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3 March 2023

The Honourable Alan Wilson KC
Public Interest Disclosure Review Secretariat
Strategy Policy and Legal Services
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

By email: PIDActReview@justice.qld.gov.au

Dear Mr Wilson

**RE: REVIEW OF THE *PUBLIC INTEREST DISCLOSURE ACT 2010* –
CRIME AND CORRUPTION COMMISSION (CCC) SUBMISSION**

I write to provide the CCC's Submission to the Review of the *Public Interest Disclosure Act 2010* ('PID Act'). The PID Act is an important part of Queensland's integrity framework, and the CCC welcomes the opportunity to contribute to this Review.

Should you require further information or seek elaboration on any aspect of the Submission we would be happy to meet with you or provide a supplementary submission as appropriate.

Yours sincerely

A solid black rectangular box used to redact the signature of Bruce Barbour.

Bruce Barbour
Chairperson

Review of the *Public Interest Disclosure Act 2010* Submission by the Crime and Corruption Commission

The Crime and Corruption Commission (CCC) is committed to fostering an ethical and transparent culture in public administration in Queensland.

The main objects of the *Public Interest Disclosure Act* (PID Act)¹, to:

1. promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector;
2. ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with;
3. ensure appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure, and
4. afford protection from reprisal to persons making public interest disclosures

are closely aligned with the CCC's purpose to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector². The CCC has a statutory responsibility to achieve this purpose by investigating cases of corrupt conduct, particularly more serious cases of corrupt conduct, and helping units of public administration to deal effectively and appropriately with corruption by increasing their capacity to do so³.

The CCC considers that the objects of the PID Act could be re-framed to provide greater emphasis on what it considers to be the most important purpose of the PID Act – promoting disclosure of suspected wrongdoing in the public sector by providing protection for those who make such disclosures.⁴

This submission particularly addresses the following aspects of the PID Act which should be reformed:

1. Additional support for disclosers and agencies with PID Act obligations should be provided by an agency such as the Office of the Ombudsman.
2. The role of ethical standards units and other investigators in supporting persons who make PIDs or who allege reprisal.
3. The civil remedies for PID reprisal set out in the PID Act should be reviewed to clarify the agencies with standing under sections 48 and 49 and their role in protecting persons making PIDs from reprisal, and make new provision to clarify what evidence may be sought and given in civil remedy proceedings.

¹ Section 3 of the PID Act.

² Section 4(1)(b) of the *Crime and Corruption Act*.

³ Section 5(3) of the *Crime and Corruption Act*.

⁴ Ensuring PIDs are properly investigated, and that persons the subject of disclosures are treated fairly are important principles, but have other sources of support such as general principles of natural justice.

4. The maximum penalty for the criminal offence of PID reprisal set out in the PID Act should be reviewed.
5. Consideration be given to aligning the protections for persons making PIDs with the protections for other witnesses in PID-initiated investigations.

Identified technical aspects of the PID Act should be reviewed to address anomalies and apparently unintended consequences.

The CCC will elaborate on any aspects of this Submission, upon request.

Introduction

CCC complaints process and public interest disclosures

The PID Act allows disclosures about wrongdoing to be made and offers protection from, and remedies for reprisal for persons making public interest disclosures (PIDs). These provisions are integral to the core business of the CCC and PIDs are a significant source of information provided to the CCC about suspected corrupt conduct.

Complaints of suspected corrupt conduct⁵ by public officers which are notified to the CCC are public interest disclosures (PID) for the purposes of the PID Act. Public officers making complaints of suspected corrupt conduct to the CCC may also self-identify as making a PID, and units of public administration who receive notifications of suspected corrupt conduct may make their own assessment that a matter is a PID disclosure before it is communicated to the CCC. In any event, the CCC makes its own assessment of complaints of suspected corrupt conduct which it receives from individuals or units of public administration, to determine whether they may involve a PID.

The number of matters where the CCC assessed possible PID involvement over the last 5 calendar years was:

| Year | Matters where the CCC assessed possible PID involvement | CCC assessments of PIDs as a percentage of total matters |
|------|---|--|
| 2018 | 424 | 12% of 3433 |
| 2019 | 729 | 21% of 3469 |
| 2020 | 836 | 23% of 3644 |
| 2021 | 772 | 21% of 3714 |
| 2022 | 609 | 17% of 3665 |

⁵ See sections 13, 15 to 19 and 38 *Crime and Corruption Act*.

Of the complaints of suspected corrupt conduct involving PIDs which the CCC received during this period, the CCC itself investigated the following complaints:

| Year | CCC investigations involving PID complaints of suspected corrupt conduct |
|------|--|
| 2018 | 26 |
| 2019 | 6 |
| 2020 | 10 |
| 2021 | 8 |
| 2022 | 17 |

The number of allegations of PID reprisal that the CCC has received over the last 5 calendar years was:

| Year | Allegations of PID reprisal received by the CCC |
|------|---|
| 2018 | 45 |
| 2019 | 49 |
| 2020 | 53 |
| 2021 | 54 |
| 2022 | 44 |

The CCC may deal with complaints of suspected corrupt conduct in the ways prescribed by section 46 of the *Crime and Corruption Act*, including investigating matters or referring matters to the home agency to deal with, or finalising matters with no further action required. When the CCC receives a notification of alleged reprisal against a person who has made a PID or other breach of section 67 of the PID Act, this is an allegation of corrupt conduct which may also be dealt with under the *Crime and Corruption Act*.

In determining how to deal with a complaint of suspected corrupt conduct, the CCC applies the principles in section 34 of the *Crime and Corruption Act* in conjunction with the requirement in section 35(3) to focus on more serious cases of corrupt conduct and cases of systemic corrupt conduct. Complaints of PID reprisal are categorised by the CCC as high priority matters which are required to be notified to the CCC by units of public administration as soon as practicable.

In the CCC’s experience, the entity which is investigating a complaint of suspected corrupt conduct is often the most appropriate entity to also investigate any allegation of reprisal made by a discloser of the corrupt conduct which is being investigated. The two investigations may occur in tandem with the result that information relevant to both investigations may be shared and a reprisal may be resolved or mitigated without the need for the person making the PID to themselves pursue the civil or criminal remedies set out in the PID Act.

The CCC has established procedures to assess and deal with complaints of suspected corrupt conduct in accordance with the purpose of the *Crime and Corruption Act*. The CCC considers that it is the appropriate agency to assess all complaints of suspected corrupt conduct, whether the notification is a PID or otherwise.

1. Additional support for persons and agencies with PID Act obligations should be provided by an agency such as the Office of the Ombudsman

The CCC identifies that the role of supporter of persons providing PIDs might be most effectively provided by an agency acting independently from the investigation of complaints of suspected corrupt conduct including PID reprisal.

The CCC supports an agency such as the Office of the Ombudsman having an enhanced role in supporting PIDs. This role could include:

- Giving practical guidance and support to persons who have made or who are contemplating making a public interest disclosure or where there are concerns about how a public sector agency is managing a PID;
- Giving information and training to public sector agencies with PID Act responsibilities to protect persons making PIDs;
- Developing best practice policies and procedures in collaboration with other oversight agencies to facilitate the management of PIDs;
- Providing a mechanism to resolve PID status where there is dispute between a person making a PID and a home agency about PID status;
- Assisting persons who have made PIDS in pursuing remedies for reprisals under the PID Act; and/or
- Providing a means of legal support to disclosers seeking to pursue civil remedies for PID reprisal in appropriate cases.

2. The role of ethical standards units and other investigators in supporting persons who make PIDs or who allege reprisal

Under the CCC's devolution model, most notifications of corrupt conduct are referred back to the home agency for investigation often subject to the oversight of the CCC. This provides an opportunity for home agencies to make appropriate responses in relation to all but the most serious complaints of suspected corrupt conduct, with the result that home agencies may develop mature risk management and more transparent processes. Under this model, larger units of public administration generally have substantial ethical standards units with mature investigation skills working at the coal face with PIDs.

The CCC is supported in its corruption investigation and corruption prevention functions by having well-resourced ethical standard units in home agencies. Ethical standards units play an important part in the investigation of suspected corrupt conduct, including PID reprisal, and the CCC supports a review of the role they play and the resources which are available to support them. However, the CCC identifies a tension with ethical standards units (or other investigation bodies) undertaking a contemporaneous role in support of persons making PIDs in circumstances where this may lead to an apprehension of bias in the investigation. The Queensland Police Service's approach, whereby PID support is provided by a witness support unit separate to any investigation, is one possible avenue to addressing this tension.

3. The civil remedies for PID reprisal set out in the PID Act should be reviewed to:
- clarify the agencies with standing under sections 48 and 49 and their role in protecting persons making PIDs from reprisal; and
 - make new provision to clarify what evidence may be sought and given in civil remedy proceedings

PID Act civil remedies for reprisal

Sections 48 and 49 of the PID Act set out the process for civil remedy for reprisal and include a provision by which the CCC may apply to the Industrial Commission or the Supreme Court for injunctive relief on behalf of a PID.

The CCC identifies technical and practical difficulties in the operation of the provisions. Injunctions sought under the PID Act provide a personal remedy for the individual discloser – an application is made by an individual, or by another entity on the individual’s behalf. That is the case whether the application is brought by them, their industrial organisation or the CCC. An application may be made to the Supreme Court if the person cannot apply to the Industrial Commission. An application to the Industrial Commission is an industrial cause within the meaning of the *Industrial Relations Act 2016*⁶.(footnote here referring to.)

This is the only legislative provision by which the CCC may act on behalf of an individual.

Similar provisions in the Crime and Corruption Act

There are similar but not identical provisions in the *Crime and Corruption Act* by which the CCC may take action to protect witnesses and other persons who have given evidence to, or helped, the CCC in the performance of its functions⁷.

Section 212 of the *Crime and Corruption Act* makes victimisation of a person who has assisted the commission, an offence. It prohibits a person from engaging in certain behaviours, such as prejudicing the safety or career of any person, intimidating or harassing a person, or doing an act to the detriment of a person because the person, or someone else, gave evidence to or helped the CCC in the performance of its functions.

Injunctions sought under the *Crime and Corruption Act* are directed at protecting people who have assisted the CCC in its functions (regardless of whether the person is a discloser). Section 344 of the *Crime and Corruption Act* enables the CCC to apply to the Supreme Court for an injunction if a person has engaged or is proposing to engage, in conduct that constitutes or would constitute a contravention of section 212 or on other ancillary grounds including “*attempting to contravene section 212*” and “*conspiring with others to contravene section 212*”. The Court may grant an injunction in the terms it considers appropriate but before it grants an injunction it must be satisfied on the balance of probabilities that the person who gave evidence to or assisted the commission acted in good faith. In addition, section 338 enables the CCC to provide witness protection under the *Witness Protection Act 2000* for a person who may be at risk or may be subject to intimidation or harassment.

⁶ Section 48(5) of the PID Act.

⁷ These are found at sections 212, 338 and 344 of the *Crime and Corruption Act*.

Under the *Crime and Corruption Act* the consent of the person sought to be protected is not required before an application for an injunction is made to the Supreme Court. The CCC may bring the application and without the need for consent of the individual, reflecting that the application is in support of the CCC's purposes and functions. An application is to be heard in closed court⁸. Whilst the Court may grant an injunction in the terms it considers appropriate⁹, section 344(8) of the *Crime and Corruption Act* specifies the court may grant an injunction requiring a person "to do an act or thing." This provision is not framed in terms of remedy as it is under the PID Act.

Section 344 of the *Crime and Corruption Act* has its genesis in sections 103 and 104 of the original *Criminal Justice Act 1989*, which allowed the Criminal Justice Commission to "make such arrangements, and take such steps, as are necessary and are open to the commission, to avoid such prejudice, intimidation or harassment." This extended to applying to the Supreme Court for an injunction to address such prejudicial conduct. Research indicates that the Criminal Justice Commission applied for one such injunction¹⁰.

The CCC submits that the civil remedy in sections 48 and 49 of the PID Act can operate effectively without the involvement of the CCC as an effective intervener and with the CCC retaining its authority to act under the *Crime and Corruption Act* for the protection of witnesses (including disclosers) in CCC investigations. Consideration may be given to whether it is appropriate for another agency to provide support to persons suffering reprisal under the PID Act, and if so whether such an agency should take up the right of intervention in these sections.

Use of CCC information as evidence in PID Act civil proceedings

The provisions for civil remedy in the PID Act give limited guidance as to how and what evidence may be adduced in support of an application. Sections 48 and 49 of the PID Act allow for an application for an injunction to be made by the CCC, however Part 3 of Chapter 4 of the PID Act is silent as to whether the CCC as a named party to civil proceedings would then be obliged to give disclosure in those proceedings of documents and evidence arising from its related investigation. The concern that an application by the CCC under sections 48 or 49 could prejudice the CCC's related investigation of a complaint of suspected corrupt conduct is a significant disincentive to making such an application.

Sections 48 and 49 of the PID Act also do not give any guidance to parties to civil proceedings as to the CCC as a respondent to a subpoena may produce evidence obtained during a related investigation of a complaint of suspected corrupt conduct for the purposes of proving an allegation of reprisal. The CCC is authorised by the *Crime and Corruption Act* to give information obtained in an investigation to another entity if it considers this appropriate¹¹. However, the PID Act is silent as to whether an entity such as the Queensland Industrial Relations Commission or the Supreme Court should consider such information.

The CCC considers that these matters could be clarified in the PID Act for the assistance of the parties to injunction proceedings.

⁸ Section 344(10) of the *Crime and Corruption Act*.

⁹ Section 344(2) of the *Crime and Corruption Act*.

¹⁰ *Criminal Justice Commission v Whitsunday Shire Council* [1997] 2 Qd R 340.

¹¹ See sections 60 and 301 of the *Crime and Corruption Act*.

4. The maximum penalty for the criminal offence of reprisal set out in the PID Act should be reviewed.

The PID Act offence for reprisal attracts a maximum penalty of two years imprisonment. It is classified in the PID Act as an indictable offence. The CCC considers that the offence has parity to other administration of justice offences which attract higher maximum penalties, such as interference with a witness under section 119B *Criminal Code 1899* and attempting to pervert the course of justice under section 140 *Criminal Code 1899*. The CCC considers that the maximum penalties for these offences are relevant benchmarks for the offence of reprisal under the PID Act. A higher maximum penalty for the criminal offence of reprisal would have the additional consequence that evidence which is currently excluded in offence proceedings where the maximum penalty is two years would be admissible, thus assisting a higher rate of successful prosecution of reprisal offences (where it is necessary to demonstrate a defendant's intent in taking a particular course of action).

5. Consideration should be given to aligning the protections for persons making PIDs with protections for other witnesses in PID-initiated investigations.

The CCC supports the extension of the PID Act protections for persons making PIDs to other witnesses in PID-initiated investigations, recognising that other witnesses may be concerned about volunteering information to an investigation where there is a concern about reprisal. The CCC notes that the Commonwealth witness protections are proposed to be extended under section 40 of the *Public Interest Disclosure Amendment (Review) Bill 2022 (Cth)* to include giving witnesses who assist in relation to a public interest disclosure, immunity from any civil, criminal or administrative action (including disciplinary action; immunity from enforcement of remedies or rights; and an absolute privilege. This approach may be appropriate for consideration in Queensland.

6. The following technical aspects of the PID Act should be reviewed to address identified anomalies and apparently unintended consequences, including:

- **the operation of the PID Act definition of 'public interest disclosure' when a person is a 'public officer', disclosures of corrupt conduct which may be made regarding government owned corporations (GOC), and disclosure of serious maladministration;**
- **consideration should be given to whether a government lawyer may make a PID in relation to information or documents which are subject to legal professional privilege; and**
- **the operation of section 8 and schedule 1 of the PID Act to the effect that the Chairperson of the CCC is the CEO for the purposes of the PID Act.**

Operation of the definition of 'public interest disclosure'

The current definition of 'public interest disclosure' as defined by sections 11 to 13 of the PID Act is not clear. The CCC suggests the definition of 'public interest disclosure' could be clarified by removing the distinction between what a public officer may disclose as a PID, and what a member of the public

may disclose as a PID. This could entail removing the ‘section 12 disclosures’ from the PID Act or by removing the distinction between sections 12 and 13 to allow disclosures by any person which fit the section 13 definition to be a PID. Either approach would streamline the process.

If PIDs are to continue to be tied to a person’s status as a ‘public officer’ the PID Act should also clarify whether a person is a public interest discloser if the disclosure is unrelated to their employment as a public officer. For example, an employee of a local council may have a dispute in their private capacity with the Department of Transport, and believe corrupt conduct has occurred. At present the PID Act is unclear as to whether such a complaint would be a public interest disclosure.

Section 19 of the PID Act provides that disclosures by GOC employees about corrupt conduct are PIDs. However, as GOCs are not units of public administration, and the *Crime and Corruption Act* only applies if a matter is notified by the CEO of the GOC or the Department, it is unclear whether this section can strictly apply to a GOC employee. This should be remedied.

The Commission of Inquiry into Forensic DNA Testing in Queensland considered large-scale systemic failures within Queensland’s forensic DNA laboratory. The Final Report of the Commission of Inquiry into Forensic DNA Testing in Queensland detailed instances in which complaints were raised about the administration of the laboratory, but those disclosures were not assessed as PIDs because the complaints were considered not to involve corrupt conduct, or maladministration of the kind required in section 13 of the PID Act. If section 13 is to be retained, the CCC suggests consideration should be given to expanding the ‘maladministration limb’ to include maladministration which seriously and substantially affects the public interest.

Government lawyers making PIDs

The CCC observes that there may be occasions when government lawyers seek to invoke PID Act protections, when the subject matter of the PID may include information which is subject to legal professional privilege.

The PID Act should be clarified to make clear whether it applies to lawyers making PIDs which may involve a breach of legal professional privilege or confidentiality. Chapter 4 provides protections for disclosers. Section 36 of the PID Act provides immunity from liability for making a disclosure. Section 37 expressly provides that obligations of confidentiality do not apply for a PID. It is not clear whether these provisions are intended to protect a discloser whose disclosure may involve a breach of legal professional privilege. While the section is clear in its intent, it does not expressly abrogate privilege. The CCC does not submit that the PID Act should provide protections for disclosers who breach LPP; merely that the current provisions on this point are ambiguous, and would benefit from clarification, whatever the intent.

Crime and Corruption Commission CEO under the PID Act

Finally, the CCC notes that section 8 and schedule 1 of the PID Act operate with the effect that the Chairperson of the CCC is the CEO for the purposes of the PID Act. This may be because the *Crime and Corruption Act* did not provide for the role of Chief Executive Officer until some years after the commencement of the PID Act. The roles and responsibilities of the Chairperson and CEO of the CCC are set out in sections 252, 253 and 269 of the *Crime and Corruption Act*. The Chairperson is responsible for the proper performance of the CCC’s functions other than the aspects of

administration of the commission which are delegated to the CEO. It is the CCC's submission that responsibility for the administration of the PID Act should rest with the CEO rather than with the Chairperson.

Conclusion

The CCC can expand on any of the matters raised in this Submission and also address any other enquiries that may arise in the course of the Review, if required. This Submission does not contain confidential information and is suitable for publication.

3 March 2023