QUT Centre for Decent Work and Industry

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

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EXECUTIVE SUMMARY & RECOMMENDATIONS

The disclosure of wrongdoing is of vital importance to a functioning democracy. However, we cannot be blind to the potential for quite serious procedural harm to occur. It is therefore imperative that high protection standards are set and enacted for all parties to the PID process which focus on the needs of and potential harms to both disclosers and subject officers.

In our submission we advocate for a series of changes to strengthen Queensland's PID regime, however, this in and of itself will be insufficient to achieve change. The efficacy and success of a PID scheme is directly linked to the implementation and enforcement ecosystem in which it operates; even the most sophisticated whistleblowing schemes will be ineffective if there is an insufficient commitment from senior leaders in public sector entities to implement them. We advocate for recommendations that encourage public sector entities to implement the requirements of the PID Act and associated statutory instruments more effectively.

In revising the Act, we suggest that regulation is preferred to standards to support effective implementation and the supporting compliance regime. Further, we argue it could be prudent to require public sector entities to provide annual reporting of PID compliance and steps taken to ensure that public officers are aware of their rights and responsibilities under the Act and that the workforce has the capabilities and capacity to effectively discharge these. Given public sector entities will have varying degrees of capability, the oversight agency should be conferred specific functions in relation to these issues.

Our recommendations based on consideration of the consultation questions are summarised below.

Consultation Question	Recommendation
Policy objectives of the PID Act	
1. Are the objects of the PID Act valid and is the Act achieving these objects?	While the objectives of the PID Act are broadly appropriate cultural reform is required to achieve them. In revising the Act regulation is preferred to standards to support implementation and the supporting compliance regime. It could be prudent to require public sector entities to provide annual reporting of PID compliance and steps taken to ensure public officers are aware of their rights and responsibilities under the Act and that the workforce has the capabilities and capacity to effectively discharge these.
3. Are changes needed to ensure public confidence in the integrity of the PID regime?	
2. Is the title of the legislation suitable?	The title should be amended to include whistleblower and public interest disclosure.
What is a public interest disclosure?	
5. What types of wrongdoing should the PID regime apply to?	Disclosures made under s.12(1)(a) – (c) should be removed from the PID Act. The test for maladministration should be amended to 'serious maladministration'. Consideration should be lent to including additional integrity violations such as pecuniary interest violations and serious contraventions of the *Right to Information Act 2009* and *Information Privacy Act 2009*.
6. Should a PID include disclosures about substantial and specific dangers to a person with a disability or to the environment?	
7. Is there benefit in introducing a public interest or risk of harm test in the definition of a PID?	Adopting a public interest or risk of harm test in the definition of a PID would mirror other jurisdictions. However, there are attendant risks that would need to be managed.

Consultation Question	Recommendation
8. Should a person be required to have a particular state of mind when reporting wrongdoing to be protected under the PID regime?	The current provisions are appropriate. It would not be desirable to introduce a motive consideration. What matters is that they have knowledge or evidence of wrongdoing.
Who can make a public interest disclosure?	
10. Should the definition of public officer be expanded to include those performing services for the public sector whether paid or unpaid? Should former public officers be covered?	The definition of 'public officer' should be expanded to capture anyone in a public sector workplace including volunteers, students, contractors and work experience participants. Former public officers should also be covered however, it is recognised that there will need to be limits regarding this. It is recommended that disclosures made within twelve (12) months of formal separation (including termination) 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?	There may be benefit in adopting a similar position to the 2022 NSW PID Bill, which differentiates between voluntary, witness and mandatory disclosures. Adopting such an approach could alleviate the administrative burden on public sector entities and allow them to focus their attention on disclosers and subject officers that are particularly vulnerable.
12. Should different arrangements apply to role reporters?	
Making, receiving and identifying public interest disclosures	
18. Who should be able to receive PIDs? Do you support having multiple reporting pathways for disclosers?	The PID Act should maintain a 'no wrong doors' approach, with additional obligations imposed on public sector entities to ensure staff that can properly receive disclosures are given sufficient training. The oversight agency should be given a specific function of auditing the efficacy of PID training that is delivered by public sector entities.
20. Should the PID legislation require a written decision be made about PID status as recommended by the Queensland Ombudsman?	Disclosers, particularly those who have made a voluntary disclosure, need to be provided with a written decision advising that their matter has been assessed as a PID. This must include information about both their right as well as their responsibilities. Similar advice should also be required to be provided to subject officers.
21. Are the provisions for disclosures to the media and other third parties appropriate and effective?	The PID Act strikes the right balance for disclosures to MPs and journalists.
Managing, investigation and responding to public interest disclosures	
24. Are agencies able to provide effective support for disclosers, subject officers and witnesses? Are any additional or alternate powers, functions or guidance needed?	The support requirements in the PID Act are insufficient and should include additional obligations on public sector entities to undertake a risk assessment for all parties to the process – including subject officers. The Queensland PID regime needs to take into account organisational justice considerations more effectively. The supporting statutory instruments should include more detailed guidance on effective support. The provision of support is administratively intensive, however, the consequences of failing to provide it are significant. One way this could be achieved is through requiring public sector entities to implement a trauma-informed approach to their PID frameworks which are linked to the legal concept of therapeutic jurisprudence, an approach that seeks to ensure such processes operate therapeutically and reduce harm to those involved. Given public sector entities will have varying degrees of capability, the oversight agency should be conferred specific functions in relation to these issues.
25. Should the PID Act include duties or requirements for agencies to take steps to correct the reported wrongdoing generally or in specific ways, provide procedural fairness to the discloser, subject officer and witnesses, 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?	The protections should not be opt out. This creates unnecessary risk for all parties, including the public sector entity involved.
Protections for disclosers, subject officers and witnesses	
27. Are the current protections for disclosers, subject officers and witnesses appropriate and effective?	The current definition of reprisal is broadly appropriate. The current PID regime fails to sufficiently consider procedural harms that can occur to all parties to the process. This must be addressed.
28. Are the current provisions about confidentiality adequate and fit for purpose?	We encourage the review to consider whether some protections should apply from the date of disclosure and others from the date of assessment. This

Consultation Question	Recommendation
29. Is the definition of reprisal appropriate and effective? Do any issues arise in identifying, managing and responding to reprisals?	would ensure all parties to the PID process are given an opportunity to be made aware of their rights and obligations and ensure they don't inadvertently commit an offence under Act.
Remedies	
31. Are the remedies available to disclosers under the PID Act reasonable and effective?	An administrative redress scheme for disclosures who consider they have experienced reprisals is essential, however, such a scheme should also be able to be accessed by subject officers who consider they have experienced reprisals.
34. Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?	
Practical considerations	
40. Should the PID legislation be more specific about how it interacts with any other legislation, process or scheme?	The PID legislation should be more specific about how it interacts with other legislation, processes, and schemes.
41. Should the PID legislation include incentives for disclosers?	The PID legislation should not include incentives for disclosers.
42. Are current arrangements for training and education about the PID Act effective?	If the definition of 'public officer' is expanded, plain English education/communication materials should be prepared which are targeted to the needs of specific user groups (e.g., volunteers, students engaged in work-integrated learning) should be prepared and disseminated. To assist disclosers from diverse backgrounds, a video guide on how to make a public interest disclosure should be part of the information page of agencies and the Ombudsman websites
44. Is the PID Act accessible and easy to understand? How could the clarity of the Act be improved?	As currently written the PID Act is complex and difficult to interpret. There is a strong argument in favour of repealing and rewriting the Act, with a focus on simplifying the Act's structure, provisions and language.

DETAILED RESPONSE TO CONSULTATION QUESTIONS

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

The PID Act is a key element of the Queensland public sector's integrity framework. **While the objects of the PID Act remain broadly appropriate, changes are needed to achieve them.** Although the number of PIDs reported to the oversight agency continues to trend upward,[1] this is not necessarily indicative that the PID Act has been effective in systematically and comprehensively uncovering wrongdoing in the public sector. Based on PID data reported by Queensland public sector entities[2], there is evidence the broad objectives of the PID Act are being achieved. Public sector entities are overall demonstrating through reporting to the oversight agency that many disclosures are being identified, assessed, investigated and actioned. However, relative to the total size of the public sector the total number of disclosures is very small, and the oversight agency [Queensland Ombudsman's Office] does not publish data that breaks down the number of disclosures received per public sector entity – only by public sector entity type. It is therefore difficult for the public to have confidence that every public sector entity has the maturity and capability to deal with PIDs effectively. This could be resolved by reconsidering the reporting obligations on public sector entities and requiring the oversight agency to publish additional data.

The integrity of any whistleblowing regime rests on the willingness of employees (and other relevant parties) to come forward and report serious wrongdoing. Whilst it is paramount that effective legislation sits at the heart of any PID regime, willingness to come forward is influenced by reporting culture. It is therefore imperative public sector entities have a good understanding of their reporting culture and barriers to reporting. An audit[3] undertaken by the NSW Ombudsman found that particular groups of local council employees—including those employed in outdoor roles, and those who had been employed at their council for a long time—are less likely to report wrongdoing. The same audit identified factors such as a lack of trust with head office, an 'us versus them' attitude, and cultures of not dobbing on your mates as potentially indicative of barriers to reporting.

There are strong arguments in favour of legislating requirements for public entities to take steps to have a clear understanding of their internal reporting culture, and potentially to be required to make an annual attestation of compliance with the PID Act and supporting statutory instruments. One option may be to require public sector entities to include such an attestation in their annual reports. While most public sector entities have a PID policy and procedure as required under the Act, the mere existence of such policy is insufficient to achieve cultural and behavioural change and to encourage potential disclosers to come forward. Requiring an annual attestation is one way to promote public confidence in the integrity of the PID regime.

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?

Although the term 'whistleblower' may have some pejorative connotations, it is more easily understood in the broader community. **The title of the PID Act should therefore be amended to incorporate whistleblower as well as public interest disclosure.** It is not recommended that wrongdoing be included as its widespread colloquial use may increase confusion regarding the coverage of the Act. Public Interest Disclosure should remain in the title as it emphasises the focus on the public interest.

[1] Office of the Queensland Ombudsman (2022) *Queensland Ombudsman Annual Report 2021-22.* https://www.ombudsman.qld.gov.au/about-us/corporate-documents/annual-report [p. 27]

[2] Office of the Queensland Ombudsman (2022) *Queensland Ombudsman Annual Report 2021-22.* [p. 24]

[3] Office of the New South Wales Ombudsman (2022) *Public Interest Disclosures Act 1994 Audit Report: Summary of Public Interest Disclosure Audits of 6 Local Councils*. https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0009/138375/PID-Audit-report-summary-of-PID-audits-of-6-councils.pdf

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 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?

The PID Act should be amended to remove disclosure types at s.12(1)(a) – (c). The use of the PID Act by members of the public continues to decline. In 2021-22, there were 46 disability PIDs reported to the oversight agency, and 17 environmental PIDs made under s.12.[4] There are open questions as to whether this is a result of a lack of awareness of the option to make disclosures under this section, whether there is a lack of capability in public sector entities in identifying and dealing with disclosures of this type, or if there are better mechanisms for dealing with complaints of this nature. Whatever the reason, these provisions should be abolished. In its Review of the PID Act the Queensland Ombudsman[5] observed: "the provision for 'any person' to make a PID is inconsistent with the concept of a PID scheme as a mechanism for facilitating internal disclosures and providing protection from reprisal for employees and others within a public sector entity who make PIDs about wrongdoing inside a public sector entity." The focus of the PID Act must be on protecting and supporting public officers who raise complaints of serious wrongdoing in the public sector. The provisions at s.12(1)(a) – (c) are complex for public sector entities to apply, with limited net benefit for members of the public making a complaint about wrongdoing. There are other mechanisms through which members of the public can raise concerns about danger to the health and safety of a person with a disability (for example through the Office of the Public Guardian), as well as the environment. Complaints on these issues can also be progressed through the relevant public sector entity's complaints management system.

It is worth noting there is limited action that public sector entities can take to protect members of the public from reprisal – they are not in the entity's workplace, and so there are limited options available to the entity to protect and support them. On balance, the inclusion of these types of wrongdoing unnecessarily complicates the PID Act and arguably does not align with the objects of the PID Act. There is therefore a strong argument in favour of their removal.

This would leave the following types of public interest information being able to be disclosed:

- corrupt conduct
- maladministration that adversely affects a person's interest in a substantial and specific way
- substantial misuse of public resources (other than an alleged misuse based on mere disagreement over policy that may properly be adopted about amounts, purposes or priorities of expenditure)
- substantial and specific danger to public health or safety
- substantial and specific danger to the environment
- reprisal.

An international study[6] of whistleblowing schemes found that most legislation covers the following types of wrongdoing: (a) breaches of law, (b) danger to the health and safety of people, and (c) integrity violations. Within this third category, there is significant variation: examples include 'shortcoming of public service duty' (Belgium), 'abuse of authority' (Republic of Korea, USA), 'breaches of ethical codes' (Norway), 'gross mismanagement' (Ireland, USA) and 'violation of administration (Israel).[7] Within the Queensland PID scheme, integrity violations would most commonly be caught by 'maladministration that adversely affects a person's interest in a substantial and specific way.'

We argue this definition of maladministration is overly complex. Maladministration is currently defined at Schedule 4 of the PID Act as an 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—

[4] Office of the Queensland Ombudsman (2022) *Queensland Ombudsman Annual Report 2021-22.* [p. 27]

[5] Office of the Queensland Ombudsman (2017) *Review of the PID Act.* [p. 22]

[6] Loyens K & Vandekerckhove W (2018) Whistleblowing from an international perspective: A comparative analysis of institutional arrangements. *Administrative Sciences*, 8, art. 30.

[7] Loyens K & Vandekerckhove W (2018) Whistleblowing from an international perspective: A comparative analysis of institutional arrangements. *Administrative Sciences*, 8, art. 30.

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.

Notably, there is no guidance within the PID Act or PID Standards as to how to interpret 'adversely affects a person's interest in a substantial and specific way.' This lack of clarity or guidance is likely to unnecessarily overcomplicate the assessment process. The legislative test is also unnecessarily limiting, potentially resulting in disclosures being inappropriately excluded from the PID regime.

The test for maladministration should be amended to 'serious maladministration'. There are arguments in favour of adopting the NSW approach to PIDs of maladministration. In the *Public Interest Disclosures Bill 2022* (NSW) (the NSW PID Bill) serious maladministration is defined as conduct, other than conduct of a trivial nature, of a public sector entity or a public official relating to a matter of administration that is—(a) unlawful, or (b) unreasonable, unjust, oppressive or improperly discriminatory, or (c) based wholly or partly on improper motive.[8] Adopting the definition in the NSW PID Bill would simplify the test (thus making it easier for public sector entities to assess PIDs and funnel them through the correct process), whilst ensuring that sufficiently serious complaints of maladministration are caught by the scheme. Establishing a threshold of "other than conduct of a trivial nature" will ensure that public sector entities are not applying an unnecessarily conservative lens to assessing potential PIDs of this nature.

Consideration should also be lent to including additional integrity violations such as pecuniary interest violations and serious contraventions of the *Right to Information Act 2009* and *Information Privacy Act 2009*, as well as pecuniary interest violations for both state and local government as types of serious wrongdoing that can be disclosed under the PID Act. Whilst the number of equivalent disclosures under the NSW PID regime have been comparatively small[9], including these types of wrongdoing would signal the importance of complying with freedom of information schemes and pecuniary interest obligations to the broader public sector. Doing so would also signal to the broader public the Government's commitment to transparency and accountability.

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

Adopting a public interest or risk of harm test in the definition of a PID would mirror other jurisdictions. However, there are attendant risks that would need to be managed. As currently drafted the objects of the PID Act include promoting the public interest by facilitating public interest disclosures of wrongdoing in the public sector. Unlike other jurisdictions, the PID Act does not carve out workplace or personal grievances. There are arguments in favour of doing so.

Workplace grievances by their very nature will frequently be of private interest in that they are primarily of interest to the complainant and the complainant only. A wide range of other mechanisms to deal with such grievances already exist, including complaints management processes and statutory administrative review schemes (including appeals through the Queensland Industrial Relations Commission under the *Public Service Act 2008*). These mechanisms are often a more appropriate way to deal with personal grievances and can provide a speedier resolution that is much less administratively burdensome to the public sector entity.

Balancing this is the fact that many disclosures contain both personal and public interest issues. Research undertaken through the *Whistling While They Work 2* research project found a significant percentage (up to 47%) of reports of wrongdoing involve a combination of public interest and personal/ workplace issues.[10] For those assessing and receiving disclosures, it can be difficult to tease out the salient issues and subject them to an appropriate assessment process. This is further complicated by the definition of corrupt conduct

[8] New South Wales Government. *Public Interest Disclosures Bill 2022.* https://legislation.nsw.gov.au/view/pdf/bill/ece635c2-8de2-4e20-90a9-891f58abad19

[9] Office of the New South Wales Ombudsman (2022) *Oversight of the Public Interest Disclosures Act 1994: Annual Report 2021–2022*. [p.13]

[10] Brown AJ, Lawrence S, Olsen J, Roseman L, Hall K, Tsahuridu E, Wheeler C, Macaulay M, Smith R & Brough P (2019) *Clean As a Whistle: A Five Step Guide to Better Whistleblowing Policy and Practice in Business and Government – Key findings and actions of Whistling While They Work 2*, Griffith University, August 2019. https://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2019/08/Clean-as-a-whistle_A-five-step-guide-to-better-whistleblowing-policy_Key-findings-and-actions-WWTW2-August-2019.pdf [p.13]

in the Crime and Corruption Act 2001, which is broad enough to capture both personal and public interest issues.

Introducing a public interest test may create dilemmas for those assessing potential disclosures. In *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health*, Lockhart J observed "the public interest is a concept of wide meaning and not readily limited by precise boundaries. Opinions have differed, do differ and doubtless always will differ as to what is or is not in the public interest."[11] Introducing a public interest test may also result in disclosers who should properly receive the protections of the PID Act being funnelled through another process (e.g., grievance process), thus creating or exacerbating reprisal/ detriment risk. NSW has attempted to grapple with this in the NSW PID Bill[12] by including the following at clause 26:

26(3) A disclosure does not comply with this section if the information disclosed—
- (a) concerns only a grievance about a matter relating to the employment or former employment of an individual, and
- (b) either—
  - (i) does not have significant implications beyond matters personally affecting or tending to personally affect the individual, or
  - (ii) relates to a disagreement with the taking or proposed taking of reasonable management action.

26(4) However, subsection (3) does not apply if the grievance arises from—
- (a) a decision made by a public sector entity in dealing with a previous voluntary public interest disclosure, or
- (b) alleged detrimental action relating to a previous voluntary public interest disclosure.

Any public interest test improperly conceived also runs the risk of excluding disclosures that at face value may appear to be purely personal interest but are symptomatic of broader systemic issues. We encourage the reviewers to consider the implications of introducing a public interest test carefully and learn from the experiences of other jurisdictions.

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?

The current provisions are appropriate. The requirement that disclosers have either an honest belief on reasonable grounds that the information they are providing tends to show the wrongdoing, or that they have evidence of the wrongdoing they are disclosing is an appropriate threshold. It would not be desirable to introduce a motive consideration as it is irrelevant why someone is coming forward; instead, what matters is that they have knowledge or evidence of wrongdoing.

[11] *Right to Life Association (NSW) Inc v Secretary, Department of Human Services & Health* (1995) 128 ALR 238 per Lockhart J.

[12] New South Wales Government. *Public Interest Disclosures Bill 2022.* https://legislation.nsw.gov.au/view/pdf/bill/ece635c2-8de2-4e20-90a9-891f58abad19

Who can make a public interest disclosure?

Question 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?

The definition of public officer should be expanded to capture anyone in a public sector workplace including volunteers, students, contractors, and work experience participants. Former public officers should also be covered; however, it is recognised that there will need to be limits regarding this. It is recommended that disclosures made within twelve (12) months of formal separation (including termination) should be covered. The current definition of public officer must be expanded to include those performing services for the public sector, whether paid or unpaid. This must extend to volunteers, students on placement and contractors (including those on a contract of service as well as a contract for service). These groups of people are equally as likely to observe wrongdoing, however, may be particularly vulnerable given the precarious nature of their link to the public sector entity they are performing services for. **The definition of public officer should be expanded to capture anyone in a public sector workplace** – this should be extended to include volunteers, students, contractors and work experience participants (including those on a contract of service as well as a contract for service. These groups of people are equally as likely to observe wrongdoing, however, may be particularly vulnerable given the precarious nature of their link to the public sector entity they are performing services for.

We support the observations of the Office of the Queensland Ombudsman[13] that widening the definition of public officer would:

- support a pro-disclosure culture within public sector public sector entities;
- provide more equitable access to PID protections;
- simplify the assessment of disclosures for public sector entities; and
- improve consistency with practice in other Australian jurisdictions.

We have particular concerns about the vulnerabilities of students on placement in public sector entities. Students engaged in work-integrated learning placements who can become "inadvertent employees."[14] Given the unpaid nature of most placements most would not fall under the current definition of public officer in the PID Act. For example, a student teacher on a work-integrated learning placement at a school would not currently be considered a public officer, yet they are uniquely vulnerable to exploitation and abuse of power particularly given their potential career rests on the school they are placed at being satisfied of their competency. Students engaged in work experience through work-integrated learning in a public service workplace should also be covered due to the high stakes associated with participation. Research has shown that students may not report instances of wrongdoing for fear of failing their placement.[15] As they are not employees, in addition to the (perceived) loss of a job offer reprisals could also include receiving a lesser grade for their placement which can impact course progression, future placements and employability. Such power disparities create significant risks for these vulnerable groups, and yet they are not currently afforded legislative protections through the PID regime. The PID Act must be guided by a basic principle that if someone is reporting serious wrongdoing they should not suffer detriment for doing so – broadening the definition of public officer would help achieve this aim.

Former public officers should also be protected when reporting wrongdoing after their employment has ended, however there may need to be limits imposed in relation to this. It is recommended that disclosures made within twelve (12) months of formal separation (including termination) should be covered.

[13] Office of the Queensland Ombudsman (2017) *Review of the PID Act* [p. 38]

[14] Cameron C (2018) The student as inadvertent employee in work-integrated learning: A risk assessment by university lawyers. *International Journal of Work-Integrated Learning*, 19(4), 337-348.

[15] Cameron C, Ashwell J, Connor M, Duncan M, Mackay W & Naqvi J (2020) Managing risks in work-integrated learning programmes: A cross-institutional collaboration. *Higher Education, Skills & Work-Based Learning*, 10(2), 325-338.

Consultation Question 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?

Consultation Question 12. Should different arrangements apply to role reporters? Why and how?

There may be benefit in adopting a similar position to the 2022 NSW PID Bill which differentiates between voluntary, witness and mandatory disclosures. Adopting such an approach could alleviate the administrative burden on public sector entities and allow them to focus their attention on disclosers and subject officers that are particularly vulnerable. The NSW PID Bill differentiates at clause 21(1) between:

(a) a voluntary public interest disclosure
(b) a witness public interest disclosure
(c) a mandatory public interest disclosure

Voluntary PIDs are disclosures of information about serious wrongdoing made by a public official (the equivalent term to a public officer in that jurisdiction). Witness PIDs are disclosures of information in an investigation of serious wrongdoing. Mandatory PIDs are disclosures about serious wrongdoing made by a public official while meeting the ordinary requirements of the official's role or functions, or under a statutory or legal obligation, other than an obligation imposed by a code of conduct. The NSW PID Bill stipulates that while all PIDs receive the protections in the Bill, administrative obligations only apply to voluntary disclosures. This approach goes some way to ensuring that the administrative burden public sector entities carry in assessing and managing PIDs is directed to those who are arguably most at risk.

It is possible a discloser may have an agent disclose on their behalf, and we encourage the Review to consider these circumstances and ensure associated issues are appropriately addressed. For example, due to lower levels of work experience and higher levels of vulnerability[16] a student engaged under work-integrated learning arrangements might disclose to their higher education institution via their placement supervisor who could make a disclosure on their behalf. Although safe-guarding student wellbeing whilst engaged in work-integrated learning is the responsibility of higher education institutions in the conduct of their educational duties, there is a lack of clarity as to who the discloser is, and by extension who would attract the PID Act protections. Reprisals against institutions could include restricting the supply of work-integrated learning placements, and we encourage the Reviewers to consider the implications of this. There is precedent for extending protections to a broader spectrum of parties than the PID Act currently protects. *Directive (EU) 2019/1937* of the European Parliament requires member states of the EU to adopt a minimum set of standards that underpin their whistleblowing schemes. This Directive[17] requires:

> Protection should be provided against retaliatory measures taken not only directly vis-à-vis reporting persons themselves, but also those that can be taken indirectly, including vis-à-vis facilitators, colleagues or relatives of the reporting person who are also in a work-related connection with the reporting person's employer or customer or recipient of services. Without prejudice to the protection that trade union representatives or employees' representatives enjoy in their capacity as such representatives under other Union and national rules, they should enjoy the protection provided for under this Directive both where they report in their capacity as workers and where they have provided advice and support to the reporting person. Indirect retaliation also includes actions taken against the legal entity that the reporting person owns, works for or is otherwise connected with in a work-related context, such as denial of provision of services, blacklisting or business boycotting.

[16] Cameron C (2017) The strategic and legal risks of work-integrated learning: An enterprise risk management perspective. *Asia-Pacific Journal of Cooperative Education,* 18(3), 343-256.

[17] European Parliament and of the Council (2019) *Directive (EU) 2019/1937.* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937

Making, receiving and identifying Public Interest Disclosures

Question 18. Who should be able to receive PIDs? Do you support having multiple reporting pathways for disclosers?

The PID Act should maintain a 'no wrong doors' approach, with additional obligations imposed on public sector entities to ensure staff that can properly receive disclosures are given sufficient training. There are significant advantages to the 'no wrong doors' approach that underpins the current PID regime. Ensuring potential disclosers have multiple options through which to make a PID reduces the risk that they will suffer detriment for raising a complaint and subsequently find they are unprotected. Such an approach shifts the obligation to public sector entities to ensure potential proper authorities—including direct managers and supervisors—have sufficient knowledge to funnel potential PIDs through the appropriate process. It is recognised that such an approach is not without risk. As the Queensland Ombudsman observed: "To effectively respond to a PID, [potential proper authorities] must have knowledge of the PID Act, [an] understanding of the public sector entity's PID policy and procedures, the capacity to identify a PID, and awareness of the internal resources available to support disclosers as well as to assist them in taking action in relation to a PID."[18] However, given the potential complexity of navigating the PID regime, a legislative obligation should be imposed on the chief executive officers of public sector entities to ensure potential proper authorities—including supervisors and managers—are provided appropriate training to fulfil their responsibilities and the oversight agency be required to audit the efficacy of PID training at periodic intervals.

Question 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 public sector entities?

Disclosers, particularly those who have made a voluntary disclosure, need to be provided with a written decision advising their matter has been assessed as a PID. This must include information about both their right as well as their responsibilities during an investigation. Similar **written advice should also be required to be provided subject officers**. We recognise there is an administrative burden linked to the administration of the PID Act. Public sector entities are frequently being asked to do more with less, and it is important this Review carefully consider the implications of any additional obligations that are being imposed. The potential imposition of additional obligations must be balanced however against the rights and interests of the parties to a PID process. Disclosers need to be provided with clear information that confirms their disclosure has been assessed as a PID, along with details of their rights and obligations under the PID Act and supporting statutory instruments. This extends to their obligations around maintaining confidentiality, but also being mindful of the subject officer's right to natural justice and reminding them to adhere to the public sector entity's Code of Conduct during the investigation. Clear information also needs to be provided on the supports available. Subject officers need to be provided with similar information, along with a reminder not to engage in reprisal. Mandating these requirements in the legislation will help achieve consistent practice across the public sector and mitigate some of the potential procedural harms that may arise from the PID process.

Question 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?

The PID Act strikes the right balance for disclosures to MPs and journalists. It is noteworthy that the NSW PID Bill continues the requirement in that jurisdiction that a disclosure be substantially true prior to a discloser disclosing to an MP or a journalist. In considering whether to remove this requirement, the NSW Government reflected on the importance of protecting the reputation of individuals against defamation and discouraging the unauthorised public disclosure of confidential information.[19] The airing of allegations against subject officers runs the risk of causing reputational damage to the subject officer. That allegations may after investigation may be found to be groundless or inaccurate will not necessarily repair such reputational damage, particularly given the confidentiality provisions of the Act.

[18] Office of the Queensland Ombudsman (2017). *Review of the PID Act.* [p. 43]

[19] New South Wales, *Parliamentary Debates*, Legislative Assembly, 29 March 2022, (M. Speakman, Attorney-General) (*Public Interest Disclosures Bill 2021 Second Reading Speech*)
https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1323879322-123660

Managing, investigating and responding to PIDs

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

Question 25. Should the PID Act include duties or requirements for public sector entities 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?

The support requirements in the PID Act are insufficient and should include additional obligations on public sector entities to undertake a risk assessment for all parties to the process – including subject officers. The PID regime (either through the Act itself or supporting statutory instruments) should include more detailed guidance on what effective support looks like. We recognise the provision of support is administratively intensive, however, the consequences of failing to provide it are significant. Where there is a heightened risk to disclosers or subject officers, the provision of support should go beyond simply providing details to the Employee Assistance Program.

Section 28(1)(a) of the PID Act requires the chief executive officer of a public sector entity to establish reasonable procedures to ensure that public officers of the entity who make PIDs are given appropriate support. The PID Act is silent on support for subject officers and others who may be party to a PID process. The current PID regime does not sufficiently take into account the negative effects on subject officers that can from coercive investigative processes. Investigations can be lengthy, emotionally demanding, and negatively affect the psychological wellbeing of the parties involved.[20] While the current PID regime attempts to address the support requirements for disclosers, it is comparatively silent on the needs of subject officers. This is particularly concerning given an investigation may result in the subject officer being exonerated, or with the allegations unable to be substantiated.

The Queensland Ombudsman reported that in 2021–22 only 62.21% of finalised investigations resulted in allegations that were either totally or partially substantiated.[21] This means that in almost two in five cases wrongdoing was unable to be established. It is paramount therefore that public sector entities are live to the procedural harms that can arise from PID assessment and investigative processes. It is also worth noting that even where investigations may substantiate allegations, there will be times when subject officers will suffer disproportionate consequences or adverse consequences. Where investigative processes are seen as capricious, unfair, or weaponised, this can have broader cultural impacts and negatively impact faith that the public sector entity will do the right thing in the future. This Review must consider the consequences of these investigations and the additional measures required to better protect the interests of those subject to investigation.

There is evidence investigative and regulatory bodies do not always pay sufficient attention to the negative psychological impacts that complaints and investigative processes have on their subjects.[22] Parliamentary inquiries in both NSW[23] and Victoria[24] have also considered the harms that can result from coercive investigative processes. **The Queensland PID regime needs to more effectively take into account organisational justice considerations.** Organisational justice refers to the extent to which employees perceive workplace systems, processes and outcomes to be fair.[25] The strength of these perceptions may influence employee behaviour, including their desire to report wrongdoing.[26] What constitutes fair is subjective, and often becomes relevant when perceived justice violations occur—a common occurrence after whistleblowing investigations.[27] Well-designed disclosure systems that promote organisational justice profit

[20] Freiberg A (2023) An inspector calls: trauma-informed regulation. *Psychiatry, Psychology & Law*, 1-16.

[21] Office of the Queensland Ombudsman (2022) *Queensland Ombudsman Annual Report 2021-22.* [p. 29]

[22] See for example, Freckelton I & List D (2004) The transformation of regulation of psychologists by therapeutic jurisprudence. *Psychiatry, Psychology & Law*, 11(2), 296-307.

[23] Parliament of NSW (2020) *Reputational Impact on an Individual Being Adversely Named in the ICAC's Investigations.* https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2595

[24] Parliament of Victoria, Integrity & Oversight Committee (2022) *Performance of the Victorian Integrity Public Sector Entities 2020/21: Focus on witness welfare.* https://new.parliament.vic.gov.au/get-involved/inquiries/performance-of-victorian-integrity-public sector entities-202021/

[25] Brown AJ (2009) Restoring the sunshine to the sunshine state: Priorities for whistleblowing law reform in Queensland. *Griffith Law Review*, 18(3), 666-691.

[26] Baldwin S (2006) *Organisational Justice.* Institute for Employment Studies: Brighton.

[27] Brown AJ (2009) Restoring the sunshine to the sunshine state: Priorities for Whistleblowing Law Reform in Queensland. *Griffith Law Review*, 18(3), 666-691.

both the individuals involved and their organisations.[28] However, the peculiarities of whistleblowing processes, combined with contests over truth and power, can make it challenging for organisations to create a positive perceived justice climate and mitigate the potential harms linked to the processes itself.

One way this could be achieved is by requiring public sector entities to implement a trauma-informed approach to their whistleblowing frameworks. Trauma-informed approaches to legal processes are linked to the legal concept of therapeutic jurisprudence. While therapeutic jurisprudence emerged from legal scholarship and 'trauma-informed practice' evolved from the fields of health and social science, both concepts "support the fundamental idea (however conceptualised) that law is a 'social force' which should avoid practices that result in trauma or anti-therapeutic impacts."[29] At its core, therapeutic jurisprudence seeks to enhance mental health and emotional wellbeing by reducing the adverse procedural harms that may arise from legal processes and outcomes. This includes whistleblowing processes. Public sector entities should be obligated to ensure that parties to a PID process do not suffer detriment from the process itself. This could be achieved by requiring those assessing, investigating and dealing with PIDs to have an understanding of the procedural harms that may arise and to ensure they are trained to recognise and respond to these harms where they occur. It is vital all parties to a PID process are provided with sufficient information about any investigative process to help them understand what to expect and how they will be supported through the process.

This Review may also wish to consider mandating timeframes within which investigations must be completed and establishing a mechanism where the oversight agency is required to be notified if investigations exceed a certain timeframe or if an investigation is discontinued. This would assist in ensuring that those who are party to a PID have clear information about expected timeframes for resolution, and the ability to escalate a complaint if these timeframes aren't met. Whilst we recognise it may result in an increased administrative burden, requiring public sector entities to keep parties to a PID updated on its status will also help alleviate some of the stressors linked to these processes.

Question 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?

The protections (i.e., confidentiality, protection from reprisal, immunity from liability and protection from defamation proceedings) should <u>not</u> be opt out. This creates unnecessary risk for all parties, including the public sector entity involved. Public sector entities should have sufficient flexibility to negotiate the level of support provided to the parties; this may be linked to the outcome of any risk assessment. As discussed earlier, one way to manage the administrative burden on public sector entities is to impose administrative obligations for voluntary disclosures only. There are of course situations where role reporters face risk of detriment and may need support. The PID regime must be flexible enough to allow for this.

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?

The current definition of reprisal is broadly appropriate, but the current PID regime fails to sufficiently consider procedural harms that can occur to all parties to the process. This must be addressed. Research on the implementation of whistleblower protection schemes found that around 13% of reprisal complaints from a whistleblower result in the formal acceptance of a complaint.[30] While there is limited data in the public domain about the number of allegations of reprisal linked to a PID, it is likely the figures are far greater than the 27 reported by the Queensland Ombudsman in their 2022 Annual Report.

[28] Lawrence S & Brown AJ (2019). Protecting whistleblowers: Creating the optimal environment. *Governance Directions*, 71(9), 486-490.

[29] McLachlan KJ (2021) Same, same or different? Is trauma-informed sentencing a form of therapeutic jurisprudence? *European Journal of Current Legal Issues*, 25(1), 41. [para 1]

[30] Devine T & Feinstein S (2021) *Are whistleblower laws working? A global study of whistleblower protection litigation*. International Bar Association. https://whistleblower.org/wp-content/uploads/2021/03/Are-Whistleblowing-laws-working-REPORT.pdf

Confidentiality is the most important protection, however, its implementation carries significant risk for the parties involved, particularly where it is not paired with sufficient support. Requiring written advice to be provided to all parties including their rights and obligations once a PID has been assessed, along with details of the support available, would go some way to addressing these risks.

It should be observed that section 40(1)(a) of the PID Act provides four different ways concerning the causal nexus and the type of knowledge held:

- Ground 1: *Because* the other person or someone else *has made* a public interest disclosure
- Ground 2: *Because* the other person or someone else *intends to make* a public interest disclosure
- Ground 3: *In the belief that* the other person or someone else *has made* a public interest disclosure
- Ground 4: *In the belief that* the other person or someone else *intends to make a public interest disclosure.*

For the purposes of Grounds 1 and 3, the PID Act does not make expressly clear at what point a PID is considered to have been made. For example, is this at the point of submission, disclosure or assessment? When the PID Act is considered as a whole, it is clear the assessment of determining whether a PID has been objectively made is a question for the receiving public sector entity and not for the discloser. Until an assessment has occurred, however, the public sector entity, its employees and even the discloser cannot know objectively whether a PID has been made. Given that PIDs can be made in any way including orally, this creates uncertainty as to whether reprisal can be considered to have occurred per s.40 of the PID Act.

Given the high likelihood of delays in the assessment process, this creates a risk to all parties to the PID process. We encourage the Review to consider whether **some protections should apply from the date of disclosure, and others apply from the date of assessment**. **This would ensure all parties to the PID process are given an opportunity to be made aware of their rights and obligations and ensure that they do not inadvertently commit an offence under the PID Act**.

Remedies

Question 31. Are the remedies available to disclosers under the PID Act reasonable and effective? Are any changes needed?

Question 34. Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?

The current legislative remedies available to disclosers to address allegations of reprisal can be costly, time-consuming, and have arguably been broadly ineffective. It is worth noting at the outset that there have been no successful criminal prosecutions for reprisal in Queensland. Where civil proceedings have gone to judgement, disclosers have in the main failed to establish to the requisite standard. Disclosers are required to establish a nexus between the alleged detriment and the fact that a PID has been made or is intended to be made. Requiring parties to a PID to pursue the current legislative remedies carries its own set of risks of procedural harms. Taking action in a court or tribunal can be stressful for the parties involved – involvement in the legal system "can be unpredictable, particularly for those who have no experience with it; confusing to those who have little or no knowledge of the process; disempowering when others are making decisions about one's fate; stigmatising and isolating from family, friends and colleagues; and can engender feelings of shame and guilt."[31] Whilst disclosers are able to lodge a complaint of reprisal with either the Queensland Human Rights Commission or the Crime and Corruption Commission, there are opportunities for this review to formalise an administrative complaints process or redress scheme for parties to a PID if they are unhappy with how it has been dealt with. **An administrative redress scheme for disclosures who consider they have experienced reprisals is essential, however, such a scheme should also be able to be accessed by subject officers who consider they have experienced procedural harms from the PID process.**

[31] Freiberg A (2023) An inspector calls: trauma-informed regulation. *Psychiatry, Psychology & Law.* [p. 4]

Practical Considerations

Question 40. Should the PID legislation be more specific about how it interacts with any other legislation, process or scheme?

The PID legislation should be more specific about how it interacts with other legislation, processes, and schemes. In many ways, the PID Act has been designed to promote best-practice complaints management across the public sector. Both the PID Act and PID Standards include a series of obligations that are designed to ensure disclosers are protected, and PIDs are appropriately assessed and dealt with. There is confusion however as to how the PID Act intersects with other pieces of legislation, including the *Crime and Corruption Act 2001 (Qld)*, the *Human Rights Act 2019 (Qld)*, the *Public Service Act 2008 (Qld)*, and other pieces of relevant legislation. Confusion can particularly arise where a matter may include content that could be a PID, an allegation of corrupt conduct, or an issue that could be dealt with under the CaPE case categorisation framework.[32] This confusion means that it can be difficult for disclosers and public sector entities alike to understand which process to funnel a matter through. Even with the 'no wrong doors' philosophy underpinning the existing legislation, this confusion can result in delays and harms linked to the assessment and investigative process itself. If a matter isn't correctly assessed and funnelled through the correct process at the beginning, then this can negatively impact the parties involved. Ensuring there is clarity as to how the PID Act intersects with other relevant processes would therefore be beneficial.

Question 41. Should the PID legislation include incentives for disclosers? If so, how should they operate?

The PID legislation should <u>not</u> include incentives for disclosers. Research has found a higher intention to engage in whistleblowing when the level of perceived seriousness of wrongdoing is higher. This is regardless of the availability of a financial incentive. The same research found that financial incentives result in a higher intention to report, even when the perceived level of seriousness is lower.[33] This could suggest that reporting of serious wrongdoing will occur in the absence of financial incentives, but that non-serious reporting may increase if a financial incentive is offered. This may result in an unsustainable level of reporting of low-level wrongdoing, creating a further administrative burden for public sector entities. Some research suggests that the provision of financial incentives could inhibit whistleblowing reporting to a greater extent than if no incentive had been offered, due to the potential for it to "unintentionally hijack a person's moral motivation to 'do the right thing'".[34] There is also the potential for financial incentives to encourage disclosers to by-pass internal control processes[35] which may be more appropriate mechanisms for raising concerns and for this to result in an over-burdening of the PID system.

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

If the definition of public officer is expanded, **plain English education/communication materials should be prepared which are targeted to the needs of specific user groups** (e.g., volunteers, students engaged in work-integrated learning). Agreements/contracts and associated targeted communication collateral are an important way of managing risk.[36] Students engaged in work-integrated learning (WIL) placements in public sector workplaces need to be apprised of their rights, obligations and protections under the PID Act. A plain English statement to this effect could be routinely included in paperwork associated with the onboarding/induction of work experience students. Materials could also be prepared for universities to provide consistent guidance in this regard as there is some question as to "degree to which WIL staff are aware of the legal rights and obligations relating to the design and management of the WIL program"[37].An online video 'how to make a PID disclosure' would also assist disclosers from diverse backgrounds to understand the process in simplified language and accessible format. Such a video should provide

[32] Queensland Government (2022) *CaPE case categorisation framework*. https://www.forgov.qld.gov.au/human-resources/employee-management-conduct-and-performance/conduct-and-performance/cape-case-categorisation-framework

[33] Andon P, Free C, Jidin R, Monroe GS & Turner MJ (2018) The impact of financial incentives and perceptions of seriousness on whistleblowing intention. *Journal of Business Ethics*, 151, 165-178.

[34] Berger L, Perreault S & Wainberg J (2017) Hijacking the moral imperative: How financial incentives can discourage whistleblower reporting. *Auditing: A Journal of Practice & Theory*, 36(3), 1-14. [p. 1]

[35] Seitz J, Oeding J & Wiese M (2015) Is it ethical for the US Government to offer financial awards to potential whistleblowers of financial statement fraud and internal control violations? *The Journal of Theoretical Accounting Research*, 10(2), 68-90.

[36] Cameron C, Ashwell J, Connor M, Duncan M, Mackay W & Naqvi J (2020) Managing risks in work-integrated learning programmes: A cross-institutional collaboration. *Higher Education, Skills & Work-Based Learning*, 10(2), 325-338.

[37] Cameron C (2017) The strategic and legal risks of work-integrated learning: An enterprise risk management perspective. *Asia-Pacific Journal of Cooperative Education*, 18(3), 343-256. [p. 249]

information and clear guidance on what types of wrongdoing are covered and what protections are given to disclosers. The oversight agency should be tasked with ensuring there are sufficient audio-visual and written resources available for public sector entities to adapt to their organisational contexts.

Question 44. Is the PID Act accessible and easy to understand? How could the clarity of the Act be improved?

As currently written the PID Act is complex and difficult to interpret. There is a strong argument in favour of repealing and rewriting the Act, with a focus on simplifying the Act's structure, provisions and language. The PID Act needs to be accessible to a broad array of stakeholders, including those within public sector entities that are required to apply it, as well as potential disclosers and subject officers. Many (if not most) of these stakeholders are unlikely to have law degrees or formal legal training. Given the importance of this legislation, ensuring it is written clearly in simple, accessible language will go a long way to achieving its main objects. There may also be benefits in recommending the oversight agency develop clear process charts for public sector entities to adapt to their organisational contexts.