code of Conduct is set out in s 13 of the *Public Service Act 1999*. Items (2) and (3) of the APS Code of Conduct say that:

‘An APS employee must act with care and diligence in connection with APS employment.’

‘An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.’

An alleged breach of either of those elements of the APS Code of Conduct could be described as ‘conduct that contravenes a law of the Commonwealth, State or Territory’.

1.186 As the above discussion shows, there is a significant overlap between the various categories of disclosable conduct in the PID Act. The most obvious is that ‘conduct that contravenes a law of the Commonwealth, State or Territory’ will also be likely to fit into one or more of the other categories.

1.187 It should also be borne in mind that the data in the table above is based on the discloser’s information, which simply needs to ‘tend to show’ disclosable conduct. In 2014—15, a total of 41 agencies told us that they completed 386 disclosure investigations. Only 99 of those investigations resulted in a finding of disclosable conduct.<sup>45</sup>

### ***Some concerns about the breadth of disclosable conduct***

1.188 The breadth of the definition of disclosable conduct in the PID Act is, in one sense, one of its strengths. Not only does the PID Act encourage public officials to speak up when they see corruption and criminal activity in their workplace, they are also able to use the same mechanism to report systemic weaknesses in an agency’s administration.

<sup>45</sup> There is no requirement for agencies to routinely report the outcome of a disclosure investigation to the Ombudsman. However, each year we survey agencies in preparation for our report to the Minister under s 76(1) of the PID Act. For 2014—15, we asked agencies to tell us the number of disclosure investigations completed and the number of times the report of that investigation included a finding of disclosable conduct.

1.189 However, the initial mandatory handling requirements for agencies are the same for every internal disclosure received. The same secrecy, confidentiality and notification provisions apply regardless of the seriousness of the conduct concerned. The requirement for an agency to investigate the disclosure under the framework of the PID Act applies to every internal disclosure unless one of the grounds in s 48 of the Act apply.

1.190 As discussed under TOR 2, s 48 of the PID Act does not support an agency deciding not to investigate under the PID Act on the ground that there is another more suitable mechanism available under another Commonwealth law, or procedures established under another Commonwealth law.<sup>46</sup> This is something that can be considered in the course of a PID investigation, but it still brings into play the requirement for the investigator to prepare a report of the investigation under s 51 (albeit a brief one) and the same secrecy and confidentiality provisions. In short, the procedural requirements of the PID Act apply regardless of the particular circumstances of a matter, and are not necessarily proportionate to the seriousness of the conduct, or the risk to the discloser should that person's identifying or protected information be disclosed.

1.191 The discussion groups that we conducted in preparation for this submission reinforced the consistent feedback that we have received from agencies since the start of the PID scheme. Agency PID practitioners told us that there are other processes better suited than the PID Act to investigating and addressing the subject matter of many disclosures. In most case, these were considered to provide sufficient protection for the person who identified and reported the conduct.

1.192 Some practitioners told us that they believed the issues being raised in PIDs would have been captured through a different means if the PID Act didn't exist. However, others acknowledged that even if the number of complaints had not increased, disclosers have reported back to them or the agency that the PID Act made them feel more comfortable about having reported their concerns. That is, the PID Act provided the discloser with a level of transparency and confidence with the system, they knew that they would be getting a report at the end of the investigation, and the Act protected them.

1.193 PID practitioners in the discussion groups told us they would like to see the introduction of a public interest test into the definition of a PID, to exclude personal grievances and interpersonal conflict that can be managed through other (usually less formal) channels. Many practitioners told us that personal employment should be excluded from the PID Act. Some said all employment-related matters should be excluded.

1.194 The overwhelming view of discussion group participants was that the threshold for disclosable conduct is too low. However some participants mentioned that the low threshold would not be an issue if they were able to deal with the PID through another mechanism at an early stage, for example by exercising discretion not to investigate under the PID Act.

1.195 The discussion group participants told us they would like to see more discretionary decision making earlier on in the PID process. Effectively, this would allow an authorised officer or supervisor to exercise some discretion about how best to deal with an issue that has been raised with them. Therefore, if a person makes a PID about a personal employment matter, the agency should be able to refer it to be handled through a code of conduct or bullying/harassment procedure early on and not have to go through the formal procedural requirements of the PID Act.

1.196 In the case of safety incidents covered by workplace health and safety (WHS) laws, agencies tell us that the PID Act can delay or impede prompt and effective response at the location where the incident or risk occurred. This was a particular concern for the Australian Nuclear Science and Technology Organisation, where a well-established reporting culture

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<sup>46</sup> Refer TOR 2: 'Conducting an investigation'.

already exists for WHS incidents, but those reports, where made to a person who is an authorised officer or supervisor, meet the definition of an internal disclosure, and must also be dealt with under the PID Act.

1.197 Several participants were concerned about the age of matters that some disclosures are about. It was suggested that the PID Act should have a statute of limitation to prevent people trying to re-agitate complaints that had already been dealt with (sometimes, repeatedly). However, we do not believe that the length of time that has passed since the alleged disclosable conduct should be a relevant threshold issue. In our view, it is appropriate for this to continue to be considered as one of the discretionary grounds for deciding not to investigate a disclosure under the PID Act.

1.198 In our view, there is a risk that the reputation of the PID scheme will be undermined by the perception that the procedural requirements are often disproportionate to the subject matter and seriousness of the disclosures. It is questionable whether there are significant benefits in having such a broad range of matters that fit within the current definition of disclosable conduct handled under the formal processes of the PID Act.

1.199 We believe the solution to the problem of too broad a range of disclosable conduct covered by the PID Act is likely to lie in legislative amendment to alter the handling requirements that apply to disclosures about disclosable conduct for which there is another suitable investigative mechanism under another Commonwealth law, or procedures established under another law of the Commonwealth.

*Ombudsman's suggestion 11*

10 Amend s 48 of the PID Act to introduce an additional discretionary ground for deciding not to investigate a disclosure, or to stop investigating a disclosure, to apply to disclosures about conduct for which there is another suitable investigative mechanism under another Commonwealth law, or procedures established under another law of the Commonwealth, and the principal officer is reasonably satisfied there are no further matters concerning the disclosure that warrant investigation.

1.200 In making suggestion 11 above, we are aware that it could potentially effect some important features of the PID Act that currently promote transparency for disclosers. These include:

- a statutory period for investigating a disclosure (s 52)
- the right to receive a copy of the investigation report (s 51(4))
- the ability to make an external disclosure (s 26).

1.201 We do note, however, that a significant proportion of PID investigations conducted under the current PID Act conclude with a recommendation (as permitted by s 47(3)) that further investigation be undertaken under another Commonwealth law, or procedures established under another law of the Commonwealth. The proportion in 2014—15 was 69% of finalised PID investigations. We are therefore reasonably confident that the actual impact on disclosers will be quite modest, with most receiving a similar level of information as they would if an agency were to conduct a brief PID investigation that recommends a different sort of investigation.

1.202 Nevertheless, we consider that it would be appropriate to require an agency to provide information to a discloser about the outcome of the other investigation. We suggest that this be by way of a summary only, within a reasonable period of the other investigation being completed, or at the point at which the agency decides no further action is warranted.

*Ombudsman's suggestion 12*

If suggestion 11 is adopted, amend the PID Act to require an agency to provide information to a discloser about the outcome of the other investigation within a reasonable period of it being completed, or at the point at which the agency decides no further action is warranted.

***Disclosures about personal employment-related grievances***

1.203 In part, TOR 3 specifically poses the question: 'whether disclosures about personal employment-related grievances should receive protection under the Act'? In our view, there are some situations where a personal employment-related grievance may nevertheless reveal systemic problems in an agency and where there is a risk that a person speaking out may suffer reprisal for doing so. We are therefore not in favour of any change that would make it impossible for a person to make a disclosure about a personal employment-related grievance.

1.204 Nevertheless, we acknowledge that a significant proportion of internal disclosures that have been made to date appear to be about less serious matters of personal grievance. We also recognise that many of the problems that agencies experience in applying the secrecy and confidentiality provisions in the PID Act arise in cases where the subject matter of the disclosure concerns the employment of the discloser.

1.205 Ombudsman's suggestion 11 above would enable agencies to use other appropriate mechanisms to investigate and respond to many disclosures about employment-related grievances. However, those disclosures would still be PIDs and attract the secrecy and confidentiality provisions in the PID Act. To avoid this, we believe there may be merit in adjusting the threshold for making a PID about disclosable conduct which is essentially a matter of personal grievance, including in relation to action relating to the employment of a public official.

*Ombudsman's suggestion 13*

Adjust the threshold for making a PID by introducing an additional seriousness (or public interest) test for disclosable conduct which is essentially a matter of personal grievance, including in relation to the employment of a public official.

## **TOR 4: Interaction with other procedures for investigating wrongdoing**

1.206 The fourth term of reference for the review is ‘the interaction between the Act and other procedures for investigating wrongdoing, including Code of Conduct procedures under the *Public Service Act 1999* and the Commonwealth’s fraud control framework’.

1.207 In our discussion of TOR 3, we have suggested two changes to the PID Act that we consider are likely to minimise, if not eliminate, the problems that agencies have identified with the PID Act’s interaction with other procedures for investigating wrongdoing. However, we set out below our observations about how the PID Act currently interacts with other procedures for investigating wrongdoing.

1.208 In relation to TOR 2, we included statistics showing that 69% of the PID investigations completed in 2014—15 were finalised with a recommendation that further investigation be conducted under another Commonwealth law, or procedure established under another Commonwealth law.<sup>47</sup> We also mentioned a common misapplication or misunderstanding of the PID Act, where agencies were choosing not to identify as an internal disclosure a matter that could be dealt with under another procedure for investigating wrongdoing.<sup>48</sup>

### ***Fraud allegations***

1.209 The PID Act requires that any disclosure investigation under the PID Act that relates to one or more instances of fraud must also comply with any rules relating to fraud made under the *Public Governance, Performance and Accountability Act 1999*, to the extent that those rules are not inconsistent with the PID Act (see s 53(4)). This potentially introduces a level of complexity to any fraud investigation, with the investigator needing to understand both the fraud rules and the PID Act requirements (including the PID standard), and identifying and resolving how to address any inconsistencies.

1.210 We note that the report of the independent Review of Whole-of-Government Internal Regulation (Belcher Red Tape Review) recommended that the ‘AGD, APSC and PM&C work together to better manage the apparent overlap between the Fraud Control Framework, the *Public Interest Disclosure Act 2013* and the APS Code of Conduct’.<sup>49</sup>

1.211 Our guidance to agencies investigating a PID about fraud attempts to address the apparent overlap between the PID Act and the Fraud Control Framework. We emphasise that it is possible to conduct a short PID investigation that considers whether a different investigation should be conducted (s 47(3)). The PID investigation can be concluded with a report under s 51 that recommends further investigation under the rules relating to fraud made under the *Public Governance, Performance and Accountability Act 1999*. While we acknowledge that this may involve some duplication of effort, we consider that it is preferable not to attempt to conduct an investigation that concurrently complies with the PID and fraud investigation frameworks.

### ***Alleged breach of the APS or Parliamentary Service codes of conduct***

1.212 The PID Act requires that any disclosure investigation under the PID Act that relates to an alleged breach of the Code of Conduct under either the *Public Service Act 1999* or the *Parliamentary Service Act 1999* must comply with the procedures established under s 15(3) of those Acts.

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<sup>47</sup> Refer TOR 2: ‘Conducting an investigation’ at paragraph 1.16.

<sup>48</sup> Refer TOR 2: ‘Technical disclosures made in the ordinary course of business’, at paragraph 1.77.

<sup>49</sup> Recommendation 19.5, see full report published at <http://www.finance.gov.au/publications/reducingredtape/>.

1.213 As noted above, the report of the Belcher Red Tape Review included a recommendation about the apparent overlap between the Fraud Control Framework, the PID Act and the APS Code of Conduct. A further recommendation deals specifically with the ‘apparent overlap between the APS Code of Conduct and the *Public Interest Disclosure Act 2013*’.<sup>50</sup>

1.214 Consistent with our guidance to agencies about PID investigations into alleged fraud, where the disclosed information concerns an alleged breach of the APS or Parliamentary Service Code of Conduct, we emphasise that it is possible to conduct a short PID investigation that considers whether a different investigation should be conducted (s 47(3)). The PID investigation can then be concluded with a report under s 51 that recommends further investigation under the agency’s procedures established under s 15(3) of the *Public Service Act 1999* or the *Parliamentary Service Act 1999*. Again, while we acknowledge that this may involve some duplication of effort, we consider that it is preferable not to attempt to conduct an investigation that concurrently complies with the PID and Code of Conduct investigation frameworks.

1.215 Our guidance has assisted many agencies to sensibly navigate through (or avoid) many of the complexities of dual Code of Conduct and PID investigations. However, not all of the agencies subject to the PID Act have employees that are covered by the APS or Parliamentary Service Codes of Conduct.

1.216 We are aware of one agency covered by the PID Act that employs staff who are not APS officers. Those staff are nevertheless public officials and are required to comply with a code of conduct that is included in that agency’s enterprise agreement. The enterprise agreement also contains procedures for investigating alleged breaches of the code of conduct. As the enterprise agreement is not a law, it would seem the agency in question is unable to consider s 47(3) in the course of investigating a disclosure about an alleged code of conduct breach. This potentially brings into play a range of complexities about the amount of sensitive personal information that needs to be included in the PID investigation report, and redactions from the copy to be provided to the discloser.

### ***Commonwealth investigative bodies that cannot receive PIDs***

1.217 The PID Act provides that an internal disclosures may be made to an ‘investigative body’ (other than the Ombudsman or IGIS) that has the power to investigate the disclosure otherwise than under the PID Act (s 34).<sup>51</sup> The term ‘investigative agency’ is defined in s 8 of the PID Act. Paragraph (c) of the definition is ‘an agency that is prescribed by the PID rules to be an investigative agency for the purposes of this Act’.

1.218 Although we understand there was originally an intention that certain bodies such as the Australian Public Service Commission (APSC) and the Australian Commission for Law Enforcement Integrity (ACLEI) would be able to receive PIDs about the subject matter they are entitled to investigate, no PID rules have been made since the PID Act became law. This means that ACLEI and the APSC can only receive PIDs that relate to themselves (i.e. about conduct of the agency, or public officials who belong or last belonged to the agency, or alternatively, disclosures made by officials who belong or last belonged to the agency). We consider this to be an undesirable gap in the coverage of the PID Act.

#### ***Ombudsman’s suggestion 14***

Make a rule under s 83 of the PID Act prescribing Commonwealth investigative agencies that can receive and investigate PIDs about subject matter within their jurisdiction.

<sup>50</sup> Recommendation 22.15, see full report published at <http://www.finance.gov.au/publications/reducingredtape/>.

<sup>51</sup> Refer to paragraph(c) of item 1 of the table of ‘authorised internal recipients’.

### ***Other mandatory reporting regimes***

1.219 Some agencies subject to the PID Act are also subject to mandatory reporting regimes. In most cases, we consider it will be possible for an agency to handle an internal disclosure in a way that is consistent with mandatory reporting regimes. However, we are aware of two possible potential areas of conflict. As far as we are aware, neither has eventuated yet.

1.220 The first area of conflict relates to the supervisor's obligation under s 60A of the PID Act (i.e. to give to an authorised officer any information disclosed to them by a public official they manage or supervise that they believe concerns disclosable conduct). It is possible that the agency's mandatory reporting regime might require the supervisor to report that information to someone other than an authorised officer. However, we consider that risk can be mitigated with some careful attention to the choice and placement of authorised officers, so that the PID Act is integrated with any relevant mandatory reporting regime. We also note that introducing another discretionary ground to not investigate in s 48 of the PID Act (Ombudsman's suggestion 11) would potentially address this potential conflict.

1.221 Another area of potential conflict relates to the PID Act requirement for the PID investigator to refer to a member of an Australian police force evidence of the commission of a serious offence against an Australian law.<sup>52</sup> The Department of Immigration and Border Protection told us that their agency is obliged to refer corruption-related materials only to the ACLEI and not to the police. While it is likely that this apparent conflict can be resolved via legal interpretation, it is desirable for the legislation to be clarified.

#### *Ombudsman's suggestion 15*

Amend s 56 of the PID Act to enable disclosure of information to ACLEI, rather than to a member of an Australian police force, where the information raises a corruption issue, or a significant corruption issue, that the Integrity Commissioner may deal with under the *Law Enforcement Integrity Commissioner Act 2006*.

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<sup>52</sup> Section 56(2) does not use the term 'serious': the requirement is to refer evidence to the police that relates to an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for life, or by imprisonment for a period of at least 2 years.

## PART TWO

### UNINTENDED CONSEQUENCES; AREAS FOR FINE TUNING

2.1 In this part, we discuss some aspects of the PID Act which we have not explored elsewhere. They include what we consider may be unintended consequences of the PID Act. We also discuss and some aspects that we consider could benefit from fine tuning, both to improve the operation of the PID scheme overall and to make it easier for agencies to administer it.

2.2 We also discuss the effectiveness of the mandatory notifications that inform the Ombudsman's oversight of the PID scheme. We suggest some refinements which we think would assist to improve the value and timeliness of the information we are able to report about the operation of the PID Act.

#### ***Deeming a person to be a public official***

2.3 An authorised officer may decide to deem an individual to be a public official so that person may make an internal disclosure under the PID Act. One of the formal requirements for a deeming decision appears to be a positive finding that the person who wishes to make a disclosure was not a public official when they obtained the disclosed information (s 70(1)(b)). Frequently, the information has been provided to the authorised officer in written form, anonymously, without any contact details for the discloser.

2.4 In such cases, it is questionable whether a deeming decision can be made, because the authorised officer is unable to tell whether the person making the disclosure is or was public official at any time, let alone when they obtained the information. We suggest that the PID Act be amended to clarify that an authorised officer may make a determination under s 70 if they are not positively satisfied that the person was a public official at the time they received the information to be disclosed.

#### *Ombudsman' suggestion 16*

Amend s 70 of the PID Act to clarify that an authorised officer may determine in writing that a person is a public official entitled to make a disclosure if they are not satisfied that the person was a public official at the time they received the information to be disclosed.

2.5 Another problem with the deeming provisions in s 70 of the PID Act is that in order to give effect to a determination, the authorised office must provide written notice of their decision to the individual (s 70(1)). Unlike most of the other discloser notice requirements in the PID Act, this requirement is not expressed to apply unless 'contacting the discloser is not reasonably practicable'.<sup>53</sup>

2.6 We think it is arguable that an inability to provide notice to the discloser might preclude a deeming decision under s 70. We do not believe that is a sensible outcome, and suggest that the Act be amended to clarify this situation.

#### *Ombudsman' suggestion 17*

Amend s 70 of the PID Act to clarify that the requirement to provide a copy of the written determination that a person is a public official entitled to make a disclosure does not apply if contacting the discloser is not reasonably practicable.

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<sup>53</sup> See below, 'Notice requirements for uncontactable disclosers'.

### ***Misdirected disclosures***

2.7 The PID Act contains a range of protections for a public official who makes a disclosure under the PID Act. Those protections are discussed in detail in part one of this submission.<sup>54</sup> However, in some cases, the official who requires protection can potentially miss out, by making their disclosure to the wrong person in an agency, because they did not understand the formal requirements.

2.8 A public official may make an internal disclosure by disclosing information about suspected disclosable conduct directly to an authorised officer, or via their supervisor. However, we have seen quite a few cases where information about disclosable conduct is received by someone other than an authorised officer or the disclosing official's supervisor. Subsequently, that information is identified as something that could be dealt with under the PID Act, and eventually makes it way to an authorised officer. In such cases, the person most at risk of reprisal may miss out on the PID Act protections, which will instead apply to the last public official who passed the information to the authorised officer.

2.9 One example we have seen is where the head of an agency's human resources (HR) section received information about disclosable conduct from a very junior member of staff, and decided to refer that information to an authorised officer to be dealt with under the PID Act. As the HR head was neither an authorised officer, nor a supervisor or manager of the junior staff member, the discloser under the PID Act was in fact the HR head and not the junior staff member.

2.10 It was only through the actions of the authorised officer, who recognised the legal implications of the way the disclosure was made, that the junior official was encouraged to make their own internal disclosure, and thus obtain the full range of legal protections under the PID Act.

2.11 Another example we are aware of is a union delegate in a workplace, who made a series of PIDs about disclosable conduct based on information disclosed to them by union members in that workplace. The union delegate was neither an authorised officer, not the supervisor or manager of the union members concerned. The discloser protections in the PID Act applied to the union delegate, rather than the public officials who were the original source of the disclosed information.

2.12 We think it is undesirable for a public official who is the original source of the information in an internal disclosure to miss out on the PID Act protections in these situations.

#### ***Ombudsman's suggestion 18***

Extend the discloser protections in the PID Act to apply to a public official who was the original source of a misdirected disclosure.

### ***Public officials disclosing information obtained in an 'unofficial' capacity***

2.13 The PID Act does not require any link between the information that a public official discloses under the PID Act and that person's role as a public official. Thus, it is possible for a public official to make an internal disclosure about their experiences in a private capacity as a recipient of services from a Commonwealth agency.

2.14 Listed below are some of the large Commonwealth agencies who routinely deal with public officials as ordinary members of the public:

- Department of Human Services (particularly in respect of delivering the Medicare, Centrelink and Child Support programs)

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<sup>54</sup> Refer to TOR 1 headings 'Support and protection from detriment and reprisal action', and 'Protecting the discloser's identity'.

- Australian Taxation Office
- Australia Post
- Comcare (which administers a compensation scheme for Commonwealth Government agencies and statutory authorities)
- Department of Foreign Affairs and Trade (particularly in respect of the Australian Passports Office)
- Department of Immigration and Border Protection (particularly in respect of its visa processing arrangements).

2.15 We do not believe it was intended that public officials would have access to the PID Act to make complaints about the service they receive from Commonwealth agencies in their private capacity, with all of the associated legal protections for disclosers. The possibility of a public official making a 'private capacity' PID continues after the person ceases to be a public official. Section 26(1)(a) provides that former public officials may make a PID, as well as people who are currently public officials.

2.16 We have seen several of these 'customer complaint' PIDs. We do not consider it is appropriate to use actual cases as examples in this submission.

2.17 The problem of 'customer complaint' PIDs poses a particular challenge for the Department of Veterans' Affairs (DVA), because most of its clients are former members of the Australian Defence Force, and thus former public officials. In the early stages of the PID Act, we worked closely with DVA to identify when a customer complaint might also be a PID. We also provided guidance about some positions which, if held by authorised officers, might unnecessarily increase the risk of triggering the PID Act through DVA's usual handling arrangements for ministerial and complaints correspondence. However, the application of the PID Act to DVA's clients remains problematic, particularly where a veteran makes a complaint by writing directly to the agency head (who is automatically an authorised officer for the purposes of the PID Act).

2.18 Ombudsman's suggestion 12 was to 'adjust the threshold for making a PID by introducing an additional seriousness (or public interest) test for disclosable conduct which is essentially a matter of personal grievance, including in relation to the employment of a public official'. If adopted, that suggested change should also limit the extent to which current and former public officials can inappropriately use the PID Act as a customer complaint mechanism.

### ***Grant recipients***

2.19 An individual who is a contracted service provider for a Commonwealth contract, or who is employed by a contracted service provider is a public official under the PID Act.<sup>55</sup> The term 'Commonwealth contract' is defined as a contract:<sup>56</sup>

- to which the Commonwealth is a party and
- under which goods and services are to be, or were to be, provided:
  - to the Commonwealth or a prescribed authority
  - for or on behalf of the Commonwealth or a prescribed authority, and in connection with the performance of its functions or the exercise of its powers.

2.20 The definition of a contracted service provider is not intended to encompass organisations that receive grant funding from the Commonwealth. However, we are aware

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<sup>55</sup> See items 15 and 16 of the table in s 69(1) of the PID Act and s 30.

<sup>56</sup> See s 30(3).

that this distinction has become blurred in the case of grants effected through a contract. We have attempted to clarify this through guidance, but we consider it would be helpful to make the distinction clear in the PID Act.

*Ombudsman's suggestion 19*

Clarify within the PID Act that a contract with the Commonwealth that gives effect to grant funding is not a Commonwealth contract for the purposes of the PID Act.

**Clarify interaction with FOI Act**

2.21 In part one of this submission we discussed some scenarios in which agencies were concerned about whether s 20 and s 65 of the PID Act provided an exception that would allow the use or disclosure of information that is likely to enable to identification of the discloser, or alternatively, about the disclosure and/or the investigation.<sup>57</sup> One specific area of confusion has been in relation to requests under the *Freedom of Information Act 1982* (FOI) for access to documents related to the disclosure, or the investigation. Some FOI requests have been made by the discloser. Other FOI requests have been made by public officials whose conduct has been the subject of a disclosure or a disclosure investigation.

2.22 We have provided guidance to agencies to the effect that although s 65 does not contain an exception that would seem to permit access to PID related documents under the FOI Act, s 82(2) is relevant. That subsection says the PID Act 'does not detract from any obligations imposed on an agency or a public official by a law of the Commonwealth other than this Act'. We consider it would assist agencies if the PID Act were amended to include a note to make explicit that documents relating to a PID are not automatically exempt from the operation of the FOI Act.

*Ombudsman's suggestion 20*

Clarify within the PID Act that documents relating to a public interest disclosure or a disclosure investigation are not automatically exempt from the operation of the FOI Act.

**Ombudsman notifications about handling individual disclosures**

2.23 As we discussed in part one, agencies must notify the Ombudsman when they allocate an internal disclosure for handling under the PID Act (s 44), and when they make a decision on one of the grounds in s 48 to not investigate, or stop investigating a disclosure (s 50A).<sup>58</sup>

2.24 If an agency cannot complete a PID investigation within 90 days of the internal disclosure being allocated for handling under the PID Act, it may apply to the Ombudsman for an extension of time (s 52(3)).<sup>59</sup> These extension applications give our office useful information about the timeliness of agency investigations and the common reasons for delay. They are also an opportunity for us to remind agencies of the need to keep the discloser informed about the progress of a PID investigation.

2.25 The information that the Ombudsman receives from these mandatory notifications and extension of time applications, is supplemented by the intelligence that we receive via complaints from people who are dissatisfied with the way an agency has administered the PID Act in a particular case.

2.26 However, there is no obligation for an agency to notify the Ombudsman as a matter of course when a PID investigation is complete, or to provide the Ombudsman with information

<sup>57</sup> Refer to TOR 2: 'Secrecy and confidentiality'.

<sup>58</sup> In the case of the intelligence agencies, these notifications are made to the IGIS, rather than to the Ombudsman.

<sup>59</sup> If the investigation is being conducted by one of the intelligence agencies, the extension application is made to the IGIS, rather than to the Ombudsman (s 52(4)).

about the outcome of the investigation. The lack of 'real time' information about the outcome of disclosure investigations impairs the Ombudsman's capacity to provide complete and up to date information about the effectiveness of the PID Act as a means to identify and address wrongdoing.

2.27 We consider that the Ombudsman's capacity to provide assistance in relation to the operation of the PID Act (as required by s 62(a)) will be enhanced by increasing the amount of 'real time' data that agencies report about their handling of disclosures. In addition to the existing notification requirements, we consider it would be appropriate to require agencies to notify the Ombudsman of the following information when disclosure investigation is completed:

- the date the investigation was completed
- the categories of disclosable conduct that were found to have occurred, if any
- whether a referral was made to an Australian police force under s 56 of the PID Act
- any action recommended to address the investigation findings
- the date the discloser was provided with a copy of the investigation report.

2.28 While it would be possible for the Ombudsman to extract this information from each investigation report prepared under s 51, we consider requiring agencies to provide a copy of every report to our office would involve an unnecessary transfer of sensitive information. Extracting the data from each investigation report would also impose a significant additional administrative burden on what is a very small office. Overall, we consider it is preferable for agencies to provide only summary data to our office, as is the case with the present mandatory notifications.

2.29 The additional 'real time' data would provide a more complete picture of the outcomes of the effectiveness of the PID Act in dealing with reports of disclosable conduct. Although we recognise that this would involve an additional administrative burden for agencies, we note that this is likely to be offset by changing the threshold for disclosable conduct and/or simplifying the handling arrangements that apply to disclosures about certain categories of disclosable conduct, as discussed elsewhere in this submission.

2.30 The data would also enhance the Ombudsman's capacity to monitor the timeliness of agency's PID investigations. At present, we only have a partial picture based on the number of extension applications that we receive from agencies and any complaints that we receive from disclosers about delays. It is possible that there are PID investigations that take more than 90 days to complete, but the agency has failed to request an extension and the discloser has not made a complaint to the Ombudsman.

#### *Ombudsman's suggestion 21*

Amend the PID Act to require agencies to notify the Ombudsman/IGIS of the following information about their handling of an internal disclosure:

- (i) when a disclosure investigation is completed
- (ii) the categories of disclosable conduct that were found to have occurred, if any
- (iii) whether a referral was made to an Australian police force under s 56 of the PID Act
- (iv) any action recommended to address the investigation findings
- (v) the date the discloser was provided with a copy of the investigation report.

2.31 As we discuss below, increasing the mandatory real time reporting for public interest disclosures is also likely to simplify the task of collecting data for the Ombudsman's annual report under s 76 of the PID Act. We believe this would benefit the agencies required to provide the data, as well as our office in undertaking our oversight and monitoring role.

## ***Ombudsman's annual report on the operation of the PID Act***

2.32 Section 76(1) of the PID Act requires the Ombudsman to prepare a report on the operation of the PID Act after the end of each financial year. The PID Act mandates certain content for the report. The Ombudsman's report must include:<sup>60</sup>

- a statement of the number and nature of the complaints made to the Ombudsman during the financial year about the conduct of agencies in relation to public interest disclosures<sup>61</sup>
- information about the Ombudsman's performance of its functions under s 62;
- information about the IGIS's performance of its functions under s 63.

2.33 The Ombudsman's annual report must also include the following statements in relation to each agency subject to the PID Act:<sup>62</sup>

- the number of public interest disclosures received by authorised officers of the agency during the financial year
- the kinds of disclosable conduct to which those disclosures relate
- the number of disclosure investigations that the principal officer of the agency conducted during the financial year
- the actions that the principal officer of the agency has taken during the financial year in response to recommendations in reports relating to those disclosure investigations.

2.34 Section 76(3) of the PID Act requires the principal officer of each agency to give the Ombudsman any reasonably required information and assistance in relation to preparing the annual report. As the 'real time' mandatory notifications that we receive from agencies throughout the year are not sufficient to report on the matters required by the PID Act, we need to survey every Commonwealth agency subject to the PID Act to obtain the missing data. This is a significant and resource intensive activity for our office.

2.35 In the discussion groups that we conducted to gather feedback from agency PID practitioners, several indicated that they felt our annual report survey was an unreasonable administrative burden upon them as well. This was especially so for those agencies with reasonably high numbers of disclosures. While we have attempted to simplify the data collection process each year, we acknowledge that it does require agencies to go back over their records of each PID allocated and investigated throughout the year.

2.36 We also acknowledge the tight timeframes for agencies to respond to our survey. However, we set those timeframes in the knowledge that we will have to chase many agencies to get their response. We also need to allow sufficient time to analyse the data, and prepare content in accordance with the timetable for the Ombudsman's annual report under s 43 of the *Public Governance and Accountability Act 2013*.

2.37 We suggest above that the PID Act be amended to require agencies to provide additional 'real time' data to the Ombudsman/IGIS about their handling of individual disclosures. We recognise that this will be an additional administrative burden upon agencies, however, we believe that this is justified by the Ombudsman's enhanced capacity to report on the operation of the PID Act. It would also be possible for the Ombudsman to analyse the real time agency notifications to obtain the data that s 76(2) says must be reported annually in relation to each agency.

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<sup>60</sup> See s 76.

<sup>61</sup> See s 76(2)(b) to (d) of the PID Act.

<sup>62</sup> See s 76(2)(a) of the PID Act.

2.38 Instead of sending each agency a blank survey form that asks for the outcome of every PID investigated during the year, we could prepare a preliminary report for each agency using the use the enhanced data per Ombudsman' suggestion 20 and the data we already receive about allocations and decisions not to investigate. The principal officer would be asked to confirm or update the report and advise the action taken to implement recommendations in disclosure investigation (s 76(2)(a)(iv)). We would continue to ask more general questions about education and awareness activities and the number and placement of authorise officers in the agency. We believe this would be a more efficient and effective process for agencies, as well as our office.

### ***Notice requirements for uncontactable disclosers.***

2.39 The PID Act contains a range of measures to provide transparency for the discloser. Agencies are required to give the discloser:

- notice of the allocation of their disclosure for handling under the PID Act (s 44(2))
- if the disclosure is not allocated, notice of the reasons why, and other possible courses of action open to the discloser (s 44(3))
- notice of the obligation to investigate an allocated disclosure (s 50(1)(a))
- notice of the estimated investigation period (s 50(1A))
- notice of a decision not to investigate, or to stop investigating (s 50(1)(b)) and
  - the reasons for that decision (s 50(2)(a)) and
  - advice about other possible courses of action open to the discloser under other Commonwealth laws(s 50(2)(b))
- information about the progress of the investigation after the Ombudsman grants an extension of time (s 52(5)(b))
- a copy of the investigation report, with deletions if permitted (s 51(4)).

2.40 The PID Act provides that these notice requirements do not apply 'if contacting the discloser is not reasonably practicable'.<sup>63</sup> This is clearly appropriate. However, we consider there may be some benefit in requiring a copy of the investigation report to be provided to the Ombudsman/IGIS if it is not reasonably practicable for the agency to contact the discloser. This would provide a greater level of accountability for the investigation of disclosures made anonymously, with no contact details available for the discloser. In saying this, we note that s 44(1)(d) of the Act specifically allows the discloser to withhold consent for their contact details to be provided to the principal officer.

### ***Ombudsman's suggestion 22***

Amend s 51 of the PID Act to require agencies to provide a copy of the investigation report to the Ombudsman/IGIS if contacting the discloser is not reasonably practicable.

### ***Arrangements for the Ombudsman to receive and handle PIDs***

2.41 The PID Act provides that an authorised officer in an agency may only receive a PID if they are an authorised internal recipient. The Ombudsman and the authorised officers appointed by him are authorised internal recipients for disclosures:

- about conduct that relates to the Ombudsman's office, or
- made by public officials who belong, or last belonged, to the Ombudsman's office or

<sup>63</sup> See ss 44(4), 50(5), 51(6), 52(5A).

- made by a discloser who 'believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman'.<sup>64</sup>

2.42 Section 5A of the Ombudsman Act was inserted at the time the PID Act became law. Section 5A enlarged the Ombudsman's jurisdiction to facilitate the Ombudsman's public interest disclosure functions. It provides that:

- the disclosable conduct within any internal disclosure is taken to be 'action that relates to a matter of administration' for the purposes of the Ombudsman Act
- if the internal disclosure is allocated to the Ombudsman under the PID Act, the discloser is taken to have made a complaint to the Ombudsman about 'action that relates to a matter of administration'
- the agency to which the disclosable conduct relates is taken to be a prescribed authority for the purposes of the Ombudsman Act
- any public official who belongs to an agency for the purposes of the PID Act is taken to be an officer of a prescribed authority for the purposes of the Ombudsman Act.

2.43 The effect of s 5A is to ensure that in most cases, it would be possible for the Ombudsman to investigate an internal disclosure under the PID Act.<sup>65</sup> It is therefore the case that a person who would prefer to make their disclosure to the Ombudsman instead of an authorised officer in the agency to which they belong, or the agency the disclosable conduct relates to, is likely to have a belief on reasonable grounds that it would be appropriate for the Ombudsman to investigate their disclosure. However, the person's belief on reasonable grounds that the Ombudsman should investigate does not automatically mean that the Ombudsman will investigate their disclosure.

2.44 We believe modified handling requirements should apply for the Ombudsman in respect of internal disclosures about other agencies. The Ombudsman does not have primary responsibility to investigate wrongdoing in other agencies. That obligation rests with the principal officer of the agency to which the disclosure relates.

2.45 In our view, it would be appropriate to amend the PID Act to recognise that, in most cases, when the Ombudsman receives a disclosure about another agency, that disclosure will be transferred to the agency concerned for handling under the PID Act. Where that is not appropriate, the Ombudsman should deal with the disclosure in accordance with the provisions of the Ombudsman Act, including by considering whether it is appropriate to not investigate the matter under one of the discretionary grounds in s 6 of the Ombudsman Act, which also permit the information to be transferred to another suitable body.

2.46 Most of the 'potential' disclosures to the Ombudsman are made by public officials who are reluctant to make a PID to the agency concerned. Sometimes this is because of a fear of reprisal. In other cases, the public official believes that the authorised officers in their agency are involved in the alleged misconduct, or too closely associated with the public official(s) concerned. Most commonly, the public official lacks confidence that the agency will properly investigate their disclosure and/or protect their identity. In all of these situations, we are able to explain to the potential discloser how the PID Act works, and we are generally able to assist the person to find a suitable authorised officer in their agency to make their PID to. We invite the discloser to come back to our office if they are dissatisfied with the way their agency handles their disclosure.

2.47 However, some disclosers remain concerned about the possible repercussions of making their disclosure to the agency concerned. In those case, we receive their disclosure

<sup>64</sup> Item 1(c) in the table in s 34 of the PID Act.

<sup>65</sup> Unless the disclosure is about conduct on the part of the IGIS or an intelligence agency (s 5A(1)(c) of the Ombudsman Act).

and will consider whether to transfer it to the agency concerned for handling under the PID Act. In most cases, we conclude that is the appropriate option. The method for transferring a disclosure to another agency for handling under the PID Act is via an allocation (s 43(1)). This can only be done with the consent of an authorised officer in that agency (s 43(6)).

2.48 In our view, it is incompatible with the Ombudsman's role to require the Ombudsman to obtain the consent of an authorised officer in the agency concerned to allocate the disclosure to that agency for handling. We should, however, note that we have not had an occasion where we could not get that consent.

*Ombudsman's suggestion 23*

Amend the PID Act to permit the Ombudsman to transfer a disclosure to the principal officer of an agency if the conduct with which the disclosure is concerned relates to that agency and the Ombudsman is satisfied that it is appropriate for that agency to handle the disclosure in accordance with the PID Act.

2.49 Apart from an allocation to the agency concerned, the only other option available to an authorised officer in the Ombudsman's office who has received an internal disclosure is to allocate the disclosure to the Ombudsman for handling under the PID Act (s 43(3)).<sup>66</sup> Once a disclosure is allocated to the Ombudsman, the Ombudsman must handle it in accordance with the PID Act. Section 47(1) of the PID Act requires there to be a disclosure investigation (i.e. under the PID Act). However, s 49 of the PID Act allows the Ombudsman to decide to investigate the disclosure using the Ombudsman Act. We would generally choose to conduct any disclosure investigation under the Ombudsman Act.

2.50 There is, however, a problem if we conclude that an investigation of the disclosure by the Ombudsman is not warranted. Section 49 of the PID Act only permits the use of a separate investigative power to investigate a PID. It is counter-intuitive to use s 49 to enliven the Ombudsman's discretion not to investigate a disclosure on one of the grounds in s 6 of the Ombudsman Act. The grounds upon which the Ombudsman may decide not to investigate a PID are in s 48 of the PID Act. These are much narrower than the Ombudsman's very broad jurisdiction to not investigate a complaint under s 6 of the Ombudsman Act.

2.51 We believe that it would be appropriate to amend the PID Act to provide where a disclosure is allocated to the Ombudsman, s 47 of the PID Act does not apply and instead, the Ombudsman shall deal with the disclosure in accordance with the provisions of the Ombudsman Act. This would allow the Ombudsman to deal with the disclosure in a way that is generally consistent with the Ombudsman Act and proportionate and appropriate to the subject matter of the disclosure.

*Ombudsman's suggestion 24*

Amend s 49 of PID Act to provide where a disclosure is allocated to an investigative agency that has a separate investigative power in relation to the disclosure, s 47 of the PID Act does not apply and instead, the investigative agency shall deal with the disclosure in accordance with the provisions of the relevant Act.

<sup>66</sup> While the PID Act anticipates that an internal disclosure may also be allocated to another investigative agency that has power to investigate the disclosure under another Act (s 43(3)(a)(iv)), this is not currently an option. As we discussed earlier, no investigative agencies have been prescribed (Ombudsman suggestion 13 refers).

## PART THREE

### CONCLUSION

3.1 The statutory review of the PID Act is a valuable opportunity to reflect on the way the Act has operated in practice and whether it is serving its legislative objects.

3.2 Our office has a unique perspective on the operation of the PID Act. We receive direct feedback from the people administering the Act; from the people who have used it to make disclosures and from senior agency officials who we meet with to discuss the way the PID Act is being administered and promoted in their agency. We are regularly approached for advice and assistance by agencies administering the PID Act. We aim to be a source of practical and reliable guidance to all of the people involved in the Commonwealth PID scheme.

3.3 Overall, we think the PID Act has been a valuable addition to the mechanisms that previously existed to report, investigate and remedy misconduct and systemic problems in the Commonwealth public sector. We have seen a number of agencies working to integrate the PID Act into their existing integrity frameworks. Some agencies have done excellent work to raise awareness with their staff about the PID Act and how they can make a disclosure. Others have been less enthusiastic.

3.4 In many cases, this lack of enthusiasm arises from a concern about the practical implications of administering the PID Act given the breadth of disclosable conduct and the procedural requirements for handling disclosures. In many cases, we think those concerns are overstated. However, there are some which we think are valid.

3.5 Throughout this submission we have attempted to give a balanced picture of the way the PID Act is operating and some of the concerns raised by agencies and disclosers. In most cases, we simply highlight those concerns to be considered by the reviewer. In some cases, we have suggested changes that we consider will enhance and improve the effectiveness of the PID Act in delivering its legislated objects.

3.6 The changes that we suggest to the PID scheme are listed below.

#### *Summary of suggested changes*

- 1 Review s 26(3) of the PID Act with the aim of expressing more simply and clearly the matters to be considered when determining if an external disclosure of information is not, on balance, contrary to the public interest.
- 2 Amend the PID Act to require principal officers to publish the PID procedures for their agency on the agency's website
- 3 Prescribe in the PID Act a formula for working out the minimum number of authorised officers to be appointed for an agency, based on the number of public officials that belong to the agency.
- 4 Amend the supervisor's obligation in s 60A of the PID Act to:
  - (i) require a supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage which the supervisor has reasonable grounds to believe concerns one or more serious instances of disclosable conduct;
  - (ii) require a supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage if that public official requests; and

- (iii) permit the supervisor to refer to an authorised officer any information that was disclosed to them by a public official they supervise or manage which the supervisor has reasonable grounds to believe concerns one or more instances of disclosable conduct.
- 5 Modify s 51(4) of the PID Act to enable the agency to provide the discloser with a summary report of the PID investigation, where significant redaction of the s 51 report would otherwise be required.
  - 6 Include another exception in s 65 of the PID Act to permit the use or disclosure of protected information for the purposes of another law of the Commonwealth.
  - 7 Review s 65 of the PID Act to clarify whether it applies to a person performing a function under the Act other than by exercising a function or power delegated by the principal officer.
  - 8 Consider whether the good faith indemnity in s 78 of the PID Act should apply to a person performing a function under the Act other than by exercising a function or power delegated by the principal officer.
  - 9 Include another exception in s 65 of the PID Act to permit the use or disclosure of protected information in connection with the performance of a function conferred on the Ombudsman by s 5A of the *Ombudsman Act 1976*.
  - 10 Amend the PID Act to define or clarify the term 'disciplinary action' for the purposes of s 29(2)(b).
  - 11 Amend s 48 of the PID Act to introduce an additional discretionary ground for deciding not to investigate a disclosure, or to stop investigating a disclosure, to apply to disclosures about conduct for which there is another suitable investigative mechanism under another Commonwealth law, or procedures established under another law of the Commonwealth, and the principal officer is reasonably satisfied there are no further matters concerning the disclosure that warrant investigation.
  - 12 If suggestion 11 is adopted, amend the PID Act to require an agency to provide information to a discloser about the outcome of the other investigation within a reasonable period of it being completed, or at the point at which the agency decides no further action is warranted.
  - 13 Adjust the threshold for making a PID by introducing an additional seriousness (or public interest) test for disclosable conduct which is essentially a matter of personal grievance, including in relation to the employment of a public official.
  - 14 Make a rule under s 83 of the PID Act prescribing Commonwealth investigative agencies that can receive and investigate PIDs about subject matter within their jurisdiction.
  - 15 Amend s 56 of the PID Act to enable disclosure of information to ACLEI, rather than to a member of an Australian police force, where the information raises a corruption issue, or a significant corruption issue, that the Integrity Commissioner may deal with under the *Law Enforcement Integrity Commissioner Act 2006*.
  - 16 Amend s 70 of the PID Act to clarify that an authorised officer may determine in writing that a person is a public official entitled to make a disclosure if they are not satisfied that the person was a public official at the time they received the information to be disclosed.
  - 17 Amend s 70 of the PID Act to clarify that the requirement to provide a copy of the written determination that a person is a public official entitled to make a disclosure does not apply if contacting the discloser is not reasonably practicable.

- 18 Extend the discloser protections in the PID Act to apply to a public official who was the original source of a misdirected disclosure.
- 19 Clarify within the PID Act that a contract with the Commonwealth that gives effect to grant funding is not a Commonwealth contract for the purposes of the PID Act.
- 20 Clarify within the PID Act that documents relating to a public interest disclosure or a disclosure investigation are not automatically exempt from the operation of the FOI Act.
- 21 Amend the PID Act to require agencies to notify the Ombudsman/IGIS of the following information about their handling of an internal disclosure:
  - (i) when a disclosure investigation is completed
  - (ii) the categories of disclosable conduct that were found to have occurred, if any
  - (iii) whether a referral was made to an Australian police force under s 56 of the PID Act
  - (iv) any action recommended to address the investigation findings
  - (v) the date the discloser was provided with a copy of the investigation report.
- 22 Amend s 51 of the PID Act to require agencies to provide a copy of the investigation report to the Ombudsman/IGIS if contacting the discloser is not reasonably practicable.
- 23 Amend the PID Act to permit the Ombudsman to transfer a disclosure to the principal officer of an agency if the conduct with which the disclosure is concerned relates to that agency and the Ombudsman is satisfied that it is appropriate for that agency to handle the disclosure in accordance with the PID Act.
- 24 Amend s 49 of PID Act to provide where a disclosure is allocated to an investigative agency that has a separate investigative power in relation to the disclosure, s 47 of the PID Act does not apply and instead, the investigative agency shall deal with the disclosure in accordance with the provisions of the relevant Act.

Appendix 1

**Table 5: Number of internal disclosures received by agency**

First two years of the PID ACT: from 15 January 2014 to 14 January 2016<sup>67</sup>

Receiving Agency	No. of PIDs received
Department of Defence	679
Department of Immigration and Border Protection / Australian Border Force (formerly Australian Customs and Border Protection Service) <sup>68</sup>	117
Australia Post	108
Australian Taxation Office	70
Commonwealth Ombudsman <sup>69</sup>	51
Airservices Australia	21
Department of Agriculture	19
Department of Human Services	17
Department of Parliamentary Services	12
Department of Veterans Affairs	12
Department of Social Services	11
Australian Broadcasting Corporation	10
Australian Government Solicitor	9
Department of the Treasury	9
Australian Crime Commission	8
Australian National University	8
Commonwealth Scientific and Industrial Research Organisation	8
Department of Foreign Affairs and Trade	8
Australian Federal Police	7
Attorney-General's Department	6
Austrade	6
Australian Rail Track Corporation	6
Australian Sports Commission	6
Civil Aviation Safety Authority	6
Comcare	6
National Health and Medical Research Council	6
National Museum of Australia	6
NBN Co Limited	7
Australian Competition and Consumer Commission	5
Australian Fisheries Management Authority	5
Australian Securities and Investments Commission	4

<sup>67</sup> The table reflects information received from agencies through their notification requirement under s 44(1A) of the PID Act. We are aware that there has been under reporting by agencies.

<sup>68</sup> On 1 July 2015, the Australian Customs and Border Protection Service was consolidated with the Department of Immigration and Border Protection. At this time, the Australian Border Force was established within the Department. The respective figures for these agencies over the two year period are 103 for the Department of Immigration and Border Protection, and 14 for the Australian Customs and Border Protection Service.

<sup>69</sup> All of the internal disclosures made to the Ombudsman's office were about suspected disclosable conduct in other agencies.

<b>Receiving Agency</b>	<b>No. of PIDs received</b>
Bureau of Meteorology	4
Department of Finance	4
Department of Health	4
Department of Industry, Innovation and Science (formerly Department of Industry and Science, and prior to that, Department of Industry)	4
Australian Financial Security Authority	3
Department of Education and Training (formerly Department of Education)	3
Department of Employment	3
Murray Darling Basin Authority	3
Office of the Fair Work Building Industry Inspectorate (known as Fair Work Building and Construction)	3
Torres Strait Regional Authority	3
Australian Communications and Media Authority	2
Australian Curriculum, Assessment and Reporting Authority	2
Australian Public Service Commission	2
Australian Transaction Reports and Analysis Centre (AUSTRAC)	2
Australian War Memorial	2
Australian Nuclear Science and Technology Organisation	2
Defence Housing Australia	2
Department of the Prime Minister and Cabinet	2
Fair Work Ombudsman	2
Family Court & Federal Circuit Court	2
National Archives of Australia	2
National Offshore Petroleum Safety and Environmental Management Authority	2
SBS Corporation	2
Administrative Appeals Tribunal	1
ASC Pty Ltd.	1
Australian Electoral Commission	1
Australian Institute for Teaching and School Leadership	1
Australian National Audit Office	1
Australian National Maritime Museum	1
Australian Nuclear Science and Technology Organisation	1
Australian Radiation Protection and Nuclear Safety Agency	1
Australian Transport Safety Bureau	1
Commonwealth Director of Public Prosecutions	1
ComSuper	1
Department of Environment	1
Department of Prime Minister & Cabinet	1
Director of Public Prosecutions	1
Indigenous Land Corporation	1
Inspector-General of Intelligence and Security	1
Museum of Australian Democracy at Old Parliament House	1
National Disability Insurance Agency	1
National Film and Sound Archive	1

<b>Receiving Agency</b>	<b>No. of PIDs received</b>
National Gallery of Australia	1
National Library of Australia	1
Office of the Inspector-General for Intelligence and Security	1
Reserve Bank of Australia	1
<b>Total PIDs received by all agencies</b>	<b>1336</b>