

1 March 2023

Our ref: [LP:MC]

**Confidential**

The Honourable 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

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

Dear Mr Wilson KC

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

Thank you for the opportunity to provide feedback on the review of the *Public Interest Disclosure Act 2010*.

Queensland Law Society welcomes this important review and appreciates the opportunity to provide input.

The *Public Interest Disclosure Act 2010* (**the Act**) is a critical piece of legislation in Queensland to promote integrity within the public sector and ensure consistency in the handling of public interest disclosures.

This response has been informed by input from members of the QLS Privacy, Data, Technology and Intellectual Property Law, Human Rights and Public Law and Occupational Discipline Law Committees, whose members have substantial expertise in this area.

Our response to some of the questions posed in the issues paper is outlined below.

**Introductory comments**

QLS is cognisant of the breadth of reviews and recommendations which have been progressed over the last 12 months which seek to enhance public confidence and discussion on integrity, accountability and transparency in the public sector.

These include:

- *Review of culture and accountability in the Queensland public sector*, Final Report (**the Coaldrake Review**);

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

- Proposed reforms to Queensland's Information privacy and right to information framework;
- Reports by the Crime and Corruption Commission; and
- The Strategic review of the Office of the Information Commissioner.

In our view, recommendations from the Coaldrake Review should be prioritised prior to any legislative changes to the Act. In particular, QLS highlights the recommendation regarding creation of a cross-government clearing house to receive, apportion and monitor complaints and determine the appropriate agency for investigation and disciplinary action. Preservation of confidentiality, consistent with section 65 of the Act, will be critical in the effectiveness and utility of this process.

We recommend that changes to the Act should be considered holistically in the context of the various other reviews to ensure that potential overlaps or gaps are identified and that the integrity framework in Queensland is clear, accessible and able to respond effectively. This is in the best interest of all parties and the public.

### Policy objectives of the *Public Interest Disclosure Act 2010*

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?*

Section 3 (c) (Main objects) of the Act currently provides that 'appropriate consideration' be 'given to the interests of persons who are the subject of a public interest disclosure'.

We note the observations from the 2017 Review of the *Public Interest Disclosure Act 2010* (**the 2017 Review**) that the now repealed *Whistleblowers Protection Act 1994* provided that a PID must be made to a public sector entity to ensure that 'unfair damage is not caused to the reputations of persons against whom disclosures are made by inappropriate publication of unsubstantiated disclosures'.<sup>1</sup>

The 2017 Review observed that a similar provision was not included in the Act when passed and that the Act 'does not contain adequate provisions to ensure that appropriate consideration is given to the interests of persons who are the subject of a PID'.<sup>2</sup>

QLS supports the addition of legislative provisions within the Act to ensure fair and reasonable treatment of public officers to whom a PID relate (consistent with the repealed *Whistleblowers Protection Act*). Any amendments should also reflect the confidentiality obligations under the Act and the detriment which may be caused to public officers, particularly in circumstances where a PID is unsubstantiated.

Ensuring the fair treatment of all parties is consistent with the purpose of the Act and reflects the principles of natural justice and the right to privacy and reputation in section 25 of the *Human Rights Act 2019*.

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<sup>1</sup> Section 10(2)(b) *Whistleblowers Protection Act 1994* (repealed).

<sup>2</sup> Queensland Ombudsman, January 2017, *Review of the Public Interest Disclosure Act 2010*; A review pursuant to s 62 of the *Public Interest Disclosure Act 2010*, available at < [5517T228.pdf](https://www.parliament.qld.gov.au/5517T228.pdf) ([parliament.qld.gov.au](https://www.parliament.qld.gov.au))> at p 62.

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?*

QLS supports revisiting the title of the Act to ensure the purpose of the legislation is easily recognisable.

We acknowledge this is consistent with Recommendation 2 of 2017 Review that:

*The title of the PID Act should be amended to incorporate both the terms 'whistleblower' and 'public interest disclosure'.<sup>3</sup>*

3. *Are any changes needed to the PID Act to make it more compatible with the Human Rights Act 2019?*

QLS supports the evaluation of all legislation to ensure consistency with the *Human Rights Act 2019 (HRA)*.

Our members with expertise in the management of PIDs in this area, have submitted that to ensure clarity and reduce practical complexity, specific reference to the HRA in the Act is not required. Further, it is likely many people and agencies exercising powers and complying with obligations in the PID Act will be public entities, and therefore must make their decisions compatibly with human rights.

Where relevant, we have noted in answering other questions how the HRA informs our suggested changes. We anticipate the most relevant rights limited or promoted by the PID Act will be the right to privacy and reputation in section 25 of the HRA, and freedom of expression in section 21, which includes the right to seek, receive and impart information. Human rights in the HRA may generally be limited, provided any limitation is reasonable and proportionate under sections 8 and 13 of the HRA.

### ***What is a public interest disclosure?***

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

QLS considers that a broad pathway is appropriate to facilitate disclosure of wrongdoing in the public sector. However, our members have expressed concern that the current thresholds for the types of wrongdoing which a discloser can report (and that attract protections of the Act) are too broad in practice and therefore do not always achieve the appropriate balance.

Sections 12(3) and 13(3) of the Act require that the person *honestly believes on reasonable grounds* that the information tends to show the conduct or other matter.

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<sup>3</sup> Queensland Ombudsman, January 2017, *Review of the Public Interest Disclosure Act 2010*; A review pursuant to s 62 of the *Public Interest Disclosure Act 2010*, available at < [5517T228.pdf](https://www.parliament.qld.gov.au/5517T228.pdf) ([parliament.qld.gov.au](https://www.parliament.qld.gov.au/))>.

The conduct includes 'corrupt conduct' or 'maladministration that affects a person's interests in a substantial and specific way'. **Maladministration** is broadly defined in Sch 4 of the Act as follows:

**maladministration** is administrative action that—

- (a) was taken contrary to law; or
- (b) was unreasonable, unjust, oppressive, or improperly discriminatory; or
- (c) was in accordance with a rule of law or a provision of an Act or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory in the particular circumstances; or
- (d) was taken—
  - (i) for an improper purpose; or
  - (ii) on irrelevant grounds; or
  - (iii) having regard to irrelevant considerations; or
- (e) was an action for which reasons should have been given, but were not given; or
- (f) was based wholly or partly on a mistake of law or fact; or
- (g) was wrong

**Administrative action** is also widely defined in Schedule 4.

QLS supports re-consideration of the scope of wrongdoing that attracts PID protection.

While we acknowledge the importance of a broad approach, in our view the drafting and definitions of the types of conduct or other matters that may be disclosed under the Act should be tightened. This would ensure greater clarity as to the types of conduct the PID regime applies and assist public sector entities in determining the appropriate processes and response required to disclosures.<sup>4</sup>

As noted earlier, sections 12(3) and 13(3) of the Act require that the person *honestly believes on reasonable grounds* that the information tends to show the conduct or other matter. When this test is applied in conjunction with the broad definitions of maladministration and administrative action, there is potentially a very wide scope of disclosable conduct.

As an alternative, we suggest considering section 38 of the CCC Act model. For example, section 38(1) of the *Crime and Corruption Act 2001* uses the 'reasonable suspicion' test and applies if the matter 'involves, or may involve, corrupt conduct' and incorporates a subjective and objective element. This test clarifies that there must be some reasonable basis to form the suspicion.

Adopting this drafting would also have the benefit of introducing consistency with a similar and well-established test in the CCC context, as another key part of the Queensland integrity framework.

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<sup>4</sup> Including referral to another public sector entity under section 31 of the Act.

In this regard, the 2017 Review also outlined that the Act should be amended to define the information that may be disclosed as a PID in more specific and objective terms and to include definitions of 'substantial', 'specific' and other key terms to define information that may be disclosed. We support these recommendations.

The legislative framework should provide a multifaceted response to ensure that disclosures are dealt with appropriately. Section 30(1) currently states when a "public sector entity may decide not to investigate or deal with a public interest disclosure". It would assist to implement further legislative guidance as to the process to be applied when an entity decides not to investigate or deal with a PID under section 30. For example, where a workplace complaint or grievance is identified and the matter ought to be referred to the public service commission or another appropriate entity. This would of course also coincide with the role of the clearing house proposed by the Coaldrake Review.

Section 30 (1) of the Act could be enhanced by making it clear that a public sector entity may decide not to investigate if the subject matter is not in the public interest, for example, where it is a workplace grievance that does not disclose a wider systemic issue. Subsection 30(1)(d) could also be amended to either remove the reference to "too trivial" or by the addition of "is not substantial" (and otherwise fall within Division 1 Information that may be disclosed and who may disclose it). Currently the legislation is not sufficiently clear as to whether a public sector entity does not have to investigate where the issue is not substantial and within sections 12 and 13.

Consistent with the objects of the Act (and rights including the right to privacy and reputation in section 25 of the HRA), the seriousness of allegations requires robust processes which facilitate proper assessment of the disclosure and where appropriate, investigation and response and ensure consideration of the interests of persons the subject of the public interest disclosure.

### ***Who can make a public interest disclosure?***

Section 19 of the Act sets out specific public interest disclosures concerning government owned corporations or rail government entities and is limited to disclosure about corrupt conduct or reprisal relating to a previous disclosure.

Firstly, we understand there is an irregularity in the applicable legislation whereby the jurisdiction of the Crime and Corruption Commission (as conferred by section 156 of the *Government Owned Corporations Act 1996*), requires that the chief executive officer must notify the CCC of the complaint relating to the GOC where it involves or may involve corrupt conduct.

Section 156 can create practical difficulties in the application of section 19 of the Act as it is only when the referral from the notification is provided by the CEO that jurisdiction of the CCC is invoked. Most often this also involves the oversight of Treasury.

We suggest there should be consistency around the way in which GOCs are subject to the jurisdiction of the CCC including in clarifying the ability of employees of GOCs to make a disclosure directly to the CCC pursuant to section 19 of the Act. The Act should provide certainty that the CCC's jurisdiction has been triggered.

Secondly, the interplay between the definition of *Public sector entity* in section 6(2)(a) and section 19 of the Act means that a large number of corporate entities would not be subject to the PID regime. As part of the review, consideration should be given to the intended scope of the Act and whether this is appropriate.

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

Lastly, section 36 of the Act should be amended to clarify that the protection does not apply to all who make a public interest disclosure. Rather, immunity from liability would not apply to a grievance or conduct outside sections 12 and 13, unless for example, the discloser makes the appropriate application to the court.

We acknowledge that there must be a balance between discouraging improper disclosures and encouraging appropriate ones. In this regard the discloser would still be protected (if the disclosure was appropriate) in the event of any reprisal. This would simply ensure that the protection does not automatically apply to those who make improper disclosures.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully



Rebecca Rogerty  
**President**

13 March 2023

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Dear Mr Wilson KC

**Supplementary Submission: Review of the Public Interest Disclosure Act**

Thank you for the opportunity to provide feedback on the review of the *Public Interest Disclosure Act 2010 (Qld) (the Act)*.

We refer to our submission of 1 March 2023 and thank you for the opportunity to provide supplementary comments to the review.

Adopting the numbering in our correspondence, in respect of question 4, (*What types of wrongdoing should the PID regime apply to? Should the scope be narrowed or broadened? Why and how?*), in addition to the views outlined, some members have also raised the following

1. Firstly, the definitions of the types of conduct or other matters that may be disclosed under the Act should be reviewed to provide greater clarity to whistle-blowers and public sector entities about the types of conduct to which the public interest disclosure (PID) regime applies. Whilst clarification is needed, this should not necessarily narrow the matters about which a public interest disclosure may be made. The 2017 Review acknowledged the risk in the Act being 'written so narrowly that it becomes excessively prescriptive and cannot be applied to the broad range of possible circumstances in which PIDs may occur and require assessment'.<sup>1</sup>
2. Secondly, there are differing views amongst our members as to the appropriateness of utilising the 'reasonable suspicion' test in this context, that is, where disclosures are not made by senior public officials or chief executives, but by other employees, officers or members of the public.

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<sup>1</sup> Queensland Ombudsman, January 2017, *Review of the Public Interest Disclosure Act 2010*; A review pursuant to s 62 of the Public Interest Disclosure Act 2010, p 28 available at < [5517T228.pdf](https://www.parliament.qld.gov.au/5517T228.pdf) ([parliament.qld.gov.au](https://www.parliament.qld.gov.au))>.

## Review of the Public Interest Disclosure Act

As noted in our earlier submission, we support re-consideration of the scope of wrongdoing that attracts PID protection and amendments which provide greater clarity for all parties.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [policy@qls.com.au](mailto:policy@qls.com.au) or by phone on (07) 3842 5930.

Yours faithfully



Chloé Kopilović  
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