

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

24 February 2023

Confidential (in part)

Dear Hon. Alan Wilson KC

Submission re Public Interest Disclosure Review (Qld) 2023 – Sharon Kelsey

I commend the Attorney General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence on progressing this much needed Public Interest Disclosure (PID) reform. I thank you for the opportunity to make this submission.

Outline of Submission

There may be suppression orders that are still operational in respect to a series of public interest disclosures that I have made. This will limit the complete context and some details of my submission but should not impact its veracity.

My submission provides some background and context, and then turn to address the questions raised by the *Review of the Public Interest Disclosure Act 2010 Issues Paper*¹ drawing on my experience as a whistleblower and my background in anti-corruption endeavours.

Confidential

I would welcome any opportunity to elaborate on my submission or provide any further assistance to aid this Review.

Background

I am the former Chief Executive Officer of the Logan City Council (Qld) and a public interest discloser. I have previously been employed as an executive at the Victorian Independent Anti-Corruption Commission (IBAC). I make this submission in my personal capacity.

¹ Queensland, Department of Justice and Attorney-General 2023 *Review of the Public Interest Disclosure Act 2010 Issues Paper* <https://www.publications.qld.gov.au/dataset/d350f6cc-2c6c-4d7d-a27d-59afd4abd5ce/resource/fa6980aa-3a46-4c9f-904a-9beaf9288f7e/download/issues-paper-pid-act-review.pdf>.

Context

The Review of the *Public Interest Disclosure Act 2010* (the Review) identifies in its Terms of Reference² (ToR) that

Making a protected public interest disclosure (whistleblowing) plays an important role in modern democratic government. It contributes to open, transparent and accountable government and public administration.

The ToR include a notation to the Queensland Government’s commitment to review the effectiveness and appropriateness of protections afforded to public interest disclosers under the *PID Act 2010*. This assertion draws from the Parliamentary Crime and Corruption Committee (PCCC) report: *Inquiry into the Crime and Corruption Commission’s Investigation of former councillors of Logan City Council and related matters* (PCCC Inquiry Report)³. This was followed by a Commission of Inquiry into the Crime and Corruption Commission (CCC Inquiry).⁴ The ToR also refer to the Final Report delivered by Professor Peter Coaldrake AO (Coaldrake Review) which reviewed the culture and accountability into the Queensland public sector⁵.

By way of background, I make the following comments. The PCCC Inquiry had narrow terms of reference. Despite the title of the PCCC Inquiry and my known role as the primary whistleblower, I was neither invited nor called before the PCCC Inquiry.

Confidential

[Redacted content]

² Queensland Government, 2022 *Terms of Reference*, Review of the Public Interest Disclosure Act 2010, 2022 <https://www.publications.qld.gov.au/dataset/d350f6cc-2c6c-4d7d-a27d-59afd4abd5ce/resource/2f9ecce5-5481-4488-b463-46bbb6d77321/download/terms-of-reference-pid-act-review.pdf>.

³ Queensland Parliament, 2021 *Parliamentary Crime and Corruption Committee Report No 108*, <https://nla.gov.au/nla.obj-3035336174/view>.

⁴ Fitzgerald GE (Hon) KC and Wilson A (Hon) KC, 2022 Commission of Inquiry relating to the Crime and Corruption Commission, https://www.cccinquiry.qld.gov.au/__data/assets/pdf_file/0004/726619/report-commission-of-inquiry-relating-to-the-ccc.pdf.

⁵ Coaldrake, P (AO), 2022 Final Report *Let the sunshine in: Review of culture and accountability in the Queensland public sector* <https://www.coaldrakereview.qld.gov.au/assets/custom/docs/coaldrake-review-final-report-28-june-2022.pdf>.

[REDACTED]

The subsequent CCC Inquiry had even narrower terms of reference. My submissions were deemed to fall outside of the CCC Inquiry's terms of reference.

My contributions to discourse in Queensland about public interest disclosures has been further frustrated by the limitation imposed in the terms of reference of the landmark 'Coaldrake Review'. The Coaldrake Review specifically referred to local government as falling outside of its terms of reference.

Confidential

[REDACTED]

The experience of the whistleblower in Queensland is far removed from the purported importance reflected in the opening extract taken from the ToR and reproduced in my submission. To the contrary, the disenfranchising of recognised whistleblowers weakens public debate, diminishes transparency and the accountability of government, and adds another level of debilitating impact worn in solitude by the whistleblower.

In short, the system is broken.

Addressing the Issues Paper

Policy objectives of the PID Act

1. Are the objects of the PID Act valid and is the Act achieving these objects? Has the PID Act been effective in uncovering wrongdoing in the public sector?

Despite the opening passage from the ToR that I have extracted to set the tone for my submission, neither the legislation, its application or the conduct of many in practice, appear to support the imperative of a PID as a critical underpinning of good government and democratic process. Instead, experience reflects a severe lack of inducement to make a disclosure, a visible absence of the requisite strength of protection to forestall reprisals, and a disincentive to encourage or mandate disclosures. Like so many jurisdictions, the *Public Interest Disclosure Act 2010 (Qld)* (PID Act)⁶, also appears to rely on the general fallacy that the risk of criminal prosecution will dissuade acts of reprisal action against whistleblowers.

⁶ Public Interest Disclosure Act 2010 (Qld) s 3.

The main objects of the PID Act reflect a conservative standard of aspiration. While the objects of the Act could at best be described as limited, it is my view that objects of the Act have not been attained either in theory or practice.

Much of the focus of the Act turns on whether a disclosure meets the criteria to be 'recognised' as a PID and as a consequence, afforded the 'protections' of the Act. The inference is that if a disclosure meets the criteria a veil will fall to shroud and protect the discloser. Of course, nothing could be further from the truth. In my experience, my disclosure was 'recognised' and 'acknowledged' as PID – that is, it was assessed to meet the criteria, yet, I believe there were no real protections afforded to me from reprisals. This has in part formed the basis of matters currently before the courts.

Confidential

[Redacted content]

I assert that the PID Act both in theory and practice, deals with the whistleblower as a by-product, not a central feature of the Act. This is despite research identifying the whistleblower as the most important source of information to combat wrong doing in the public sector.⁷

There is nothing in the objects of the Act that corrects the all too often imbalance of might and resource regularly available to subject officers and organisations that support them, often at the direct expense of the whistleblower. Instead, the Act operates on a misconception that the scales are balanced between the subject officers and the whistleblower throughout the process.

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?

The term, 'public interest discloser' is not well understood and is not part of the broad vernacular. The term, whistleblower is immediately recognisable. However, the now well-rehearsed reception to whistleblowers has tarnished the term. Where the role should be appreciated, it is all too often admonished. The problem here is not the term but the way it is used and mis-used. This includes the culture created around whistleblowing and the private, public and political response afforded to it. My preference is to use the term, whistleblower. The culture around whistleblowing doesn't need piecemeal change, it needs to be turned on its head.

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

Absolutely. There is very limited or little faith in the PID regime. Almost without exception, people I sought out for advice and support unanimously reinforced a view that the PID regime is broken and they would never recommend that people rely on it. Having said that, there was tremendous personal support for someone to take the PID regime through its paces. I did, and it failed the test.

It is my view that the public perception generally mirrors my own. All too often the experiences of those that speak out is a negative one. The public recognise the closing of the ranks, the

⁷ Brown AJ, 2008 *Whistleblowing in the Australian public sector: enhancing the theory and practice of internal witness management in public sector organisations*. Acton, ACT: ANU E-Press.

manipulation of facts, and the attack on the messenger. It is no wonder that only a very limited number of people ever pursue matters within the PID regime.

There is a general premise in PID legislation that disclosures come from the rank and file of Agency personnel. Further, legislators assume the subject conduct is generally contained within a single Agency, and that the discloser is not the Principal Officer. In short, legislation appears to focus on low-hanging fruit, rather than broad-scale systemic fraud or corruption enabled by others in positions of power and often involving parties external to a single Agency.

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

It is my view that the relationship between the PID Act and the Human Rights Act 2019 should be fundamentally strengthened. Public interest disclosing should be recognised as a fundamental human right attracting obligations and positive duties.

Confidential

[Redacted content]

What is a public interest disclosure?

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

The PID regime should focus on exposing and addressing systemic fraud and corruption. However, such conduct is not always immediately evident. Even systemic corruption starts small so the PID regime needs to encompass broad reporting of concerns.

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?

Yes, because a person living with a disability may have an increased vulnerability, rely on others to provide care and matters relating to them may be life-threatening. I also support the PID regime including disclosures about abuse or risks to the environment. This is because the environment is a major at-risk public asset that directly impacts all of our lives. There should be an increased obligation of responsible custodianship.

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

No, I don't consider this should occur. I am not sure if this will assist process and is more likely to encourage another point of legal argument, disincentivise disclosers and encourage attacks on the motivation and credibility of the whistleblower.

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?

No, the state of mind of the discloser should not be a relevant consideration as it necessitates debate away from the crux of the issue, the disclosure itself. This would have an adverse effect and likely limit the revelation of important disclosures.

Confidential

Who can make a public interest disclosure?

9. Who should be protected by the PID regime? Should the three categories of disclosers (public officer, employees of government owned corporations or Queensland Rail, and any person) be retained? Why or why not?

I don't consider there should be any distinction between people that make disclosers. Consideration should be given to mandating all public servants and those associated with public service to make public interest disclosures (as applicable). Or in the alternative, all parties that are exposed to potential fraud and /or corruption that ultimately impact the public should be actively encouraged, genuinely protected and reasonably rewarded for speaking up.

The Act should recognise that interests and enablers in systemic fraud and corruption often reach beyond a single agency, the public service itself and into the wider world.

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?

Yes, as per my earlier comments that systemic corruption is rarely limited to the confines of a single agency and people that are aware of enablers outside of the agency should be supported to disclose. This includes former public officers.

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?

Relatives of disclosers often have to pick up the void left by others. They are often the central confidant and supporter of the discloser. In the course of the relative's role they may also become aware of conduct that falls within the PID parameters and should be enabled and protected to report it.

Confidential

In addition, the consequences of making a PID can have detrimental consequences for the relative, including threats of legal pursuit or physical harm to themselves or the discloser. The relative of the discloser should be able to rely on the protections afforded by a fully effective PID regime.

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

Reporters that have assisted in the public disclosure are a fundamental public interest conduit and should attract full shield protections. They should be afforded protections from prosecution and litigation to maintain their independence and real measures that flow on to the protection of their source(s).

Experiences of people who witness and report wrongdoing

13. *How would you describe your experience in reporting wrongdoing under the PID Act? Do you have any suggestions for improvements?*

Whistleblowing or public interest disclosing is often the final check and balance on good government. Unfortunately, history shows that the risk of whistleblowing is overwhelmingly borne by the individual when the interest they serve is clearly a greater public one.

An insight to my experience is portrayed in the public interest video, 'The Cost'.⁸

Confidential
[Redacted]

The Act should provide a clear and safe passage for Principal Officers to make disclosures.

Confidential
[Redacted]

14. *What factors impacted your decision to report or not report wrongdoing? Did you encounter any barriers or obstacles during the process? How can the PID regime encourage disclosers to come forward?*

I made the decision once I had formed a suspicion of wrongdoing.

Confidential
[Redacted]

⁸ Get Up! 2022 "The Cost" https://www.youtube.com/watch?v=_ALY8gXxba0

[REDACTED]

15. Were you supported effectively during the process? Would alternative or additional support have been helpful?

I received no direct support during the process save for that of family, friends and colleagues. Support by colleagues was largely surreptitiously given as they had been warned not to contact me. There was general support offered by the various ratepayer groups and members of the public. The real lack of support was financial assistance to protect my rights. Instead, I continue to personally finance my pursuit of justice (currently \$3mil +).

Confidential

[REDACTED]

16. Did you feel your disclosure was taken seriously, assessed in a timely way, investigated fairly and addressed appropriately?

Confidential

[REDACTED]

The current mechanisms at state and federal level to encourage and protect whistleblowers has failed. Despite the prevalence of allegations of reprisal coming from whistleblowers, research conducted by the Human Rights Law Centre into public interest disclosure cases over the last thirty years shows that only a single whistleblower received any compensation for detrimental action.⁹

Further, the experience of state anti-corruption agencies shows the bar to successful prosecution in respect to retaliatory action is incredibly high, arguably even insurmountable. These facts should disturb us and warrant the strongest of reform.

Making, receiving and identifying PIDs

17. Are the requirements for making, receiving and identifying PIDs appropriate and effective?

The current requirements are too arduous, too convoluted and needs to be clearly attainable.

⁹ Pender K, 2022 Get Up! "The Cost" https://www.youtube.com/watch?v=_ALY8gXxba0see

18. Who should be able to receive PIDs? Do you support having multiple reporting pathways for disclosers? Is there a role for a clearing house or a third party hotline in receiving PIDs?

There should be sufficient avenues to ensure that all levels of reporting are effectively covered.

This should include an appropriate avenue for a Principal Officer to report. While a clearing house or third party role could be effective, it would be dependent on the ability of the service to fully independent.

19. At what point in time should the obligations and protections under the PID regime come into effect?

There should be a positive duty on parties that hold a role within the PID regime to protect whistleblowers. This protection should extend to the preparation of the disclosure.

Confidential

[Redacted]

20. Should the PID legislation require a written decision be made about PID status as recommended by the Queensland Ombudsman? What would the implications be for agencies?

I am not sure that this would sufficiently assist to advance the process. The status of the PID may be 'open' or 'under review' for years.

Confidential

[Redacted]

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 role of the media in supporting public interest reporting is necessary to ensure the integrity of the PID regime. Shield laws should be operationally effective and must be complementary with the protection of the whistleblower.

Confidential

[Redacted]

22. *Should the PID process for government owned corporations or Queensland Rail be different to those for public sector entities? Why or why not? Are the current arrangements appropriate and effective?*

There should be no distinction between parties that perform a public service or have custodianship of resources that are held on public trust. Any distinctions in the PID regime will add another level of confusion and complexity.

Managing, investigating and responding to PIDs

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

The PID Act in Queensland, like many of its counterparts in the commonwealth and other states is founded on the 'traditional' and arguably, unsuccessful anti-reprisal provisions. Without a comprehensive whistleblower protection regime, weak stand-alone provisions suggest protection when in practice, little protection exists. Individuals will act in full reliance on provisions that in practice have little ability to protect them. This presents an increased risk to the discloser.

The reliance on the risk of potential prosecution to dissuade one person from taking reprisal against a person who has made a PID, remains a fundamental flaw in much PID legislation. The risk of criminal prosecution is not sufficiently dissuasive. In addition, the bar to successful prosecution is arguably set too high.

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 Act needs to establish a positive duty to protect whistleblowers. It is not sufficient for the duty to fall only on the Agency where the disclosure was made. It assumes that any reprisal is limited to the confines of that Agency. Broad-scale corrupt conduct is often enabled by others, resulting in interests that almost certainly go beyond the reach of a single Agency. The Act needs to be amended to address the gap in the limits of a single Agency's reach.

25. *Should the PID Act include duties or requirements for agencies to:*

- a. take steps to correct the reported wrongdoing generally or in specific ways?*
- b. provide procedural fairness to the discloser, subject officer and witnesses?*
- c. assess and minimise the risk of reprisals?*

The application of these suggested duties or requirements on Agencies would reflect the intent, motivation and good-will of the Agency. This may not be enough.

Confidential

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?*

I think an opt-out option would undermine the PID regime.

Confidential

Protections for disclosers, subject officers and witnesses

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

No, they are significantly insufficient. I have made suggestions for alternative protections throughout this submission.

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

No, they are not adequate. Yes, improvement should be considered as the maintenance of confidentiality remains elusive.

Confidential

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

It is insufficient and fails to identify the myriad of ways that reprisal can occur.

Confidential

30. Is there a role for an independent authority to support disclosers in Queensland? If so, what should its role be?

Yes, there is a need for an independent authority. Without a full and effective whistleblower protection regime, whistleblowers remain exposed to potential harm in undertaking their public interest role. Unfortunately, this harm is all too often realised.¹⁰

I fully support establishing a dedicated and independent Whistleblower Protection Authority that provides welfare, legal and financial support to whistleblowers. This should be complemented by provisions that provide:

- effective “shield” laws to protect public interest journalism and third-party disclosures
- recognition of whistleblower rights as fundamental human rights
- provision of legal support to pursue protection rights
- reciprocal recognition of rights at an international level, e.g. seeking asylum
- simplification and ease of access to legal remedies
- whistleblower care and welfare
- consideration of a reward scheme.

¹⁰ Mangwana S, 2022 “The Cost” Get Up! https://www.youtube.com/watch?v=_ALY8gXxba0

Remedies

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

The remedies are insufficient and fall to the whistleblower to assert and pursue.

32. Do the evidentiary requirements for remedies need amendment?

Yes, to facilitate full transparency and balance.

Confidential

33. Are the provisions permitting complaints to the Queensland Human Rights Commission appropriate and effective? What role should alternative dispute resolution play in resolving disputes?

Alternative Dispute Resolution (ADR) should have limited application to PID matters. In general, the whistleblower is at significant power and positional disadvantage. This is not able to be sufficiently addressed to enter ADR with trust and confidence.

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

Yes, because to date there is no fair playing field for claims of reprisal to be addressed. Any redress scheme should be complementary to and not a bar against other forms of recompense that the discloser may be able to secure. It is important to recognise that the whistleblowers' pursuit of justice is all in the name of public interest.

Role of the oversight agency

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

The Ombudsman's Office needs clarity on their functions and powers.

Confidential

36. Are there any conflicts between the Queensland Ombudsman's advisory and review functions for PIDs? If yes, how could these be managed or resolved?

There needs to be a review of the functions of the Ombudsman's Office.

Confidential

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

I don't believe the roles overlap but there is confusion about the roles.

Confidential

There should be a broad positive duty to protect whistleblowers that extends to agencies, government bodies and government affiliated organisations that become aware of the disclosure or the identity of the discloser. There should also be obligations on agencies that handle, investigate, review or ultimately prosecute matters arising from the disclosure.

Some integrity bodies have acted under a misconception that they had a duty to protect whistleblowers, later to find by Independent Inquiry that they owed no such duty.¹¹ If such agencies do not owe the whistleblower a duty of care, whistleblowers will continue to be harmed by the act of assisting investigations.

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

The Standards appear sufficient. However, there is a significant challenge in the Standards being met in practice.

Confidential

39. Do you agree with the recommendations of the Queensland Ombudsman's 2017 review?

The review provides a range of recommendations. Many of them are appropriate. A number of them place a specific responsibility on the CEO of the Agency. The recommendations do not appear to acknowledge that the CEO or Principal Officer could be the discloser and these responsibilities would then be inappropriate or would need to be delegable.

Confidential

Practical considerations

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

¹¹ CCC Inquiry.

Yes, the interaction should be clearly stated. The interaction should be subject to a preservation of the broadest possible protection of the rights of the whistleblower.

The discloser or whistleblower should not have to spend their own limited finances to assure good law in Queensland prevails. Good law should be the role of parliament and the government of the day.

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

Certainly, there should be financial support to enable whistleblowers to pursue their rights, rather than them running out of money before their rights can be realised. Other incentives could be considered but most whistleblowers are not motivated to disclose by 'incentives' beyond the public good. Instead, they would prefer to have their rights inherently protected and the disclosure appropriately investigated.

Confidential

[Redacted]

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

I received training from the Ombudsman's Office. Unfortunately, the training represented the PID process as a linear process, starting at one point and invariably ending at another. The experience of whistleblowers stands in stark contradiction to the assertion of a linear journey.

43. How could an effective PID scheme provide for the needs of First Nations Peoples, culturally and linguistically diverse people and those in regional or remote communities?

I will limit my comments to my lived experience in regional and remote communities. The PID regimes generally have city-centric application. The services available in the city need to have outreach to other locations.

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

No, the PID Act is neither accessible nor easy to understand. This is borne out by the fertile ground it presents in litigation. Language should be simplified and any process requirements be made clear and achievable.

Yours sincerely

[Redacted Signature]
Sharon Kelsey