

24 February 2023

Honourable Mr Alan Wilson KC  
Public Interest Disclosure Review Secretariat  
Strategic Policy and Legal Services  
Department of Justice and Attorney General  
GPO Box 149  
Brisbane QLD 4001

Via email: [PIDActReview@justice.qld.gov.au](mailto:PIDActReview@justice.qld.gov.au)

Dear Mr Wilson

**Re: Office of the Independent Assessor submission to the PID Act Review**

Please find attached a submission from the Office of the Independent Assessor to assist your review of the *Public Interest Disclosure Act 2010*.

The submission outlines how public interest disclosures interact with the councillor conduct complaints system.

The OIA deals with many confidential matters and while care has been taken with this submission, I would appreciate a further opportunity to review the content before it is published for public viewing.

I am available at your convenience to discuss any topics that would be of further assistance to the review.

Sincerely



Kathleen Florian  
**Independent Assessor**



# Office of the Independent Assessor – Submission

## Review of the *Public Interest Disclosure Act 2010*

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## Scope

This submission sets out:

- how public interest disclosures (PIDs) are assessed and managed by the Office of the Independent Assessor (OIA) in dealing with complaints about local government mayors and councillors, and
- responds to questions set out the Review's issues paper which are relevant to the experience of the OIA.

## Background

### A new councillor conduct framework

The OIA was established on 3 December 2018 as part of the Queensland Government's integrity reforms of the councillor conduct complaints system. The reforms sought to enhance public confidence in local government and to foster a culture that encouraged complaints to be made.

The *Local Government (Councillor Complaints) and Other Legislation Amendment Act 2018* established the OIA as an integrity body. Its functions are set out in section 150CU of the *Local Government Act 2009* (LG Act) and include,

- to receive and assess councillor conduct complaints
- refer certain inappropriate conduct complaints to councils to deal with
- investigate councillor misconduct
- refer certain misconduct complaints to the Councillor Conduct Tribunal (CCT)
- refer suspected corrupt conduct to the Crime and Corruption Commission (CCC), and
- to prosecute some statutory offences under the LG Act in the Magistrates Court.

Other major changes to councillor conduct system were introduced including,

- a new mandatory Code of Conduct for Councillors in Queensland
- new mandatory reporting requirements for local government officials
- new offences and penalties
- new extended definition of misconduct
- new procedural fairness requirements
- requiring the OIA to discharge the onus of proof in misconduct proceedings before the CCT
- establishing a single new CCT to decide if misconduct is made out
- publication of decisions and a summary of reasons of the CCT, and
- providing for a full merits review of CCT decisions to QCAT.

The effect of creating new councillor conduct offences was twofold.

1. It increased the number of councillor conduct matters that would be required to be reported to the CCC as potential corrupt conduct, and
2. It increased the number of complainants that could be assessed as a PID.

The OIA was established with a total of 10 staff and resources to assess 160 complaints a year.

As of early February 2023, the OIA has received more than 4,400 councillor conduct complaints.

## Categories of councillor conduct

The OIA receives and assesses complaints of **inappropriate conduct** and **misconduct** by a councillor.

Complaints may be dismissed on assessment for a broad range of reasons including public interest considerations. For example, the capacity of some councillors and councils to deal with the complexity of local government business, conflict of interest and register of interest requirements may result in systemic capacity issues being dealt with by way of training interventions, rather than investigation.

Lower-level **inappropriate conduct** involves either a breach of the Code of Conduct for Councillors or a breach of a council policy, procedure or resolution. They must be referred back to a council to deal with if, following a natural justice process, there is a reasonable suspicion of inappropriate conduct. Inappropriate conduct complaints are investigated by councils and determined by majority resolution of councillors.

Inappropriate conduct complainants would rarely, if ever, be assessed as a PID based on the current definition.

**Misconduct** is defined in section 150L of the LG Act. Misconduct complaints are assessed, and if appropriate, investigated by the OIA. Common categories of misconduct include:

- failures to declare conflicts of interest
- inappropriate influence of council decisions by councillors who have a conflict of interest
- failures to report or update certain financial interests
- the release of information confidential to council
- the misuse of council information for a benefit or detriment, or
- breaches of the trust placed in a councillor either knowingly or recklessly.

At the conclusion of an investigation a proportion of these complaints will undergo a natural justice process.

At the conclusion of the natural justice process a matter may be referred to the CCT to determine if misconduct has been engaged in.

Complaints that are received and assessed as **corrupt conduct** will either:

- be referred immediately to the CCC, or
- if they come within the terms of section 40 arrangement between the CCC and the OIA under the *Crime and Corruption Act 2001*, the investigation will be commenced by the OIA and reported to the CCC in a monthly schedule. The CCC may resume these investigations at their discretion.

Matters immediately referred to the CCC are assessed by the CCC and either investigated by the CCC or referred back to the OIA to investigate and deal with as misconduct. Some matters are referred back to the OIA to deal with as potential misconduct following the conclusion of a criminal investigation by the CCC.

It is this category of complainants that are most likely to be assessed as a PID.

Since establishment in December 2018 and up to December 2022, complaints received by the OIA have been dealt with as follows:

- 72 per cent have been dismissed on assessment or following a full investigation
- 4 per cent have been referred to councils to deal with as suspected inappropriate conduct
- 25 per cent of all complaints have been fully investigated as suspected misconduct
- 6 per cent of complaints have progressed to a natural justice process following an investigation, and
- 4 per cent of complaints have been referred to the CCT to determine.

*Local Government Electoral (Implementing Stage 2 of Belcarra) and Other Legislation Amendment Act 2019* which commenced in October 2019, removed a number of the councillor conduct offences that were introduced in 2018, and replaced those offences with section 201D of the LG Act.

Section 201D created a higher threshold for dealing with certain councillor conduct as statutory offences. This in turn has driven a reduction in the number of matters required to be referred to the CCC and a reduction in the number of complainants that would come within the definition of a PID.

## **Councillor conduct complaints system and the PID Act**

### **Definition of PIDs in local government context**

Both a council and the OIA are proper authorities authorised under the PID Act to receive PIDs.

A public sector officer, such as a local government employee, can make a disclosure about the following public interest matters:

- corrupt conduct
- maladministration that adversely affects a person's interests in a substantial and specific way
- a substantial misuse of public resources
- a substantial and specific danger to public health or safety
- a substantial and specific danger to the environment.

Consequently, most complaints made to the OIA would not result in an assessment that the complainant is a PID.

Matters assessed as PID's generally come within the corrupt conduct or maladministration categories.

## **How the OIA manages, investigates and responds to PIDs**

### **Making a PID to the OIA**

A discloser can make a PID in any way, including anonymously, either verbally or in writing.

The disclosure will be assessed in accordance with the PID Act, the PID standards, the OIA's PID policy and procedure.

If there is any doubt as to whether a matter is a PID, further information may be obtained to inform the decision. If doubt remains, the matter will be considered and managed as a PID.

## Communication with PIDs

Under the PID Act, the OIA must give reasonable information to a discloser including public officers such as council employees.

It is very rare for the OIA to receive a complaint from a person who self identifies as a PID indicating that the existence and scope of the PID scheme is not well known or understood in councils.

Where the OIA assesses a complaint as a PID, the OIA will acknowledge receipt of the PID in writing as soon as practicable.

The discloser will be provided with information that meets the requirements of the PID Act and the standards issued by the Queensland Ombudsman, including:

- the action that will be taken in response to the PID
- the protections under the PID Act
- confidentiality obligations of the discloser and the OIA, and
- support arrangements.

The OIA will maintain contact with the discloser and provide regular updates during the management of the PID, including arranging support for the discloser through the relevant council PID support officer.

At a minimum, this will occur whenever the matter reaches a decision point or on a three-monthly basis, whichever is sooner. Decision points include the: decision to investigate, decision to undertake a natural justice process, decision to refer to the CCT or a decision to dismiss or take no further action in relation to a matter.

If a PID is dismissed either on assessment or after an investigation the discloser will be provided with detailed written reasons for that decision.

Such a decision may be the subject of a request for internal review<sup>1</sup>.

If the Independent Assessor determines there is another proper authority that is better able to deal with the PID, the PID may be referred to that agency. This may be because:

- the OIA is statutorily bound to refer the matter to the CCC; and
- a matter is referred to the CCT to determine whether misconduct has been engaged in.

### When the OIA refers a PID complaint to the CCC

The OIA has referred 20 PID complaint matters to the CCC as required under the LG Act and the CCC Act.

Before referring the PID to another agency, the OIA will consider implications for the PID and consult with the PID and or their support officer as appropriate. The discloser will be advised of the action taken by the OIA.

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<sup>1</sup> [OIA complaints management and internal review policy](#), [Internal review of an OIA councillor conduct complaint assessment decision procedure](#)

## When the OIA refers a PID complaint to the CCT for determination

Section 150AA of the LG Act requires that before referring a matter to the CCT as potential misconduct, the Independent Assessor must give the subject councillor notice or information about the allegation sufficient for the councillor to be able to respond to the allegation and say why the assessor should not make a decision to refer the matter to the CCT to deal with.

In drafting this natural justice notice, the OIA will consider whether the information falls within the exception in section 65(4) of the PID Act and a discloser will be consulted at this stage. The OIA explains the requirements for a natural justice process and the potential implications for PID management.

The OIA has referred 18 PID matters to the CCT for determination.

## How CCT decisions deal with PIDs

Under the LG Act, the CCT is required to publish a summary of its decisions. Decisions which involve a PID are published with the following statement:

### **Local Government Act 2009: Sections 150AS(2)(c)**

*Note that the Tribunal is prohibited from giving another entity information that is part of a Public Interest Disclosure unless required or permitted under another Act; or including in this summary the name of the person who made the complaint or information that could reasonably be expected to result in identification of the person: S150AS(5)(a) and(b).*

Section 150AS (5) (a) and(b) states:

(5) *The conduct tribunal must not—*

*(a) give another entity any information that is part of a public interest disclosure under the Public Interest Disclosure Act 2010, unless giving the information is required or permitted by another Act; or*

*(b) if a decision relates to the conduct of a councillor that was the subject of a complaint—include in a summary of the decision to be published on the department’s website— (i) the name of the person who made the complaint; or (ii) information that could reasonably be expected to result in identification of the person.*

## OIA feedback on questions identified in the Issues paper and set out below

### Policy objectives of the PID Act

*Question 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?*

*Question 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?*

*Question 3. Are changes needed to ensure public confidence in the integrity of the PID regime?*

Local government employees, CEO’s and other councillors are uniquely placed to make informed complaints about councillor conduct engaged in by councillors.

Local government employees who make complaints about councillor conduct are in a very vulnerable position as workplace relationships, their employment and livelihood may be affected by the decision to lodge a complaint.



CEOs can also be placed in precarious positions balancing mandatory notification obligations with the management of an employee-employer relationship with councillors who are legislatively responsible for their employment, termination and performance management.

Disclosures by local government employees and other councillors help uncover corruption, misuse of public resources and maladministration, including such matters that may, under the LG Act 2009 and or the Crime and Corruption Act 2001, be dealt with as misconduct by the OIA.

An effective PID scheme is a key element required to establish and or promote a local government integrity culture across 77 different local governments.

It is the OIA's view that the objectives of the PID Act are valid but there are opportunities to improve the scheme.

The existence of the PID Act and scheme does not appear to be well understood in councils. As such, a change in title to a term which more clearly denotes what a PID is, could well be useful.

The consideration of opportunities to simplify or streamline the scheme would also likely be of assistance.

It is the OIA's experience that PIDs do provide evidence that requires investigation, and which uncovers wrongdoing engaged in by councillors.

The OIA results for PIDs include:

- 178 complaint matters received have been assessed as a PID
- 66 per cent (117 matters) of these complaints have been fully investigated as potential misconduct
- 24 per cent (28) have progressed to a natural justice process following investigation, and
- 75 per cent (18) of those natural justice matters have been referred to CCT for determination.

CCT referrals that have been decided include:

- A Mayor was found to have engaged in 8 counts of serious misconduct including failing to declare conflicts of interest, bullying and racism, directing council staff and failing to declare an interest in his register of interests. The CCT ordered a public admission, reprimand and to pay council \$4,665. The Mayor has since resigned.
- A former councillor was reprimanded by the CCT after he failed to declare a conflict of interest based on an electoral donation when considering a request for support for an airport proposal.
- A councillor failed to declare a conflict of interest when awarding an infrastructure contract valued at more than \$1 million and was ordered to make an admission of misconduct during a council meeting, attend training at the councillor's expense and pay council \$500.

Ten applications related to PID matters remain with the CCT awaiting a hearing.

Whether a PID can be progressed through an investigation will often turn on the extent to which the substance of a complaint can be corroborated by other witnesses or by council records.

In the OIA's experience record keeping in some rural and remote councils is inadequate and records of decisions, including minutes do not meet legislative requirements. This represents a significant barrier to the investigation of PID's in these councils.



## What is a public interest disclosure?

*Question 5. What types of wrongdoing should the PID regime apply to? Should the scope be narrowed or broadened? Why and how?*

*Question 7. Is there benefit in introducing a public interest or risk of harm test in the definition of a PID?*

*Question 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?*

What may be a PID in the local government context, is impacted by changes to what may be corrupt conduct.

Currently some serious misconduct complaints made by vulnerable complainants are not captured by the PID scheme. It is understood that this goes to the policy question of how far a scheme should extend and or what flexibility can or should be built into the definition of a PID.

The OIA would support a public interest or risk of harm test.

The OIA does not support a requirement that a person have a particular state of mind. It is considered that the seriousness and merits of the complaint should be determinative and not the actual or suspected motives of a complainant.

## Managing, investigating and responding to PIDs

*Question 23. Are the requirements for managing, investigating and responding to PIDs appropriate and effective?*

*Question 24. Are agencies able to provide effective support for disclosers, subject officers and witnesses? Are any additional or alternate powers, functions or guidance needed?*

It is considered that the current requirements for managing, investigating and responding to PIDs are appropriate.

The OIA has experienced difficulties however when a PID classification changes during the investigation or natural justice process. For example, an initial assessment of a complaint may determine that it is not a PID, but this may change over the course of the OIA dealing with the complaint.

This can occur because further enquiries result in information which reaches the corrupt conduct threshold. Conversely further investigation may determine that a complaint does not in fact come within the definition of a PID.

This requires the OIA to reassess the PID status of matters on an ongoing basis.

It is considered that a balance needs to be struck around building a framework that flexibly and effectively classifies, supports and protects PIDs without the management around this distracting from the achievement of the policy intent of the PID Act.

The person or entity responsible for undertaking a PID risk assessment and for providing effective support to a PID should be a person or entity who has visibility of the PID in the workplace; can have regular personal interactions; and can make any necessary workplace decisions that may be needed to better support a PID including consideration of seating, managerial oversight, and line responsibilities.

Generally, the appointed PID support officer in a council is the CEO.

The OIA works with the council's designated PID officer, where this is appropriate, to support and protect disclosers.

This is problematic however in the following circumstances:

- where the CEO is the PID
- where the CEO is also a subject officer identified in the same PID and therefore is not notified or consulted by the OIA; or
- where there is a perception that the CEO, who under the LG Act is employed by the councillors, may feel under pressure to act in the interests of a council/councillors rather than the PID.

A more effective and consistent solution for supporting and protecting disclosers is required in these circumstances.

### **Protections for disclosers, subject officers and witnesses**

*Question 27. Are the current protections for disclosers, subject officers and witnesses appropriate and effective? Should additional or alternative protections be considered?*

*Question 28. Are the current provisions about confidentiality adequate and fit for purpose? Should any improvements be considered?*

*Question 29. Is the definition of reprisal appropriate and effective? Do any issues arise in identifying, managing and responding to reprisals?*

Local government employees or councillors, who are complainants, or who assist the OIA with their inquiries may be placed in a difficult position, depending on the culture of particular councils.

Under the PID Act, there are restrictions on the disclosure of 'confidential information'.

'Confidential information' is given a broad meaning and includes information about the identity of the person who made the disclosure and the information disclosed. (See section 65 PID Act).

There are some exceptions to this prohibition under section 65(3) which could apply to the work of the OIA, including:

- To discharge a function under another Act including, for example, to investigate something disclosed by a public interest disclosure; or
- For a proceeding in a court or tribunal.

The PID Act also recognises the natural justice principles and that this process may require disclosure of 'confidential information' for the purposes of the PID Act. Relevantly for the legislated natural justice process under section 150AA of the LG Act,

- Section 65(4) provides that: *"This section does not affect an obligation a person may have under the principles of natural justice to disclose information to a person whose rights would otherwise be detrimentally affected.*
- Section 65(5) goes on to state that *"subsection (4) applies to information disclosing, or likely to disclose, the identity of a person who makes a public interest disclosure only if it is: (a) essential to do so under the principles of natural justice; and (b) unlikely a reprisal will be taken against the person because of the disclosure.*

There is a natural tension therefore between the obligation to afford natural justice to subject councillors and the need to protect the confidentiality of PID information.

The OIA manages this tension by consulting with the PID before any natural justice paperwork is provided to a subject councillor; and notifying their support person of any increased risk or concern.

Further while the OIA will make every attempt to keep the details of a discloser confidential, it cannot guarantee that others will not try to deduce or make assumptions about their identity.

The OIA does not find the reprisal offence under section 41 of the PID Act effective. This is in part because the LG Act has its own reprisal offence:

**150AW Protection from reprisal** Maximum penalty—167 penalty units or 2 years imprisonment.

(1) A councillor must not take detrimental action against a protected person in reprisal for a complaint or notification about the councillor's conduct.

(2) A councillor takes detrimental action in reprisal for a complaint or notification about the councillor's conduct if—

(a) the councillor takes, threatens to take, or attempts to take the action because—

(i) a protected person has made, or intends to make, a complaint or notification about the councillor's conduct; or

(ii) the councillor believes a protected person has made, or intends to make, a complaint or notification about the councillor's conduct; or

(b) the councillor incites, permits or conspires with another person to take or threaten to take the action for either of those reasons.

(3) In determining whether a councillor takes detrimental action in reprisal, it does not matter whether a reason stated in subsection (2)(a)(i) or (ii) is the only or main reason for taking the action, as long as it is a substantial reason.

(4) An offence against subsection (1) is an indictable offence that is a misdemeanor.

A 'protected person' is another councillor or a local government employee, which would include a CEO.

This provision is not only specific to the councillor complaints context; but it provides greater protection than section 41 of the PID Act because it extends protection against reprisal to misconduct and inappropriate conduct complaints.

In cases where there is assessed to be a high risk of reprisal the OIA will provide the subject councillor with an excerpt of section 150AW and a warning about committing the offence of reprisal. Those councillors will also be encouraged to seek their own legal advice on the scope and import of section 150AW.

Just because a PID is made however, does not mean that a complaint is honestly made, substantive or capable of proof. A disclosure may also be the result of an honest but mistaken belief about the facts or the nature of a councillor's legal obligations.

Further, a PID after making a disclosure, is still responsible for their own conduct and making a disclosure does not prevent reasonable management action.

It is therefore essential that all parties are treated fairly. The OIA also protects the rights of subject councillors by:

- assuring them that all complaints will be dealt with impartially, fairly and reasonably
- confirming that a complaint is an allegation only unless and until information or evidence obtained through an investigation substantiates the allegation
- providing them with a contact point to access high level information about the progress or

- status of a matter
- referring them to specialist assistance for support where appropriate, and
- providing them with natural justice before any decision is made whether to refer a matter to the CCT for determination.

**Role of the oversight agency**

*Question 35. Are the Queensland Ombudsman’s functions and powers suitable and effective for the purpose of the oversight body?*

*Question 37. Do the roles of integrity bodies overlap during the PID process? Are changes needed or do the existing arrangements work effectively?*

*Question 38. Are the Standards published by the Queensland Ombudsman effective? Are changes needed?*

*Question 42. Are current arrangements for training and education about the PID Act effective? How could they be improved?*

The OIA regularly attends the Queensland Ombudsman training courses for officers who work with PIDs and has received excellent support from the Ombudsman’s office.

It is the OIA’s experience however that councils would benefit from training on the assessment and management of PIDs.

It is also observed that many councils do not have policies or procedures in place to deal with PIDs.

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