

Our reference: PID – 2023 PID Act Review



Department of  
Justice and Attorney-General

The Honourable Alan Wilson KC  
Public Interest Disclosure Review  
PIDActReview@justice.qld.gov.au

Dear Mr Wilson

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

I refer to the Issues Paper inviting submissions to the review of the *Public Interest Disclosure (PID) Act 2010* ('the Act').

The Department of Justice and Attorney-General (DJAG) applies the Act where it deals with disclosures involving staff and activities of DJAG.

DJAG is responsible for administering justice in Queensland. DJAG also provides regulatory and consumer protection services, reducing the risk of harm from liquor and gambling, supporting business, community and not-for-profit organisations, and reducing the rate of domestic, family and sexual violence.

DJAG's Ethical Standards Unit delivers the PID Co-ordinator role for the department and has had experience in dealing with PIDs relevant to the diversity of DJAG's services and functions. For your consideration are submissions prepared from that perspective, reflecting feedback on the experience of applying the Act.

**Responses to select matters**

*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?*

It is our experience that explaining the legislation with reference to terms like 'whistleblowing' is more readily understood by those not familiar with it. However, after over ten years of operation of the Act, the 'public interest disclosure' terminology now appears familiar to many.

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

Many different types of allegations and complaints arise requesting or claiming PID status, for example individual employee grievances about treatment and decisions, client complaints about standard of service, privacy complaints, misconduct allegations, or other allegations of improper conduct like breaches of the Code of

Conduct for the Queensland Public Service that warrant action but are not exceptionally serious.

In all of these cases, the concerns should be taken seriously and responded to appropriately, and it would always be inappropriate for a complainant of any sort to be subject to retribution for having raised genuine concerns. Our departmental policy says as much.

However in many of these circumstances, the complainant does not need the encouragement of legislation like the Act, nor are always they in circumstances where they are likely to really need the protections.

There are other existing provisions that provide relevant protections, for example the general protections under the *Industrial Relations Act 2016* against adverse action for exercising workplace rights like lodging a grievance.

The most common circumstances we have experienced where people seek or could benefit from support and protections, but do not currently fall within the scope of a PID, are:

- Persons who report allegations that amount to serious instances of misconduct (as currently defined in the *Public Service Act 2008*) but not amounting to corrupt conduct or other grounds. Serious sexual harassment allegations are one example. [Noting, it is understood that a Public Sector Directive is being considered to ensure public sector entities (*inter alia*) provide appropriate support and protection of rights for employees affected by alleged sexual harassment.]
- Persons who raise concerns or allegations about decisions made at a senior level, where the impact may be significant but maladministration as defined, corrupt conduct and other existing grounds are not involved.

*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?*

It is difficult to seek to assess the state of mind of another, particularly on the basis of only a single piece of correspondence (they may not always be readily contactable or identified). When assessing a possible/purported PID on the current criteria, applying the provisions about whether there is an 'honest belief' hinges on carefully considering the 'on reasonable grounds' that follows.

As suggested in the issues paper, caution should be exercised not to be too quickly dismissive of a complaint due to a presumed lack of good faith based on limited initial information.

This could also be considered in the context of ensuring protections are equally accessible to those in possibly more vulnerable circumstances (where the disclosure otherwise meets the criteria). PIDs are received from various sources including clients and members of the public (using the current s12) and for instance, the author may be a person with disability or a person writing in English as a second language,

whose message may be less clear in terms of conveying an intended connection to the public interest if the threshold is too high. They could be inadvertently excluded.

Also, we note that at times it may not be a person's intent to make a PID when raising information but they later may appreciate the support and protections if it leads to investigation of wrongdoing or other action.

This being said, the continued inclusion of some threshold test connected to any obligation to take particular actions of substance to deal with a possible/purported PID remains very important to ensure that excessive public resources are not spent on dealing disproportionately with complaints that do not justify it (for example, for corrupt conduct matters, the reasons at s44(3) *Crime and Corruption Act 2001*), or those complaints that are appropriately (or have been appropriately) dealt with through other processes. These need to be able to be addressed quickly and proportionately, as dealing with these can significantly distract from time dedicated to deal with other matters in a robust and timely manner.

We don't have any suggestions to offer about the threshold being made higher or lower than the current state.

*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?*

It may be considered to be in the interests of achieving the objectives of having wrongdoing in the public sector reported to include those who are well placed to observe and or experience wrongdoing first-hand from close proximity while working within government, even if they are not public officers as such.

Volunteers, students, contractors and work experience participants at times engaging in work where they are in a position much like employees to observe and report information about serious wrongdoing.

For the public service, the current Code of Conduct for the Queensland Public Service states that it applies to *'any volunteer, student, contractor, consultant or anyone who works in any other capacity for a Queensland public service agency'*, and provides at 1.1 for meeting obligations to report suspected wrongdoing.

In many circumstances they are in the same position in terms of possible risk of reprisal and could benefit from support and protection.

Former public officers of recent employ could also be considered to have been well placed to observe or experience wrongdoing and could be usefully included to encourage them to report it. They would generally be considered less likely to be at risk of reprisal or other harm after leaving the employing agency where the conduct allegedly occurred. However, in some circumstances where the involved persons live in the same small community, share social circles or continue to work in the same industry, this may not be so.

Of course, it would also be disadvantageous to broaden the definition to the extent that it creates obligations for agencies to apply additional actions without any real discernible benefit.

Consideration might be given to a deeming provision similar to other jurisdictions where there is discretion to extend support and protections in particular circumstances and/or where requested.

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

*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?*

It may be considered that any legal protections afforded under the Act should apply to all disclosers regardless of whether or not they made a disclosure in the course of their duties.

Role reporters have obligations to report suspected wrongdoing like any other staff. They are also perhaps more likely to encounter wrongdoing within the scope of their official duties and include information about such wrongdoing in their reports.

However, to best achieve the intention of the Act, it is suggested there should be the opportunity to at least adjust the relevant arrangements to ensure the expenditure of public resources is where it is most appropriate and commensurate to the circumstance. This may include about the provision of support, information, communication, ongoing risk assessments and such. Role reporters often require more modest strategies than other disclosers. Current practice sees adjustment as far as practicable after risk and support needs assessments are conducted, in accordance with the Standards.

It is not uncommon for a 'role reporter' discloser to seek to politely decline any PID protection and support measures, yet as it stands, it remains the responsibility of the department to address various minimum steps as outlined in the Act and Standards.

Some disclosers may be at a higher (actual or perceived) risk and could benefit from the redirection of these resources to support and protect them.

However, questions might arise around fairness, responsibility and liability following these decisions if harm did in fact follow to a 'role reporter' who was afforded less support or protections.

At times, an assessment 'on paper' that a role reporter won't need support or protection may prove not to be the case after further consulting them – for instance they may be experiencing significant stress over a matter and would appreciate the extra support. Accordingly, an 'opt out' system, or option to make a decision after consulting the discloser, might be the most appropriate.

*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?*

It is important for a complainant to know whether or not a matter has been assessed as a PID, in order to understand the support and protections they will have available.

Current practice in accordance with the mandatory PID Standards already sees the agency create a record of an assessment considerations and decision, and advise the discloser accordingly, along with various other relevant information, whether the assessment is PID or not.

If this is not done in some form, many complainants may either not know of, or misunderstand, their PID status.

In terms of considering implications of incorporating this into the legislation, in similar or different form, the extent and detail of these requirements (and others) should proportionately balance the value to the discloser/others with the administrative and resource impost on the agencies that must meet them. Time devoted to various document preparation and approval, is time where a case officer is not focussed on dealing with the substance of the concerns, which delays the resolution and outcome for the complainant.

To explain the context in which that is said, this is amongst a series of various requirements and regimes that often apply to the same complaint that does, or might, involve a PID. For example one single complaint may also have obligations under the *Crime and Corruption Act 2001* regarding assessing, recording, reporting and communicating decisions and dealing with the matter; periodically reporting particular aspects for monitoring by the Public Service Commission in accordance with the *Public Service Act 2008*; considering and applying human rights and potentially managing a complaint as a human rights complaint; and reporting/liaison with relevant external agencies, for example Queensland Police Service and Queensland Audit Office.

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

It can be quite an extensive task for an agency to ensure that at least the staff in roles most likely to receive and deal with PIDs, for example complaints handlers, Ethical Standards and Human Resources staff, managers and other leaders, are afforded training to properly understand the Act and how to use it.

The current availability of the Office of the Queensland Ombudsman to provide detailed training for this purpose (within its resourcing) is very valuable and has been repeatedly utilised by this department.

This is in addition to the need for all staff to be afforded at least a basic level of training on what PIDs are, how they may be protected and supported, and what their responsibilities are.

Depending on the nature of resultant reforms in response to the recommendations of Professor Peter Coaldrake AO in *Let the Sunshine In* on refreshed Codes of Conduct and training, there might be opportunity for sector-wide consistent and efficient PID training connected to Code of Conduct training.

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

When applying the Act, the points of difficulty have proven to be primarily around provisions where there is no express definition of key terms, or otherwise could be open to interpretation, for instance:

- *Substantial and specific* for s12(1)
- *Reasonable grounds* for ss12(3) and 13(3)

In some instances legal research finds statutory or judicial interpretation that assists, or the ordinary dictionary meaning is applied, but this is not necessarily achievable for every person seeking to understand the Act and what it means for them, nor does it give a consistent result.

More generally, people at times seek to make PIDs when their complaint does not align with the grounds described in ss12-13. It appears to quite often be assumed (or perhaps hoped) to have a broader application to complaints or allegations, on the expectation that it will afford protection or perhaps impetus to deal differently with the concerns raised.

It is often necessary to take steps to explain the application of the Act in plain language to make it easier to understand, especially where a person is not a public sector employee with the benefit of training.

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

Such an entity could take up a role similar to what is currently done by an appointed PID Support Officer as described in Standard 2/2019, including providing advice to involved parties about their rights and obligations, the availability of support services, checking on their welfare, providing updates, and if needed liaison with the agency's PID co-ordinator.

A question would be whether it is valuable having this delivered externally to ensure consistency and independence, and if so, if the expense is justified. Or, if it is more effective for this function to continue being performed from within the agency (but independent from an investigation), where the authority exists to make decisions and take actions (for instance temporary adjustments to employment arrangements to support the discloser), without the need to include another external authority.

This should also be considered in the context, as outlined in the issues paper, that there are already multiple other bodies with involvement in dealing with PIDs.

Thank you for the opportunity to provide submissions for consideration. Should you require any further information, please do not hesitate to contact Natalie Homan,

A/Executive Director (DJAG's PID Co-ordinator), Ethical Standards Unit by email  
[REDACTED] or by telephone on [REDACTED]

Yours sincerely

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