

Review of the
Public Interest Disclosure Act 2010
Issues paper



January 2023



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The Review of the *Public Interest Disclosure Act 2010* is seeking submissions in response to this issues paper. Any personal information contained in correspondence, including in any attached document or submission, will be collected by the Department of Justice and Attorney-General for the purpose of undertaking the review.

Submissions to the Review will be treated as public documents. They may be published on the Department's website along with the name of each person or organisation making the submission. If you would like your submission, or any part of it, to be treated as confidential you must clearly state this in your submission.

All submissions may be subject to disclosure under the *Right to Information Act 2009* or the *Information Privacy Act 2009* and access applications for submissions, including those submissions marked confidential, will be determined in accordance with the Acts. For more information about submissions and how the Review will deal with them, see Part 2.

An individual, group or organisation may publish their own submission if they choose to do so (for example they may publish their submission on their website).

Review of the *Public Interest Disclosure Act 2010* Issues Paper

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Assistance

If you need a translator, call 131 450. If you are deaf or have a hearing or speech impairment: contact us through the National Relay Service. For more information, visit: www.relayservice.gov.au.



Glossary

ADR	alternative dispute resolution
Attorney-General	Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence
CCC	Crime and Corruption Commission Queensland
Coaldrake Report	final report delivered by Professor Peter Coaldrake AO on 28 June 2022 titled <i>Let the sunshine in: Review of culture and accountability in the Queensland public sector</i>
Department	Department of Justice and Attorney-General
discloser	a person who makes a PID
GOC	government owned corporation
Ombudsman Report	report delivered by the Queensland Ombudsman in January 2017 pursuant to section 62 of the PID Act titled <i>Review of the Public Interest Disclosure Act 2010</i>
PID	public interest disclosure
PID Act	<i>Public Interest Disclosure Act 2010</i> (Qld)
proper authority	defined in section 5 of the PID Act as a public sector entity or a member of the Legislative Assembly
public officer	defined in section 7 of the PID Act and includes an employee, member or officer of a public sector entity
public sector entity	defined in section 6 of the PID Act and includes a department, local government, registered higher education provider or TAFE Queensland, court or tribunal, and an entity established under an Act or under State or local government authorisation for a public, State or local government purpose
QHRC	Queensland Human Rights Commission
Review	Review of the PID Act pursuant to the Terms of Reference made by the Attorney-General on 21 November 2022
Reviewer	the Honourable Alan Wilson KC
Standards	standards issued by the Queensland Ombudsman under section 60 of the PID Act
subject officer	a person about whom a PID is made
witness	a person, other than the discloser, who provides information about wrongdoing about which a PID is made



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1. Introduction

1.1. The Review

The Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence has appointed the Honourable Alan Wilson KC to conduct a review of the *Public Interest Disclosure Act 2010* (PID Act).

Mr Wilson is being assisted by a Public Interest Disclosure Review Secretariat at the Department of Justice and Attorney-General.

1.2. Scope of the Review

The Review will consider the objects, purpose and function of the PID Act including recent reviews, recommendations, developments in other jurisdictions, research and other information it considers relevant. The Review will also be informed by consultation, including submissions in response to this issues paper.

The Review's terms of reference are [available online](#)¹ and include:

- whether the objects of the PID Act are valid and are being achieved;
- the scope of public interest disclosures (PIDs) and persons who may make a PID, protections for disclosers and processes for dealing with PIDs;
- the roles of the Queensland Ombudsman and other integrity bodies for PIDs, including the Crime and Corruption Commission (CCC);
- arrangements for education and training about the PID Act in the public sector;
- recent whistleblowing reviews and developments in other jurisdictions which represent good practice and recent research about public integrity; and
- whether the PID Act is consistent with the *Human Rights Act 2019*.

Matters out of scope

The Review will not consider, undertake enquiries or research, or make recommendations in respect of the definition of 'corrupt conduct' in section 15 of the *Crime and Corruption Act 2001*, or the implementation of the Parliamentary Crime and Corruption Committee's recommendations relating to public interest disclosures by CCC officers.

Reporting timeline

The Reviewer has been asked to provide a final report to the Attorney-General by 30 April 2023.

1.3. Purpose of issues paper

The purpose of this issues paper is to:

- (a) seek submissions to inform the Review; and
- (b) provide information and consultation questions to those wishing to make a submission.

¹ Available at: <https://www.justice.qld.gov.au/community-engagement/community-consultation/current/review-public-interest-disclosure-act-2010>.



2. Making a submission

The Review is seeking submissions from individuals, groups and organisations.

2.1. What can be included in a submission?

The questions in this issues paper are provided as a guide. However, submissions may take any form or structure and may respond to some or all questions or address other issues or topics. A consolidated list of the questions for consideration is in the Appendix.

A submission may include feedback, comments, proposals or opinions about the operation of the PID Act, for example:

- problems or challenges in applying the PID Act;
- a personal account of how the current procedures for PIDs have affected you (subject to any confidentiality obligations you may have);
- ideas for encouraging reporting of wrongdoing in the public sector; and
- suggestions for best practice to manage PIDs.

2.2. How will submissions be used?

The Review will use submissions to assist in forming conclusions and making recommendations. The Review may contact you about your submission or the issues you raise.

Submissions will be treated as public documents and may be published on the Department's website. The name of each person making a submission and extracts from submissions may be included in the final report of the Review, which will be provided to the Attorney-General. Submissions may also be incorporated in other review materials, including presentations and briefings.

The Review will redact personal information when submissions are published, such as contact details and signatures. Submissions may also be redacted before publication if necessary – for example, to protect the identity of a discloser or subject officer. The Review and the Department will not publish any content it considers may be offensive, insulting or defamatory or may compromise an investigation process.

An individual, group or organisation may publish their own submission if they choose (for example they may publish their submission on their website).

Confidential submissions

The Review will accept and consider submissions made on a confidential basis.

You can request that all or part of your submission be treated confidentially. If you want your submission treated confidentially you must indicate this clearly or mark relevant sections as 'confidential'.

A person should consider and comply with any confidentiality requirements that may apply to them before making a submission.

Confidential submissions will not be published on the Department's website and any references to the submission will not identify the author. Extracts or quotes from confidential submissions may be included in the final report but will not be attributed or include the name of the submitter.

Submissions may be subject to disclosure under the *Right to Information Act 2009* or the *Information Privacy Act 2009* and applications for access to submissions (including confidential submissions) will be determined in accordance with those Acts.



What the Review cannot deal with

The Review is not a 'proper authority'² for the PID Act and is not able to investigate, deal with or influence the handling of current or past PIDs or complaints.

Any material received by the Review which may be a PID will be referred to the Department's Ethical Standards Unit to be handled in accordance with the Department's [Public Interest Disclosure Policy](#).³ If appropriate, submissions or material may be referred to other departments or authorities as required by law, including confidential submissions.

If you want to make a PID or have a complaint about how a PID has been dealt with, you should contact the relevant proper authority or the Queensland Ombudsman. You may also wish to seek legal advice.

Information about PIDs and how to make them is available on the [Queensland Ombudsman's website](#).⁴

2.3. How to make a submission

Submissions can be made electronically or in hard copy, although electronic submissions are preferred. Please include:

- the name of the submitter, group or organisation;
- contact details including a contact person if applicable; and
- any request for confidentiality.

If you choose to respond to some or all of the questions in this issues paper please use the question numbering provided.

Electronic submissions

Please provide electronic submissions in Word or PDF format. Electronic submissions may be emailed to: PIDActReview@justice.qld.gov.au.

Hard copy submissions

Please provide hard copy submissions in A4 format as they will be scanned for publication. Please do not provide original documents as submissions will not be returned.

Hard copy submissions may be mailed to:

Public Interest Disclosure Review Secretariat
Strategic Policy and Legal Services
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

Assistance

If you are unable to make a submission in writing you may contact the Public Interest Disclosure Review Secretariat for information about how we can help you by phoning (07) 3738 9919 or emailing PIDActReview@justice.qld.gov.au.

2.4. Due date for submissions

Submissions can be made until **5pm on Friday 24 February 2023**.

² See [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 5-6 for the meaning of proper authority.

³ Available at: <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/9e1f7f16-0749-4d10-b05f-e8857956a063/djaq-public-interest-disclosure-policy.pdf?ETag=8cefa908ddd9c800800d429e600c9646>.

⁴ Available at: <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures>.



3. Issues for consideration

3.1. Policy objectives of the PID Act

Whistleblowers have been identified as the most important source of information about wrongdoing in the public sector in Australia.⁵ The PID Act is a key part of Queensland's integrity framework and is designed to prevent, uncover and combat corruption and wrongdoing in Queensland's public sector.

The PID Act was passed on 20 September 2010 and commenced on 1 January 2011. It replaced the *Whistleblowers Protection Act 1994*.

The main objects of the PID Act are:

- to promote the public interest by facilitating PIDs of wrongdoing in the public sector;
- to ensure that PIDs are properly assessed and, when appropriate, properly investigated and dealt with;
- to ensure that appropriate consideration is given to the interests of persons who are the subject of a PID (subject officers); and
- to afford protection from reprisals to persons making PIDs.⁶

The PID Act's objectives must accord with the *Human Rights Act 2019*, which recognises an individual's rights to freedom of expression, take part in public life, privacy and reputation, liberty and security of the person and a fair hearing. The PID scheme also reflects Australia's commitments under international frameworks to protect people reporting corruption and to uphold the rights to safe and healthy working conditions and equal opportunities for advancement.⁷

Questions to consider

1. Are the objects of the PID Act valid and is the Act achieving these objects? Has the PID Act been effective in uncovering wrongdoing in the public sector?
2. Is the title of the legislation suitable? Should any other terms, such as 'whistleblower' or 'wrongdoing', be included in the title or used in the legislation?
3. Are changes needed to ensure public confidence in the integrity of the PID regime?
4. Are any changes needed to the PID Act to make it more compatible with the *Human Rights Act 2019*?

3.2. What is a public interest disclosure?

A PID is a report about wrongdoing that entitles the discloser to protections under the PID Act, such as confidentiality, immunity from liability and protection against reprisal. The PID Act sets out requirements for the types of disclosures that attract these protections.

Types of wrongdoing considered PIDs

Under the PID Act, a 'public officer' of a 'public sector entity' (including employees of State government, local governments, universities and TAFEs)⁸ can report:

- corrupt conduct, as defined in section 15 of the *Crime and Corruption Act 2001*;
- maladministration that adversely affects a person's interests in a substantial and specific way;

⁵ [Brown, A.J. \(2008\). *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*. Acton, ACT: ANU E-Press.](#)

⁶ [Public Interest Disclosure Act 2010 \(Qld\) s 3.](#)

⁷ [United Nations Convention Against Corruption, GA Res 58/4, UN Doc A/58/422 \(14 December 2005, adopted 31 October 2003\) Art. 33.](#) Australia adopted the convention by [ratification on 7 December 2005](#); [International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 \(entered into force 3 January 1976\)](#). Australia adopted the ICESCR by [ratification on 12 October 1975](#), but has not adopted the Optional Protocol.

⁸ Section 6 of the [Public Interest Disclosure Act 2010 \(Qld\)](#) defines public sector entity and s 7 defines public officer.



- a substantial misuse of public resources;
- a substantial and specific danger to public health or safety; or
- a substantial and specific danger to the environment.⁹

Any person can report:

- a substantial and specific danger to the health and safety of a person with a disability;
- an offence or contravention that is a substantial and specific danger to the environment; or
- a reprisal against a person who has made or intends to make a PID.¹⁰

The Act also allows reports to be made about certain types of wrongdoing by government owned corporations (GOCs) and Queensland Rail.¹¹

As a result, the types of wrongdoing a discloser can report (and that attract the protections of the Act) depend on the identity of the discloser and the type of entity the wrongdoing relates to. The wrongdoing must also meet one or more of the definitions in the Act. Navigating the definitions in the Act could be a potential barrier for some disclosers if they are unsure whether the relevant conduct meets the necessary threshold.

The PID Act allows any person to report substantial and specific dangers to people with a disability or the environment and obtain PID protections. Other issues such as serious risks to other vulnerable groups (for example, children in the child protection system) are not matters about which a member of the public can make a PID. In its 2017 review of the PID Act (Ombudsman Report), the Queensland Ombudsman found that low numbers of PIDs were being made by members of the public about dangers to people with a disability or the environment. In light of this and the availability of alternative complaint mechanisms to deal with these issues, the Ombudsman recommended they be removed from the PID regime.¹²

Approaches to defining the scope of wrongdoing that attracts PID protections for disclosers vary in other jurisdictions. The Commonwealth, New South Wales and New Zealand PID legislation each include definitions that may be useful for considering whether the current scope of Queensland's provisions are appropriate.¹³

Individual employee grievances and PIDs

In the Ombudsman Report, the Queensland Ombudsman considered whether personal workplace grievances should be dealt with under the PID Act. The Public Service Commission provides a framework for dealing with workplace grievances which are termed 'individual employee grievances'. These matters largely relate to administrative decision making, conduct or behaviour that may be a breach of the code of conduct or behaviour considered to be unfair or unreasonable. The Ombudsman found there was overlap between grievances which were assessed as PIDs and other mechanisms for dealing with these concerns. It also found that dealing with these matters as PIDs could cause delays in resolving issues as they may be better suited to informal resolution.¹⁴

The Ombudsman also acknowledged the findings of the review of the Commonwealth PID Act that 'occasionally, a personal employment-related grievance can be symptomatic of a larger, systemic concern... Such concerns should attract the protection of the PID Act.'¹⁵

Research from 2019 found there can often be connections between disclosures that involve personal grievances and those that involve broader integrity concerns.¹⁶ It has also been recognised that a

⁹ [Public Interest Disclosure Act 2010 \(Qld\) s 13.](#)

¹⁰ [Public Interest Disclosure Act 2010 \(Qld\) s 12.](#)

¹¹ [Public Interest Disclosure Act 2010 \(Qld\) s 19.](#)

¹² [Clarke, P. \(2017\). Review of the Public Interest Disclosure Act 2010. Brisbane, QLD: Queensland Ombudsman. Recommendation 4.](#)

¹³ [Public Interest Disclosure Act 2013 \(Cth\) s 29; Public Interest Disclosures Act 2022 \(NSW\) s 13, Sch 2; Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\) s 10.](#)

¹⁴ [Clarke, P. \(2017\). Review of the Public Interest Disclosure Act 2010. Brisbane, QLD: Queensland Ombudsman. p 29.](#)

¹⁵ [Moss, P. \(2016\). Review of the Public Interest Disclosure Act 2013. Canberra, ACT: Department of Prime Minister and Cabinet. p 32. Cited in: Clarke, P. \(2017\). Review of the Public Interest Disclosure Act 2010. Brisbane, QLD: Queensland Ombudsman. p 31.](#)

¹⁶ [Brown, A.J. et al. \(2019\) Clean as a whistle: a five-step guide to better whistleblowing policy and practice in business and government. Brisbane, QLD, Griffith University. Fig 4.](#)



person may only observe or witness a part of systemic wrongdoing and that disclosures about seemingly minor matters may lead to the discovery of more serious wrongdoing.¹⁷

The Queensland Ombudsman recommended that, to strike the balance between addressing administrative challenges and ensuring that PID protections are not lost, the PID Act should be amended so that disclosures solely about personal workplace grievances are not protected except in specific circumstances, such as if the grievance is indicative of a wider systemic issue.¹⁸

A 'public interest' or 'risk of harm' test?

One option canvassed by the Queensland Ombudsman for determining what matters should be considered PIDs is the introduction of a 'public interest' test. This could involve an assessment of whether a disclosure relates solely to a personal matter or may also include broader systemic concerns.¹⁹ An alternative could be to decide PID status based on the risk of harm the conduct creates rather than the criminality or illegality of the conduct.²⁰

Discloser's state of mind

Under the PID Act, a discloser must either have an honest belief on reasonable grounds that the information they disclose demonstrates wrongdoing – or the information disclosed must in fact be sufficient to demonstrate the wrongdoing regardless of the person's state of mind.²¹ The discloser is entitled to the protections of the Act regardless of whether the alleged wrongdoing is ultimately substantiated.

International bodies advise caution when implementing 'good faith' requirements for disclosers, in part because over-emphasis on a person's motives may deter reporting and because reports that are made with ulterior motives may yet be vital in uncovering wrongdoing in an organisation.²² This must be balanced against the need to appropriately deal with people who knowingly and maliciously report false information.

Questions to consider

5. What types of wrongdoing should the PID regime apply to? Should the scope be narrowed or broadened? Why and how?
6. Should a PID include disclosures about substantial and specific dangers to a person with a disability or to the environment? Why or why not?
7. Is there benefit in introducing a public interest or risk of harm test in the definition of a PID?
8. Should a person be required to have a particular state of mind when reporting wrongdoing to be protected under the PID regime? Are the current provisions appropriate and effective?

¹⁷ [UNODC. \(2015\). *Resource Guide on Good Practices in the protection of Reporting Persons*. Vienna: United Nations](#), p 22.

¹⁸ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman Recommendation 7; Griffith University, Transparency International and Human Rights Law Centre, 2022, *Protecting Australia's Whistleblowers: The Federal Roadmap*, report, Queensland](#). Further discussion on the power to 'declare' or 'deem' PIDs is contained in section 3.5 of this issues paper.

¹⁹ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman](#), p 29.

²⁰ [All Party Parliamentary Group for Whistleblowing, 2019, *The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring it*, report, United Kingdom](#), p 11.

²¹ [Public Interest Disclosure Act 2010 \(Qld\) s 13\(3\)](#).

²² [UNODC. \(2015\). *Resource Guide on Good Practices in the protection of Reporting Persons*. Vienna: United Nations](#), p 25; [Council of Europe. \(2014\). *Protection of Whistleblowers Recommendation CM/Rec\(2014\)7 and explanatory memorandum*](#), p 39.



3.3. Who can make a public interest disclosure?

The PID Act refers to three types of disclosers: public officers, employees of GOCs or Queensland Rail, and any person.²³ Each of them is eligible for protection if they report certain types of wrongdoing.²⁴

In its 2017 report, the Queensland Ombudsman recommended the definition of public officer be expanded to include volunteers, contractors, trainees, students and others in employment-like arrangements in the public sector.²⁵ (In the private sector, PIDs made under the *Corporations Act 2001* (Cth) can also be made by relatives of employees or public officers.²⁶)

Since 2015, the majority of PIDs in Queensland under the PID Act have been made by public officers, with PIDs made by members of the public accounting for between 1.5% and 6.5% annually.²⁷

In practice a significant number of PIDs are made by public officers in the ordinary course of their duties such as auditors, IT staff or managers who pass on disclosures they receive from team members. These are often referred to as PIDs made by 'role reporters'. Some role reporters may make multiple PIDs about different staff members – for example, a single IT officer may disclose inappropriate access of IT systems made by multiple staff members. Under the current arrangements, role reporters are entitled to the same protections and support as an individual discloser, even though their needs may be different.

In NSW, PIDs are categorised according to whether they are made voluntarily, as a witness providing information in an investigation or because of a mandatory reporting requirement (including as part of their usual duties).²⁸ Consideration could be given to creating categories of disclosers and having separate arrangements for role reporters that are more appropriately tailored to their position and circumstances.

Questions to consider

9. Who should be protected by the PID regime? Should the three categories of disclosers (public officer, employees of government owned corporations or Queensland Rail, and any person) be retained? Why or why not?
10. Should the definition of public officer be expanded to include those performing services for the public sector whether paid or unpaid, for example volunteers, students, contractors and work experience participants? Should former public officers be covered?
11. Should relatives of disclosers, or witnesses be eligible to make PIDs? Should they, or anyone else, be entitled to protection under the PID regime?
12. Should different arrangements apply to role reporters? Why and how?

3.4. Experiences of people who witness and report wrongdoing

The Review understands that reporting wrongdoing may be stressful, and have both personal and broader impacts. From the time a person notices something, they must make decisions which can affect their career, those around them, and society more generally.

The experience of disclosers can vary – for some, it may be positive but for others it may be mixed, or negative.

²³ Section 19 of the *Public Interest Disclosure Act 2010 (Qld)* defines GOCs and rail government entities and s 12 defines 'any person'.

²⁴ Discussion about the subject matter of disclosures is contained in section 3.2 of this issues paper.

²⁵ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman. Recommendation 9.](#)

²⁶ See, for example, *Corporations Act 2001 (Cth)* ss 1242, 1317AAA(g).

²⁷ Based on data collected by the Queensland Ombudsman and published in Annual Reports between 2017-18 and 2021-22, available at: <https://www.ombudsman.qld.gov.au/about-us/corporate-documents/annual-report>.

²⁸ *Public Interest Disclosures Act 2022 (NSW)* ss 21-23, 26.



Individuals who have seen and reported wrongdoing provide a unique and vital perspective when considering possible reforms to improve the experience for disclosers.

Research conducted in Queensland found that:

... whistleblowing does not have to be a universally damaging experience for reporters or organisations. On average, more than half of reporters in our research indicated they were treated well or no differently by management and colleagues... While this still means adverse outcomes for reporters in many organisations, it also means organisations have a major opportunity to ensure that their assessments of reports leads to actions aimed at minimising those outcomes.

Further, the fact that whistleblower suffering is not inevitable creates an obligation on organisations to make their best efforts to prevent detrimental outcomes.²⁹

A person making a report, an agency and the courts may have different views about whether a reporter is a discloser under the PID Act,³⁰ meaning that opportunities to provide support to the person may be lost depending on whether the PID Act is considered to apply.

The Review is interested to understand what aspects of the PID regime are working well from the perspective of disclosers, and what aspects can be improved. The Review is also interested to hear about perceptions of the fairness and transparency of the PID regime, including from any reporters whose matters were not dealt with under the PID Act.

The Review acknowledges that people who report wrongdoing may be subject to confidentiality requirements outside the PID Act, such as a direction given under the *Public Service Act 2008*. Submitters to the Review should ensure they comply with any confidentiality requirements that apply to them.

Questions to consider

13. How would you describe your experience in reporting wrongdoing under the PID Act? Do you have any suggestions for improvements?
14. What factors impacted your decision to report or not report wrongdoing? Did you encounter any barriers or obstacles during the process? How can the PID regime encourage disclosers to come forward?
15. Were you supported effectively during the process? Would alternative or additional support have been helpful?
16. Did you feel your disclosure was taken seriously, assessed in a timely way, investigated fairly and addressed appropriately?

3.5. Making, receiving and identifying PIDs

Disclosures to proper authorities

The PID Act requires disclosures to be made to a proper authority, namely a public sector entity or a member of the Legislative Assembly.³¹

Generally, there is no requirement for a person to make a disclosure to a specific agency.³² This is consistent with a 'no wrong doors' approach to reporting wrongdoing which ensures potential disclosers have a range of reporting options and are not required to report to the entity or person the

²⁹ [Brown, A.J. et al. \(2019\) *Clean as a whistle: a five-step guide to better whistleblowing policy and practice in business and government*. Brisbane, QLD. Griffith University.](#) p 23 (citations omitted).

³⁰ See for example, [Acreman v Deputy Commissioner Pointing \[2021\] QCATA 133](#); [Baragan v State of Queensland & Ors \[2022\] QCAT 202](#) at [169].

³¹ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 5, 6, 14-16.

³² Queensland Ombudsman guidance recommends that disclosers generally report concerns to the agency in which the wrongdoing occurred, see: [Queensland Ombudsman \(2011\) *Making a Public Interest Disclosure: A Guide for individuals working in the public sector*. Brisbane, QLD.](#) p 8.



subject of the report. This approach also avoids reports ‘falling through the cracks’ because they were made to an ineligible recipient.³³

There are different requirements for GOCs and Queensland Rail. Disclosures about wrongdoing by those entities can only be made either to the entity itself or to the CCC.³⁴ Similarly, reports about the judiciary can only be made either to the chief judicial officer of the relevant court or tribunal or to the CCC.³⁵

Disclosures can be made in any way including anonymously but must comply with any reasonable procedures of a proper authority.³⁶ New Zealand legislation contains similar requirements but also provides that technical non-compliance is not a barrier to protection.³⁷

In 2022 an independent Review of the Queensland public sector (the Coaldrake Report) recommended that a ‘clearing house’ be established to serve the needs of complainants who are unsure where to direct a report.³⁸ Some agencies and private companies also provide the option of an independent hotline to report wrongdoing.

Who decides PID status?

It is an agency’s responsibility to identify PIDs when they are made and take appropriate action. The Ombudsman Report recommended the PID Act be amended to require an agency that assesses a disclosure to provide a written decision to the discloser within a month about whether it has been assessed as a PID, including reasons and information about review rights.³⁹

Currently agencies are required to conduct a formal assessment about whether a matter is a PID ‘as soon as practicable’ after receiving the disclosure.⁴⁰ However, an agency’s assessment of whether a disclosure is a PID is not binding: if an agency receives information after an assessment which alters its view about whether a disclosure is a PID, the agency may revise its treatment of the disclosure without formally re-assessing the matter.⁴¹ Alternatively, a court or tribunal may determine that information is a PID even if it has never been recognised or asserted to be one.⁴²

Legislation in some jurisdictions allows reports to be ‘deemed’ to be PIDs in certain circumstances. This enables agencies to offer protection to individuals who may fall outside the PID regime because of a technicality or provide certainty about PID status. For example, receiving agencies in NSW are permitted to deem certain disclosures to be a voluntary PID even if they do not meet the statutory definition.⁴³ In the Northern Territory, a reporter of wrongdoing can apply to the Independent Commissioner Against Corruption for a declaration that their disclosure is a protected communication, and the Commissioner’s declaration is binding upon agencies.⁴⁴

One benefit of a system that does not require a binding assessment of PID status to be made is that PID protections for disclosers can be retrospectively acknowledged, even if the disclosure has not previously been considered to be a PID. However, these arrangements may create uncertainty for agencies and disclosers about their rights and obligations.

³³ See, for example, [Griffith University, Transparency International and Human Rights Law Centre, 2022, *Protecting Australia’s Whistleblowers: The Federal Roadmap*, report, Queensland](#), p 7.

³⁴ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 6(2), 19(2).

³⁵ [Public Interest Disclosure Act 2010 \(Qld\)](#) s 16.

³⁶ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 17, 19(4)-(5).

³⁷ [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\)](#) s 11(4).

³⁸ [Coaldrake, P. \(2022\) *Let the sunshine in: Review of culture and accountability in the Queensland public sector*, report, Queensland](#), pp 40-47, 97.

³⁹ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman](#), Recommendations 17-19.

⁴⁰ [Public Interest Disclosure Standard No. 2/2019 \(Qld\)](#) p 4.

⁴¹ Queensland Ombudsman guidance suggests that once an agency assesses a matter to be a PID, PID status should not be revoked.

⁴² See, for example, [Baragan v State of Queensland & Ors \[2022\] QCAT 202](#) at [169]; [Acreman v Deputy Commissioner Pointing \[2021\] QCATA 133](#) at [135].

⁴³ [Public Interest Disclosures Act 2022 \(NSW\)](#) ss 29, 49. A person may seek an internal review of decisions to deal with a report as a PID (s60), However, an agency’s decision is not binding once made: [Public Interest Disclosures Act 2022 \(NSW\)](#) s 79(e).

⁴⁴ [Independent Commissioner Against Corruption Act 2017 \(NT\)](#) s 94.



Referring PIDs between agencies

The PID Act contains provisions that allow agencies to refer disclosures to another agency if the initial agency that receives the PID is not the appropriate body to deal with it.⁴⁵

The Queensland Ombudsman has acknowledged that administrative complexities can arise when a discloser makes a report to multiple agencies or when a matter is referred between agencies.⁴⁶ Considerations may include which agency is best placed to support the discloser and the extent of information which can be shared as part of the referral.⁴⁷ The Queensland Ombudsman's PID Standards provide some guidance about how these matters should be dealt with.⁴⁸

Disclosures to the media and third parties

Many PID schemes include protection for people who disclose their concerns to third parties, such as the media. These disclosures, or the possibility they could occur, can galvanise an agency to take steps to address a problem it has otherwise failed to deal with. They can also ensure appropriate public scrutiny. The term 'third parties' does not only refer to the media: in some circumstances, these outcomes may also be achieved by advocacy from peak bodies or special interest groups without the need for broader publicity.

The PID Act provides protection for disclosers who report wrongdoing to journalists (but not other third parties) in limited circumstances such as if the agency decided not to investigate the matter, did not recommend taking action or did not notify the discloser about the matter within six months.⁴⁹ Under the Act, a disclosure to a journalist is intended to be an 'avenue of last resort' and protections only apply if internal disclosure options have been exhausted.⁵⁰

Approaches to third party disclosures in other jurisdictions are varied. Under Commonwealth legislation, third party disclosures are permitted in emergencies or for seeking legal advice.⁵¹ In NSW, a disclosure to a journalist is only protected if the content of the disclosure is substantially true.⁵² New Zealand legislation requires external disclosures to be made to a Minister and is silent on disclosures to the media.⁵³

New Zealand also allows disclosure to third parties (for example friends, colleagues, union representatives or legal advisors) if done confidentially and for the purpose of seeking advice about whether or not to make a formal disclosure.⁵⁴ In workplace investigations, interviewees are commonly able to nominate and disclose to a support person. Consideration could be given to reforms to enable disclosers to repeat their concerns to limited members of their usual support network, which may assist to alleviate feelings of isolation that have been reported by some disclosers during the PID process.⁵⁵

⁴⁵ [Public Interest Disclosure Act 2010 \(Qld\) s 31](#).

⁴⁶ [Clarke, P. \(2017\). Review of the Public Interest Disclosure Act 2010. Brisbane, QLD: Queensland Ombudsman](#), pp 44-47.

⁴⁷ See section 3.6 of this issues paper on supporting disclosers and section 3.7 on confidentiality and information-sharing between agencies.

⁴⁸ [Public Interest Disclosure Standard No. 2/2019 \(Qld\)](#) pp 5, 7-8, 12.

⁴⁹ [Public Interest Disclosure Act 2010 \(Qld\) s 20](#).

⁵⁰ [Explanatory Notes Public Interest Disclosure Act 2010 \(Qld\)](#) p 10.

⁵¹ See, for example, [Public Interest Disclosure Act 2013 \(Cth\)](#) s 26; [Corporations Act 2001 \(Cth\)](#) ss 1317AA, 1317AAD.

⁵² [Public Interest Disclosures Act 2022 \(NSW\) s 28\(1\)\(a\)](#).

⁵³ [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\)](#); cf. [Law on the protection of public officials complaining about violations of the law 2004 \(Romania\)](#); [Sveriges grundlagar](#) [Basic Laws of Sweden], comprising [Tryckfrihetsförordningen](#) [Freedom of the Press Act] 1949.

⁵⁴ [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\) s 11\(4\)](#).

⁵⁵ [Griffith University, Transparency International and Human Rights Law Centre, 2022, Protecting Australia's Whistleblowers: The Federal Roadmap report, Queensland](#), p 15. See also Nash-Arnold, N. and Walker, S. (2020). [Nursing and Midwifery Emporium: Toni Hoffman on Whistleblowing in Nursing](#). [Podcast]. Sep 11 2020. Available at: <https://anchor.fm/sue-walker/episodes/Toni-Hoffman-on-Whistleblowing-in-Nursing-ejd54c>.



Questions to consider

17. Are the requirements for making, receiving and identifying PIDs appropriate and effective?
18. Who should be able to receive PIDs? Do you support having multiple reporting pathways for disclosers? Is there a role for a clearing house or a third party hotline in receiving PIDs?
19. At what point in time should the obligations and protections under the PID regime come into effect?
20. Should the PID legislation require a written decision be made about PID status as recommended by the Queensland Ombudsman? What would the implications be for agencies?
21. Are the provisions for disclosures to the media and other third parties appropriate and effective? Are there additions or alternatives that should be considered?
22. Should the PID process for government owned corporations or Queensland Rail be different to those for public sector entities? Why or why not? Are the current arrangements appropriate and effective?

3.6. Managing, investigating and responding to PIDs

Processes and procedures

The PID Act requires public sector entities to develop procedures for handling PIDs.⁵⁶ It also includes requirements about record-keeping, the circumstances in which no action is required and informing disclosers of certain matters, such as action taken about a disclosure.⁵⁷ The Queensland Ombudsman has published binding Standards about dealing with PIDs.

In some jurisdictions, PID legislation includes provisions about other procedural matters such as:

- timeframes for certain actions;⁵⁸
- how agencies are to determine who is most appropriate to deal with the PID;⁵⁹
- the obligations of public officers during investigations;⁶⁰ and
- the conduct of investigations and content of investigation reports.⁶¹

In some cases a PID may intersect with other laws, including the Commonwealth PID regime, employment law, and rules about privilege. Legislation in some jurisdictions contain provisions addressing some of these interactions.⁶²

Support for disclosers

The PID Act requires agencies to consider the risk of reprisal when deciding whether to refer a PID to another agency⁶³ but otherwise does not include provisions about how and when the risks to disclosers should be assessed and managed. The PID Act does not address which entity has responsibility for providing support to a discloser when PIDs are referred between agencies.

The Queensland Ombudsman's Standards require that agencies address these issues in their PID policies. The Standards also provide guidance about how risk assessments should be carried out and the support to be given to disclosers.⁶⁴

⁵⁶ [Public Interest Disclosure Act 2010 \(Qld\) s 28.](#)

⁵⁷ [Public Interest Disclosure Act 2010 \(Qld\) ss 29, 33, 30, 32.](#)

⁵⁸ See, for example, [Public Interest Disclosure Act 2013 \(Cth\) s 52](#); [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\) s 13.](#)

⁵⁹ [Public Interest Disclosures Act 2013 \(Cth\) s 43\(3\)](#); [Public Interest Disclosures Act 2022 \(NSW\) ss 55-56.](#)

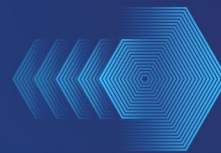
⁶⁰ [Public Interest Disclosures Act 2013 \(Cth\) s 66](#)

⁶¹ [Public Interest Disclosures Act 2013 \(Cth\) ss 47, 49, 51, 54.](#)

⁶² See, for example, [Public Interest Disclosures Act 2022 \(NSW\) Part 1, Div 2](#); [Public Interest Disclosure Act 2013 \(Cth\) ss 22-22A, 79-82.](#) Further discussion on the interaction between employment law and the PID Act is included in section 3.7 of this issues paper.

⁶³ [Public Interest Disclosure Act 2010 \(Qld\) s 31.](#)

⁶⁴ [Public Interest Disclosure Standard No. 2/2019 \(Qld\) pp 10-11.](#)



Support for subject officers and witnesses during the PID process

The process of disclosing and dealing with reports of wrongdoing under the PID Act involves managing the interests and rights of all parties, including people under investigation and people identified as potential witnesses. A witness may be a person other than the discloser who observed the wrongdoing and may be able to provide information during an investigation or other process. The Ombudsman Report found that the Act did not contain adequate provisions to take these interests into account.⁶⁵ It recommended the PID Act be amended to:

- require agencies to have reasonable procedures to ensure procedural fairness to all parties;
- require investigating agencies to provide reasonable information in writing to subject officers in addition to disclosers; and
- protect employees who are the subject of an unsubstantiated PID from detriment.⁶⁶

The PID legislation in NSW imposes a positive duty on receiving agencies to assess and minimise the risks of reprisals against both disclosers and subject officers. If they fail to do so, they may be liable to pay damages.⁶⁷ While the PID Act does not contain a specific duty of care, the Queensland Court of Appeal has found that employers have a duty to minimise the risk of psychological injury to employees who are the subject of complaints or investigations.⁶⁸

Opting out of the PID regime

As the PID Act allows a broad range of people to make a disclosure, there may be resourcing impacts on agencies required to conduct ongoing risk assessments and provide support to role reporters. There may also be limits to the kinds of support a public sector entity can practically provide, particularly to members of the public or officers of other agencies.⁶⁹

In these circumstances, the PID Act or Standards may benefit from flexibility to allow individuals to 'opt in and out' of administrative protections – either on a case by case basis or by allowing risk assessments to be considered in terms of 'overall risk' of reprisal to an individual because of their role within an agency.

Addressing wrongdoing

The PID Act requires that each agency's procedures 'ensure that... appropriate action is taken in relation to any wrongdoing that is the subject of a public interest disclosure made to the entity',⁷⁰ but does not prescribe the action an agency may take to address the subject matter of a PID. The Queensland Ombudsman's electronic PID reporting system provides an indicative list of actions that could be taken to resolve the wrongdoing disclosed in a PID.

New South Wales PID legislation is more specific about how wrongdoing should be addressed. It requires those who make a disclosure to assist in an investigation, requires agencies to take corrective action in response to the wrongdoing found, and lists possible resolutions including formal apologies, payment of compensation, publication of findings or internal policy or procedural reform.⁷¹

⁶⁵ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman.](#) pp 62-63.

⁶⁶ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman.](#) Recommendations 27-29.

⁶⁷ [Public Interest Disclosures Act 2022 \(NSW\)](#) ss 61-62.

⁶⁸ [Hayes v State of Queensland \[2017\] 1 Qd R 337](#) at 348-349.

⁶⁹ [Public Interest Disclosure Standard No. 2/2019 \(Qld\)](#) p 12 sets guidance on formulating support options for non-employees.

⁷⁰ [Public Interest Disclosure Act 2010 \(Qld\) s 28\(1\)\(c\)](#).

⁷¹ [Public Interest Disclosures Act 2022 \(NSW\)](#) ss 65-66.



Questions to consider

23. Are the requirements for managing, investigating and responding to PIDs appropriate and effective?
24. Are agencies able to provide effective support for disclosers, subject officers and witnesses? Are any additional or alternate powers, functions or guidance needed?
25. Should the PID Act include duties or requirements for agencies to:
 - a. take steps to correct the reported wrongdoing generally or in specific ways?
 - b. provide procedural fairness to the discloser, subject officer and witnesses?
 - c. assess and minimise the risk of reprisals?
26. Should a discloser be able to opt out of protections afforded under the Act, such as the requirement to receive information or be provided support? Should this only apply to role reporters, or to any type of discloser?

3.7. Protections for disclosers, subject officers and witnesses

The PID Act contains a range of protections for disclosers including:

- immunity from liability for making a PID;⁷²
- protection from reprisals by making a reprisal a criminal offence;⁷³
- availability of criminal, civil (tort and vicarious liability), administrative and anti-discrimination law remedies for reprisals;⁷⁴
- entitlement to seek an injunction to prevent or rectify a reprisal;⁷⁵
- confidentiality requirements;⁷⁶ and
- entitlement to relocation or transfer.⁷⁷

The Queensland Ombudsman's Standards also require agencies to provide support to disclosers.⁷⁸

The PID Act does not currently provide any protections for subject officers or witnesses who assist in investigations. However, protections available under other legislation may address some or all the needs of these individuals.⁷⁹ The Queensland Ombudsman's recommendations about including protections for these individuals are discussed in section 3.6 of this issues paper.

Immunity from liability

The PID Act provides disclosers with immunity from civil and criminal liability (including disciplinary liability) for making a disclosure.⁸⁰ This immunity includes a defence of absolute privilege in defamation actions for disclosers and protection against actions for breach of non-disclosure agreements by making a PID.⁸¹ However, the defamation protections do not extend to journalists or other third parties who publish the content of a PID.

The PID Act does not specify whether these immunities or the exceptions to the Act's confidentiality requirements extend to protect a person who repeats or voluntarily provides information about a PID to a Royal Commission, independent review or in response to a policy consultation process.

The PID Act does not provide any immunity to a person who self-reports their own wrongdoing.⁸² While this may serve to prevent misuse of the PID legislation, it may also discourage reporting by, or

⁷² [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 36-38.

⁷³ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 40-41.

⁷⁴ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 40-44, 46.

⁷⁵ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 40, 48-56.

⁷⁶ [Public Interest Disclosure Act 2010 \(Qld\) s 65](#).

⁷⁷ [Public Interest Disclosure Act 2010 \(Qld\) s 47](#).

⁷⁸ [Public Interest Disclosure Standard No. 2/2019 \(Qld\)](#) pp 9-11.

⁷⁹ For example, [Crime and Corruption Act 2001 \(Qld\)](#) ss 66-68, 71A, 211, 212, 343; [Ombudsman Act 2001 \(Qld\)](#) ss 45-47, 50, 56; [Industrial Relations Act 2016 \(Qld\)](#) ss 285, 291, 936.

⁸⁰ [Public Interest Disclosure Act 2010 \(Qld\) s 36](#).

⁸¹ [Public Interest Disclosure Act 2010 \(Qld\) s 38](#) (defence of absolute privilege), s 37 (non-disclosure agreements).

⁸² [Public Interest Disclosure Act 2010 \(Qld\) s 39](#).



complicate litigation involving, people who are part of or discover broader systemic issues.⁸³ New South Wales legislation provides an example of how these considerations can be balanced: it gives the Attorney-General in NSW discretion to provide undertakings about the extent to which a self-disclosure can be used as evidence against the discloser.⁸⁴

Protection against reprisals

The PID Act prohibits a person from causing, conspiring or attempting to cause a detriment to someone because they or another person have or may make a PID, or are involved in a proceeding under the PID Act.⁸⁵ The PID does not have to be the sole reason for the detrimental action but it must be a 'substantial' reason for it.⁸⁶ An employer is entitled to take reasonable management action in relation to a discloser only if the reasons for taking action do not include the fact the person has made a PID.⁸⁷

In 2021 the NSW Ombudsman recommended the definition of reprisal be amended to clarify that a suspicion, belief or awareness of a person's involvement with the PID regime need only be a 'contributing' – rather than a 'substantial' – factor to the taking of detrimental action.⁸⁸ The NSW Ombudsman considered that the substantial factor requirement was complex and difficult to prove and 'deprive[d] the protections of much of their practical force.'⁸⁹ This recommendation was adopted and is reflected in the current NSW legislation.⁹⁰

The NSW legislation provides further guidance on the definition of 'reprisal' in the form of a list of examples of detrimental action and specifies that detriment does not include lawful investigative actions, publication of findings or criminal prosecution.⁹¹

In New Zealand there are two types of protection against reprisals: a prohibition against specific retaliatory actions by an employer and a general prohibition against victimisation.⁹²

Confidentiality

Ensuring a discloser's confidentiality is one of the most effective methods of preventing reprisals.⁹³ However, there are practical limits to the extent to which confidentiality can be guaranteed and maintained.

The PID Act provides that a discloser's identity and personal information, as well as the content of their disclosure, is confidential information which cannot be recorded or disclosed to anyone except in limited circumstances. These circumstances include:

- for the purposes of administering the PID Act;
- where consent has been obtained;
- if it is necessary for safety or welfare protection; or
- if a person may be required under the principles of natural justice to disclose information to a subject officer.⁹⁴

The Ombudsman Report found that officers administering the PID Act 'would be justifiably uncertain about the extent to which it is legitimate for them to consult another public sector entity while

⁸³ See, for example, [Acreman v Deputy Commissioner Pointing \[2021\] QCATA 133](#) at [168]-[174].

⁸⁴ [Public Interest Disclosures Act 2022 \(NSW\) s 41.](#)

⁸⁵ [Public Interest Disclosure Act 2010 \(Qld\) s 40.](#)

⁸⁶ [Public Interest Disclosure Act 2010 \(Qld\) s 40\(5\)](#); See also advice from the Director of Public Prosecutions cited in [Parliamentary Crime and Corruption Committee. \(2021\). Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council: and related matters. Brisbane, Qld: Parliamentary Crime and Corruption Committee.](#) p 46. This is also the approach in New Zealand: [Employment Relations Act 2000 \(NZ\) s110B\(2\)-\(3\).](#)

⁸⁷ [Public Interest Disclosure Act 2010 \(Qld\) s 45.](#)

⁸⁸ [Miller, P. \(2021\) Special report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021. Sydney, NSW: New South Wales Ombudsman](#) Recommendation 21.

⁸⁹ [Miller, P. \(2021\) Special report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021. Sydney, NSW: New South Wales Ombudsman.](#) pp 8-9.

⁹⁰ [Public Interest Disclosures Act 2022 \(NSW\) s 33.](#) See also [Public Interest Disclosure Act 2013 \(Cth\) s 13\(1\)\(c\).](#)

⁹¹ [Public Interest Disclosures Act 2022 \(NSW\) ss 31, 32, 33\(3\).](#)

⁹² [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\) ss 20-22.](#)

⁹³ [UNODC. \(2015\). Resource Guide on Good Practices in the protection of Reporting Persons. Vienna: United Nations.](#) p 49.

⁹⁴ [Public Interest Disclosure Act 2010 \(Qld\) s 65\(3\)-\(4\).](#)



assessing a disclosure', and recommended the Act be amended to clarify this.⁹⁵ It also identified the potential for confusion about the interaction with the *Right to Information Act 2009* and requests for information made under the *Workers' Compensation and Rehabilitation Act 2003*. The Report recommended the PID Act be amended to clarify the extent to which agencies could withhold confidential information in these circumstances.⁹⁶

Options for other protections

Non-interference and anti-gag provisions

The value of prohibitions against interfering with, or attempting to prevent, a person from making a protected disclosure has been recognised.⁹⁷ For example, New Zealand legislation contains an 'anti-gagging' provision which prevents non-disclosure agreements from requiring a person to withdraw or not to make a PID.⁹⁸ Other jurisdictions deal with efforts to subvert or prevent the making of a PID through existing obstruction of justice offences.⁹⁹

The PID Act protects disclosers who make a valid PID despite a confidentiality requirement in a non-disclosure agreement. However, the PID Act does not contain an offence for individuals who attempt to prevent or interfere with the making of a PID.

Independent authority to support disclosers of wrongdoing

Calls have been made in Australia and overseas for the establishment of an independent authority responsible for ensuring the welfare of disclosers.¹⁰⁰ Proponents generally envision that such a body would be separate to oversight or monitoring agencies and would undertake functions such as:

- providing advice and support to disclosers about their rights and options;
- receiving complaints about and investigating alleged reprisals or detriments;
- promoting best-practice policy in collaboration with existing oversight agencies; and
- supporting litigation and/or facilitating mediated outcomes if disclosers experience reprisals.

Such a body could exist as an independent agency or as a function within an existing agency, such as the CCC, Queensland Ombudsman or the proposed Victims' Commission.¹⁰¹ Recently, the Coaldrake Report indicated a reluctance to recommend the creation of new integrity bodies within the Queensland Government.¹⁰²

The structure of an independent body and its interaction with existing agencies would need to be considered in light of any potential conflicts of interest that may arise from an agency having both dual advisory and adjudication functions.

⁹⁵ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman, pp 46-47, Recommendation 16.](#)

⁹⁶ [Clarke, P. \(2017\). *Review of the Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman, pp 67-68, Recommendation 32.](#)

⁹⁷ [UNODC. \(2015\). *Resource Guide on Good Practices in the protection of Reporting Persons*. Vienna: United Nations, pp 56-57.](#)

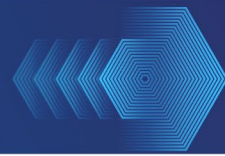
⁹⁸ [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\) s 24.](#)

⁹⁹ For example, Hungary and the USA. [UNODC. \(2015\). *Resource Guide on Good Practices in the protection of Reporting Persons*. Vienna: United Nations, p 57.](#)

¹⁰⁰ [Griffith University, Transparency International and Human Rights Law Centre. 2022. *Protecting Australia's Whistleblowers: The Federal Roadmap*, report, Queensland; All Party Parliamentary Group for Whistleblowing, 2019, *The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring it*, report, United Kingdom.](#)

¹⁰¹ Recommended by the [Women's Safety and Justice Taskforce](#) and [announced by the Premier and Attorney-General on 21 November 2022](#).

¹⁰² [Coaldrake, P. \(2022\) *Let the sunshine in: Review of culture and accountability in the Queensland public sector*, report, Queensland, pp 1, 31-32.](#)



Questions to consider

27. Are the current protections for disclosers, subject officers and witnesses appropriate and effective? Should additional or alternative protections be considered?
28. Are the current provisions about confidentiality adequate and fit for purpose? Should any improvements be considered?
29. Is the definition of reprisal appropriate and effective? Do any issues arise in identifying, managing and responding to reprisals?
30. Is there a role for an independent authority to support disclosers in Queensland? If so, what should its role be?

3.8. Remedies

The PID Act provides several remedies for disclosers.

Legal proceedings

Multiple causes of action

A reprisal is actionable in both criminal and civil law, as well as via a complaint under the *Anti-Discrimination Act 1991*. Although the PID Act requires a discloser to choose between pursuing a civil claim or a complaint under the *Anti-Discrimination Act 1991*, it does not include provisions about the interaction of civil and criminal remedies.

For example, it does not include specific provisions dealing with the interactions between civil claims in tort under section 42, applications for injunctions under section 48 and applications for administrative review under section 46, and the extent to which awards given and orders made in other proceedings (for example through separate employment claims) must be accounted for in an action under the PID Act.

By contrast, the NSW PID legislation makes it clear that civil action may be pursued even if criminal prosecution has not been brought or if a person has been acquitted.¹⁰³ The Commonwealth PID legislation contains provisions about the interaction between the PID regime and the *Fair Work Act 2009* (Cth).¹⁰⁴

Evidentiary issues

Proving reprisals

Disclosers may have difficulty in proving detrimental action was taken 'because of' a PID, or an intention to make a PID.¹⁰⁵ International guidance notes that often the party in the best position to provide evidence of the reasons for allegedly detrimental action is the person who took the action in question.¹⁰⁶

New South Wales and New Zealand PID legislation address this imbalance by only requiring a person alleging reprisal to prove a *prima facie* case, and reversing the onus to the defendant or accused to prove they took the action for an unrelated reason.¹⁰⁷ This approach accords with international guidance and the recommendations of academics,¹⁰⁸ but may conflict with principles of natural justice. In a criminal prosecution, such an approach must be considered in light of the right to the presumption of innocence.¹⁰⁹

¹⁰³ [Public Interest Disclosures Act 2022 \(NSW\) s 39](#). See also: [Public Interest Disclosure Act 2013 \(Cth\) s 19A](#).

¹⁰⁴ [Public Interest Disclosure Act 2013 \(Cth\) s 22A](#).

¹⁰⁵ Section 3.7 of this issues paper includes a discussion about this issue.

¹⁰⁶ [UNODC. \(2015\). Resource Guide on Good Practices in the protection of Reporting Persons. Vienna: United Nations](#), p 64.

¹⁰⁷ See [Public Interest Disclosures Act 2022 \(NSW\)](#) ss 33(4), 35(4), 37(7); [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\) Sch 3](#), amending the [Employment Relations Act 2000 \(NZ\) s 110B](#).

¹⁰⁸ [UNODC. \(2015\). Resource Guide on Good Practices in the protection of Reporting Persons. Vienna: United Nations](#), pp 64-65; [Brown, A.J. et al. \(2019\) Clean as a whistle: a five-step guide to better whistleblowing policy and practice in business and government. Brisbane, QLD, Griffith University](#), p 44.

¹⁰⁹ [Human Rights Act 2019 \(Qld\) s 32\(1\)](#).



Proving immunity from liability

The PID Act does not identify which party bears the onus of proof in establishing immunity from liability in proceedings. By comparison, the Commonwealth PID legislation specifies that the party seeking to rely on the immunity is required only to establish a reasonable possibility that the immunity may be relied on, at which point the onus shifts to the other party to prove otherwise.¹¹⁰

Third party disclosure

Evidentiary issues may arise when an investigating agency possesses information relevant to a plaintiff's case.¹¹¹ Ordinarily, evidence compelled by an investigating agency for one purpose cannot be admitted into evidence in a proceeding for another purpose.¹¹² Amendments to the PID Act would be needed to allow information sharing of this kind, if considered appropriate. Mechanisms such as those relating to protected counselling communications could be adapted for use in this context.¹¹³

Access to justice

Matters arising under the PID Act can result in lengthy or complex court proceedings or litigation including within the context of other substantive causes of action, such as disputes arising under employment law. The costs and delays of court proceedings and litigation can have significant impacts on disclosers.

The United Kingdom's All Party Parliamentary Group for Whistleblowing suggests this burden could be eased through the expansion of state-funded legal representation.¹¹⁴ Under Commonwealth PID legislation, costs can only be ordered against disclosers in limited circumstances.¹¹⁵

Alternate dispute resolution

The PID Act enables the Queensland Human Rights Commission (QHRC) to receive and conciliate complaints of reprisal. However, in recent years the QHRC has dealt with only a small number of these complaints.¹¹⁶

Currently there is no requirement for parties to attempt alternative dispute resolution (ADR) before pursuing litigation under the PID Act.

It is not readily apparent whether the small number of conciliated matters is a result of individuals choosing to pursue alternate remedies, concerns about the effectiveness of ADR in resolving issues under the PID Act, a lack of awareness or understanding of the options for ADR, or other factors.

Administrative redress

In 2017, the Queensland Ombudsman recommended the introduction of an administrative redress scheme for disclosers or other parties who have experienced a detriment as a result of making a disclosure or their involvement in a PID.¹¹⁷ An administrative redress scheme could allow a discloser to make an application to their agency for redress, with a focus on developing administrative outcomes or remedies rather than a person being required to pursue civil or criminal proceedings. If a person is dissatisfied with the outcome of their application for redress, it may be possible to provide for a review process under the PID Act.

An administrative redress scheme has the potential to provide more efficient resolution of claims about reprisals than criminal and civil proceedings. However, such a scheme would also create

¹¹⁰ [Public Interest Disclosure Act 2013 \(Cth\)](#) s 23.

¹¹¹ See, for example, [Kelsey v Logan City Council & Ors \[2018\] QIRC 108](#); [Parliamentary Crime and Corruption Committee. \(2021\). Inquiry into the Crime and Corruption Commission's investigation of former councillors of Logan City Council; and related matters.](#) Brisbane, Qld: Parliamentary Crime and Corruption Committee. pp 68-82.

¹¹² [Flori v Commissioner of Police \[2015\] 2 Qd R 497.](#)

¹¹³ [Evidence Act 1977 \(Qld\)](#) ss 14K-14P.

¹¹⁴ [All Party Parliamentary Group for Whistleblowing. 2019. The Personal Cost of Doing the Right Thing and the Cost to Society of Ignoring it, report, United Kingdom.](#)

¹¹⁵ [Public Interest Disclosure Act 2013 \(Cth\)](#) s 18.

¹¹⁶ [Annual reports](#) indicate the QHRC accepted eight reprisal complaints in 2021/2022, nine in 2020/2021 and six in 2019/2020.

¹¹⁷ [Clarke, P. \(2017\). Review of the Public Interest Disclosure Act 2010.](#) Brisbane, QLD: Queensland Ombudsman. p 73.



additional responsibilities and burdens for government agencies in assessing and resolving these matters.

Questions to consider

31. Are the remedies available to disclosers under the PID Act reasonable and effective? Are any changes needed?
32. Do the evidentiary requirements for remedies need amendment?
33. Are the provisions permitting complaints to the Queensland Human Rights Commission appropriate and effective? What role should alternative dispute resolution play in resolving disputes?
34. Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?

3.9. Role of the oversight agency

Existing functions and powers

The Queensland Ombudsman oversees the PID Act. Its functions are to:

- monitor compliance with the PID Act and trends in relation to PIDs;
- review how public sector entities deal with PIDs; and
- provide education and guidance, including by publishing binding Standards.¹¹⁸

The Queensland Ombudsman undertakes a range of activities to discharge these functions.

The Ombudsman monitors compliance and trends through the collection of data through electronic reporting software, RaPID. In recent years it has also introduced an annual self-assessment audit process for agencies to monitor their compliance with the PID Act.

The Ombudsman carries out its review functions using its powers under the *Ombudsman Act 2001* to investigate administrative actions and make recommendations and reports. The PID Act does not confer any additional review powers on the Queensland Ombudsman other than those set out in its own legislation.

The Queensland Ombudsman also provides training and ad-hoc advice to agencies. It has published three Standards which seek to clarify procedural matters and provides training about the Standards.

Previous recommendations

In 2017, the Ombudsman Report recommended the PID Act be amended to provide clarity about:

- internal and external review rights for administrative decisions made under the PID Act; and
- the oversight agency's power to audit compliance with the Act.¹¹⁹

Consideration must be given to potential conflicts of interest that may arise as a result of the Queensland Ombudsman having advisory functions for both whistleblowers and proper authorities, as well as compliance and adjudication functions.

The Ombudsman Report also made recommendations about a significant number of other matters relating to the PID regime. Some of the Ombudsman's recommendations have been discussed specifically in this issues paper. However, not every individual recommendation has been specifically addressed. It would be beneficial for the Review to understand if stakeholders support the Ombudsman's recommendations in full or only in part – and if so, which parts are supported and why.

¹¹⁸ [Public Interest Disclosure Act 2010 \(Qld\)](#) ss 59-60.

¹¹⁹ [Clarke, P. \(2017\). Review of the Public Interest Disclosure Act 2010. Brisbane, QLD: Queensland Ombudsman. Recommendations 35-38.](#)



Integrity agencies who deal with PIDs

While the Queensland Ombudsman is the oversight agency for PIDs, it is not the only body with a role in dealing with disclosures. For instance, proper authorities receiving PIDs raising a reasonable suspicion of corrupt conduct are required to report matters to the CCC under the *Crime and Corruption Act 2001*.¹²⁰ On receipt, the CCC undertakes an assessment of PID status and determines its need to be involved in a matter. In most cases the CCC refers matters back to agencies to deal with in line with the CCC's statutory functions. The agency assigned to deal with the PID is responsible for reporting the matter to the Queensland Ombudsman through the RaPID database. The CCC provides resources to guide agencies in their approach to addressing and resolving corrupt conduct matters, in the public interest.

This is one example of the reporting structure in place under the PID regime which involves multiple agencies seeking to address matters through the crossover of their legislative functions. Another is a PID involving maladministration. Concerns in relation to maladministration fall within the remit of the Queensland Ombudsman's office to consider and action, where appropriate. As indicated above, the Ombudsman holds dual roles of review and oversight in relation to PIDs.

In the past, the Public Service Commission also played a more significant role in relation to disciplinary proceedings against public servants through the Public Service Disciplinary Board. Currently, the Public Service Commission's role is to deal with workforce policy, strategy, leadership and performance across the Queensland public service, including providing advice and support to public sector agencies in these areas.

There may be opportunities to streamline the administration of the PID regime for all parties and to address any potential overlaps or gaps. This could also take into account any potential role for an independent authority to support disclosers.¹²¹

Questions to consider

35. Are the Queensland Ombudsman's functions and powers suitable and effective for the purpose of the oversight body?
36. Are there any conflicts between the Queensland Ombudsman's advisory and review functions for PIDs? If yes, how could these be managed or resolved?
37. Do the roles of integrity bodies overlap during the PID process? Are changes needed or do the existing arrangements work effectively?
38. Are the Standards published by the Queensland Ombudsman effective? Are changes needed?
39. Do you agree with the recommendations of the Queensland Ombudsman's 2017 review?

3.10. Practical considerations

Interaction of PID regime with other legislation

The operation of the PID Act may overlap or interact with other legislation in a variety of ways.

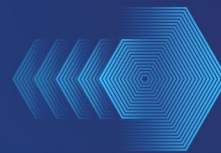
For example, investigations into disclosures about corrupt conduct must also comply with the provisions of the *Crime and Corruption Act 2001*. It is also possible that, where the wellbeing of a discloser or subject officer is affected by the PID process, claims may be made or information requested under the *Workers' Compensation and Rehabilitation Act 2003*.

Where PIDs have resulted in litigation, proceedings may be commenced seeking remedies under both the PID Act and the *Industrial Relations Act 2016*. The Queensland Industrial Relations Commission has recently held that the PID Act is not an industrial law for the purposes of the Industrial Relations Act – though this decision is currently under appeal.¹²² The Commonwealth PID

¹²⁰ [Crime and Corruption Act 2001 \(Qld\)](#) ss 38, 40

¹²¹ See section 3.7 of this issues paper for further discussion about proposals for an independent authority.

¹²² [Kelsey v Logan City Council \(No. 8\) \[2021\] QIRC 114](#) at [35], see also [44]-[63].



legislation contains express provisions that the legislation be considered a ‘workplace law’ for the purposes of the protections and remedies available under the *Fair Work Act 2009* (Cth).¹²³

The Review is interested in the experiences of stakeholders about practical interactions between the PID regime and other legislation to consider whether any changes are needed to provide more certainty or improve consistency with other regimes.

Incentives for disclosers

PID schemes in Australia do not contain any specific incentives to encourage potential disclosers to report wrongdoing. One reason for this is the broad use of ‘mandatory reporting’ mechanisms in the public service. For example, the Code of Conduct for the Queensland Public Service requires those bound by it to report suspected wrongdoing as part of their employment.

However, reward schemes are used in other jurisdictions including the United States, Canada, United Kingdom, Malaysia and South Korea. Generally, whistleblower reward schemes work on the principle that a discloser is awarded a proportion of funds recovered in proceedings made possible by their disclosure. Reward schemes are often limited in scope: they may only apply to certain categories of fraud or wrongdoing (such as in tax matters or cartel activity) or if the total amount of funds recovered reaches a particular threshold. The quality of information provided may also affect eligibility for a financial reward. The introduction of a reward scheme would also need to consider the appropriate use of public funds to benefit individuals, above any compensation they might be entitled to under civil remedies.

Other forms of incentives for potential disclosers may include public honours or publication of ‘success stories’ where reporting has led to the uncovering of systemic issues, subject to confidentiality requirements.

Consideration could also be given to alternate strategies that may encourage self-disclosure of wrongdoing, particularly where a person may be involved in or aware of wrongdoing by a broader group of people.

Education and training

As outlined above, the Queensland Ombudsman undertakes education and training about the PID Act with public sector agencies. Agencies also provide training to their own staff about how the PID regime operates within their agency, including the local procedures for making PIDs. The Standards require agencies to reinforce the need for identification and reporting of wrongdoing including ensuring how to make a PID and the support options available. Additionally, specialised training for managers, supervisors and the PID coordinator is needed to address the specific responsibilities for these officers including decision making, assessment, confidentiality requirements and protection from reprisal.

The Ombudsman operates the Public Interest Disclosure Agency Network Training which holds information and training sessions at least quarterly for agencies and participants as well as comprehensive workshop training sessions covering the requirements of the Standards. Additionally, the Ombudsman provides an array of information resources and templates for agencies to adopt as they see fit. The Public Service Commission operates the Community of Practice for Ethical Behaviour attended by participants from government agencies. It also holds quarterly sessions covering a broad range of integrity topics and professional development, including matters relating to the PID Act.

The Review is interested in feedback about best-practice approaches to education, training and awareness in public sector agencies and suggestions for improvements.

Accessibility of legislation

Cultural considerations

Practical challenges may arise for First Nations Peoples, people in regional and remote communities or people from culturally and linguistically diverse backgrounds when reporting wrongdoing. The PID

¹²³ [Public Interest Disclosure Act 2013 \(Cth\)](#) ss 22, 22A.



Act and Standards do not currently address cultural factors that may affect how the legislation is applied.

The Review is interested to hear about the experiences of reporting wrongdoing by First Nations Peoples, people who are culturally and linguistically diverse, and people in regional or remote communities.

Structure and language of the PID Act

It is important that PID legislation is understood by both potential disclosers and agencies responsible for implementing the Act. Given the significant legal and practical implications of disclosures, difficulties in understanding the legislation may be a barrier to reporting wrongdoing.

The Commonwealth PID legislation contains 'simplified outlines' of each division of the Act.¹²⁴ The New Zealand legislation contains a flowchart explaining the interaction of some of its key provisions.¹²⁵

The Review is interested to receive feedback about whether the structure or language of the PID Act could be improved.

Questions to consider

40. Should the PID legislation be more specific about how it interacts with any other legislation, process or scheme?
41. Should the PID legislation include incentives for disclosers? If so, how should they operate?
42. Are current arrangements for training and education about the PID Act effective? How could they be improved?
43. How could an effective PID scheme provide for the needs of First Nations Peoples, culturally and linguistically diverse people and those in regional or remote communities?
44. Is the PID Act accessible and easy to understand? How could the clarity of the Act be improved?

¹²⁴ [Public Interest Disclosure Act 2013 \(Cth\)](#) ss 59-60.

¹²⁵ [Protected Disclosures \(Protection of Whistleblowers\) Act 2022 \(NZ\)](#) s 7.



Appendix: Questions to consider

These questions are provided as a guide. However, submissions may take any form or structure and may respond to some or all questions or address other issues or topics.

3.1 Policy objectives of the PID Act

1. Are the objects of the PID Act valid and is the Act achieving these objects? Has the PID Act been effective in uncovering wrongdoing in the public sector?
2. Is the title of the legislation suitable? Should any other terms, such as 'whistleblower' or 'wrongdoing', be included in the title or used in the legislation?
3. Are changes needed to ensure public confidence in the integrity of the PID regime?
4. Are any changes needed to the PID Act to make it more compatible with the *Human Rights Act 2019*?

3.2 What is a public interest disclosure?

5. What types of wrongdoing should the PID regime apply to? Should the scope be narrowed or broadened? Why and how?
6. Should a PID include disclosures about substantial and specific dangers to a person with a disability or to the environment? Why or why not?
7. Is there benefit in introducing a public interest or risk of harm test in the definition of a PID?
8. Should a person be required to have a particular state of mind when reporting wrongdoing to be protected under the PID regime? Are the current provisions appropriate and effective?

3.3 Who can make a public interest disclosure?

9. Who should be protected by the PID regime? Should the three categories of disclosers (public officer, employees of government owned corporations or Queensland Rail, and any person) be retained? Why or why not?
10. Should the definition of public officer be expanded to include those performing services for the public sector whether paid or unpaid, for example volunteers, students, contractors and work experience participants? Should former public officers be covered?
11. Should relatives of disclosers, or witnesses be eligible to make PIDs? Should they, or anyone else, be entitled to protection under the PID regime?
12. Should different arrangements apply to role reporters? Why and how?

3.4 Experiences of people who witness and report wrongdoing

13. How would you describe your experience in reporting wrongdoing under the PID Act? Do you have any suggestions for improvements?
14. What factors impacted your decision to report or not report wrongdoing? Did you encounter any barriers or obstacles during the process? How can the PID regime encourage disclosers to come forward?
15. Were you supported effectively during the process? Would alternative or additional support have been helpful?
16. Did you feel your disclosure was taken seriously, assessed in a timely way, investigated fairly and addressed appropriately?

3.5 Making, receiving and identifying PIDs

17. Are the requirements for making, receiving and identifying PIDs appropriate and effective?
18. Who should be able to receive PIDs? Do you support having multiple reporting pathways for disclosers? Is there a role for a clearing house or a third party hotline in receiving PIDs?



19. At what point in time should the obligations and protections under the PID regime come into effect?
20. Should the PID legislation require a written decision be made about PID status as recommended by the Queensland Ombudsman? What would the implications be for agencies?
21. Are the provisions for disclosures to the media and other third parties appropriate and effective? Are there additions or alternatives that should be considered?
22. Should the PID process for government owned corporations or Queensland Rail be different to those for public sector entities? Why or why not? Are the current arrangements appropriate and effective?

3.6 Managing, investigating and responding to PIDs

23. Are the requirements for managing, investigating and responding to PIDs appropriate and effective?
24. Are agencies able to provide effective support for disclosers, subject officers and witnesses? Are any additional or alternate powers, functions or guidance needed?
25. Should the PID Act include duties or requirements for agencies to:
 - a. take steps to correct the reported wrongdoing generally or in specific ways?
 - b. provide procedural fairness to the discloser, subject officer and witnesses?
 - c. assess and minimise the risk of reprisals?
26. Should a discloser be able to opt out of protections afforded under the Act, such as the requirement to receive information or be provided support? Should this only apply to role reporters, or to any type of discloser?

3.7 Protections for disclosers, subject officers and witnesses

27. Are the current protections for disclosers, subject officers and witnesses appropriate and effective? Should additional or alternative protections be considered?
28. Are the current provisions about confidentiality adequate and fit for purpose? Should any improvements be considered?
29. Is the definition of reprisal appropriate and effective? Do any issues arise in identifying, managing and responding to reprisals?
30. Is there a role for an independent authority to support disclosers in Queensland? If so, what should its role be?

3.8 Remedies

31. Are the remedies available to disclosers under the PID Act reasonable and effective? Are any changes needed?
32. Do the evidentiary requirements for remedies need amendment?
33. Are the provisions permitting complaints to the Queensland Human Rights Commission appropriate and effective? What role should alternative dispute resolution play in resolving disputes?
34. Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?

3.9 Role of the oversight agency

35. Are the Queensland Ombudsman's functions and powers suitable and effective for the purpose of the oversight body?
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39. Do you agree with the recommendations of the Queensland Ombudsman's 2017 review?

3.10 Practical considerations

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