

Department of Education Submission

Public Interest Disclosure Act 2010
Review

February 2023

Contents

Introduction	3
3.1 Policy objectives of the PID Act	3
3.2 What is a public interest disclosure?.....	4
3.3 Who can make a public interest disclosure?	7
3.5 Making, receiving and identifying PIDs	8
3.6 Managing, investigating and responding to PIDs	9
3.7 Protections for disclosers, subject officers and witnesses.....	10
3.10 Practical considerations.....	11

Introduction

The Queensland Department of Education (the department) strongly supports the purpose of the *Public Interest Disclosure Act 2010* (the Act), specifically to ‘facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures’.

The department has in place, a strong integrity framework to ensure our culture is characterised by the highest standards of ethical behaviour and accountability at every level of the organisation. As such, the framework supports public interest disclosures (PIDs) being effectively assessed, and where necessary, investigated and responded to.

In this submission a number of observations and recommendations have been made with respect to the Act achieving its intended purpose and objectives. These observations are informed by the department’s experience in receiving, assessing and managing PIDs. The responses below are framed around specific ‘Issues for consideration’ as outlined in the Issues Paper released on 30 January 2023.

3.1 Policy objectives of the PID Act

Section 12 of the Act

Despite the legislative intent to protect disclosers from reprisal, the department observes that there are limits to the protection and support that can be provided by the department to individuals who are not a ‘public officer’ of the department. Treating matters disclosed by ‘any person’ as a PID, may not help to achieve the stated purpose and objects of the Act.

The need to assess all incoming correspondence against the Act, irrespective of the type of discloser, can create an administrative burden on agencies to respond to, and treat, matters disclosed by individuals who typically do not require support or protection. These processes can result in various pressures impacting response and treatment timeframes.

The department is aware that avenues already exist for members of the public to submit complaints against public sector agencies to entities such as the Queensland Ombudsman, the Queensland Human Rights Commission, the Crime and Corruption Commission (CCC) and the Queensland Police Service (QPS). There are also existing complaint mechanisms in place for

members of the public to raise concerns about dangers to the health or safety of a person with a disability, or to the environment, while providing protections to those complainants.

There is an opportunity to focus the legislation towards facilitating the disclosure of wrongdoing within an agency by members of that agency, as they are more likely at risk of reprisal and need protection. Provision for 'any person' to make a PID is inconsistent with the concept that a PID scheme is a mechanism for facilitating internal disclosures and providing protection from reprisal for employees. For this reason, the department would support the removal of section 12 of the Act whilst retaining the ability for public officers to make disclosures of reprisal.

Disclosure of personal conduct

If section 12 of the Act is to remain and subject to amendment, the department is of the view that the Act could include an explicit statement that employees cannot make a disclosure about their own conduct. This would not preclude the reporting of potential wrongdoing by the employee's supervisor or another 'public officer'.

The Department would therefore propose consideration be given to:

- whether the inclusion of PIDs by 'any person' about certain types of wrongdoing is effective in promoting the stated purpose and objects of the Act;
- repealing section 12 of the Act; and
- making specific mention in the Act that employees cannot make a disclosure about their own conduct.

3.2 What is a public interest disclosure?

Definitions

As indicated above, the department would support a focus of the Act towards protections for public officers as private persons are not considered 'whistle-blowers' and would not require protections.

The Department would therefore propose that the definition of 'public officer' (section 7) be amended to encompass all persons performing duties for public sector entities, whether paid or unpaid. Volunteers, contractors (including employees engaged under contracts of service), trainees, and others in employment-like arrangements in the public sector.

To support a clearer definition of what constitutes a ‘public officer’, the department proposes that school students not be included in the definition for ‘public officer’¹. The department has some 250,000 school students and robust student protection frameworks and processes are already in place to support students to make complaints. The safety and wellbeing of students is a priority for the department, and incorporating students into a PID scheme would provide limited, if any, additional benefit.

The incorporation of students within the definition of ‘public officer’ would also impart a significant administrative burden on principals and other local officers who deal with student complaints as part of their day-to-day role. Similarly, it would create substantial and significant burdens on administrators to appropriately record, report and adhere to the obligations of the Act.

To assist with the interpretation and application of the Act, the department proposes that some definitions be amended to clarify, in more objective terms, information that may be disclosed as a PID. Specifically, the following terms would benefit from greater clarity:

- i. Substantial and specific: The Act currently provides no guidance on the meaning or application of this phrase. The *Acts Interpretation Act 1954* (AI Act) provides no further guidance.
- ii. Reprisal/Detriment: The Act currently provides limited guidance on the meaning or application of this. The NSW *Public Interest Disclosure Act 2022* (NSW PID Act) clearly defines ‘detriment’ and ‘detrimental action’ within section 32 and section 33, and creates a nexus between the PID and detrimental action.

Support for a public interest test

The department has a significant workforce and therefore deals with a high number of complaints that potentially fall within the definition of ‘maladministration’ or ‘corrupt conduct’ (under the *Crime and Corruption Act 2001*), but which ultimately relate to personal workplace grievances.

Categorisation of these grievances as PIDs means that additional public sector resources (human and financial) are expended on ensuring administrative obligations under the PID Act are adhered to (for instance, ensuring that matters are registered in the Office of the Queensland Ombudsman’s PID reporting system RAPID).

¹ This is contrary to recommendation 9: Clarke, P. (2017). Review of the *Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman.

The definition of corrupt conduct is broad and can be applicable for grievances which may otherwise be considered trivial in nature and may not meet the community perception of corruption. The department would support the introduction of a 'public interest' test to assist the effective assessment of PID complaints and enable complaints that could be considered trivial or to purely concern personal workplace grievances (e.g. administrative decisions that do not relate to serious or systemic organisational issues) to be managed through existing complaint management processes. The department also notes that 'public officers' have other mechanisms, both administrative and statutory, available to them to address individual workplace complaints.

Given that a review of the definition of 'corrupt conduct' (section 15 of the *Crime and Corruption Act 2001*) is out of scope for this review, the department is of the view that the introduction of a public interest test would create a much higher threshold for the assessment of disclosures as PIDs. In this respect, the department concurs with the Office of the Information Commissioner (OIC):

*'...for something to be in the public interest it needs to affect more than just your private or personal interests. It needs to affect a significant part of the public or community. This is reflected in the public interest factors for disclosure, which include promoting government accountability, discussion of public affairs, effective oversight of government funds, and protection of the environment.'*²

Workplace grievances

The department would support the amendment of section 13(1)(ii) of the Act to exclude PIDs that purely represent a personal workplace grievance, but permit the exercise of discretion by the proper authority to accept a disclosure, if the circumstances are reasonable to do so.

The department notes that section 26(3) of the NSW PID Act precludes a grievance from being a PID on the grounds that it 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.

² Office of the Information Commissioner Queensland. *Do my interests or concerns count as the public interest?*, accessed 14 February 2023, <<https://www.oic.qld.gov.au/guidelines/for-community-members/information-sheets-access-and-amendment/what-is-the-public-interest>>.

The adoption of a similar model could potentially support legitimate disclosures of wrongdoing within the public sector. Further, this would align with the object of the Act to provide protections to disclosers who make a disclosure in good faith.

The department would propose consideration be given to:

- amending section 7 of the Act to encompass all persons performing duties for a public sector entity, whether paid or unpaid;
- excluding school students from (future) definitions of a ‘public officer’;
- including robust definitions in the Act for ‘substantial and specific’, ‘grounds for reprisal’ and ‘detriment’; and
- introducing a ‘public interest’ test for disclosures by ‘public officers’ that are substantially workplace complaints.

3.3 Who can make a public interest disclosure?

Categories of disclosers

Best-practice legislation focuses on the special measures required for protecting and managing people internal to an organisation. Those who possess crucial information about internal wrongdoing generally face greater incentives against revealing it. These factors affect volunteers, contractors and non-employees.

The department suggests amending the Act to expressly state that a disclosure by a ‘public officer’ includes a disclosure of information falling within the ordinary course of an officer’s performance of their duties. As an example, the ACT’s *Public Interest Disclosure Act 2012* uses a simple but comprehensive definition which encompasses all persons internal to a public agency.

Further, the department suggests consideration should be given to differentiating between persons who undertake mandatory reporting of PIDs as part of their duties of employment (i.e. a police officer, an auditor reporting serious fraud or a legal officer referring information associated with a historical injury claim), with those who voluntarily report. The vulnerability of persons to the risk of reprisal is potentially much higher for voluntary disclosers.

A suggested model for identifying who can make a public interest disclosure is current within the NSW PID Act. It references three PID categories that disclosers may fall under:

- iii. Voluntary PID (someone who has made an intentional disclosure of wrongdoing, which would sit outside the scope of their role);
- iv. Witness PID (a discloser of information in an investigation of serious wrongdoing, at the request/response of an investigating officer); and
- v. Mandatory PID (someone who reported misconduct as a part of their role/duties).

Recognising that different categories of disclosers require different levels of support, a categorisation model could lead to greater efficiencies.

Protections from reprisal

For greater clarity, the department would support the amendment of section 40 to clarify who is protected from reprisal, and to include examples to assist in the interpretation and application of the Act. Currently anyone involved in a PID (witnesses, assessors, investigators) is protected from reprisal. In practical terms, the application is an onerous task and involves additional red tape to support people who are unlikely to need protections. This can result in an impost on agencies to meet their PID obligations.

Section 33 of the NSW PID Act (which lists reprisal as 'detrimental action') provides clear definitions of reprisal, and outlines the repercussions for engaging in reprisal action. If adopted for the Queensland context, this could assist in assessing and managing allegations of reprisal.

The department would propose consideration be given to:

- making specific mention in the Act that a PID includes a disclosure by a person as part of their normal course of employment;
- introducing specific categories of disclosers; and
- developing clearer definitions for reprisal or detrimental action (consistent with recommendations in section 3.2).

3.5 Making, receiving and identifying PIDs

Disclosing information

In alignment with the provisions of section 15 of the Act, a person can make a disclosure to a public sector entity or to an entity that has the power to investigate the disclosure. There is no specific obligation for a discloser to report the information to the relevant public sector entity in the

first instance. The department sees value in amending the Act to require disclosers to report information about a public sector entity to that entity in the first instance, or to an entity that has the power to investigate the disclosure.

Timeframes for assessment

In undertaking a formal assessment of a potential PID, the department has experienced voluminous amounts of information requiring review and assessment, which could present challenges in meeting statutory timeframes. Given the broad categories of information that require assessment, the implementation of a specific statutory timeframe (e.g. assessment within 1 month) could unnecessarily divert resources away from staff involved in supporting disclosers.

The department sees benefit in retaining the 'as soon as practicable' assessment timeframe to allow sufficient time for agencies to gather additional relevant information from complainants to assess matters and communicate the outcome of the assessment to the discloser.

The department would propose consideration be given to:

- amending the Act to require disclosers to report information about a public sector entity to that entity in the first instance, or to an entity that has the power to investigate the disclosure; and
- retaining the 'as soon as practicable' assessment timeframe for PIDs.

3.6 Managing, investigating and responding to PIDs

Options for disclosers

The department is aware that there are some disclosers who prefer to remove themselves from a PID process and not be involved in the protections offered by the agency or receive further advice from the agency. This is particularly evident in the case of 'role reporters' such as police officers or legal officers who may make multiple disclosures in a given day as part of their role and may not wish to receive further advice about these matters. These individuals often do not require the same level of support, if any, as other PID disclosers.

To accommodate this, the department sees benefit in a voluntary 'opt in' or 'opt out' option for 'role reporters', which would therefore ensure that resources are channelled to those who need the greatest support.

Where a person makes a mandatory report of a PID, there would be benefit to the discloser and the agency if discretion about the administrative process and requirements for these matters was available. The requirement for RAPID entries and additional responses can inadvertently create an administrative burden on both the agency and the discloser (who has to process acknowledgements and outcome advice) without advancing the purposes of the Act.

Status reporting

Given the broad categories and the volume of PIDs received by the department, it is observed that a significant investment of public resources is made towards effectively managing PID processes. The introduction of statutory timeframes, such as status reporting to disclosers at regular intervals³ or communicating in writing the outcome of an assessment within one month⁴ of receipt of the disclosure, would increase the resources needed to manage PIDs and divert public resources away from other activities. It is noted that statutory timeframes may conflict with timeframes relevant to other complaint frameworks including Conduct and Performance Excellence (CAPE), human rights, privacy or corrupt conduct frameworks.

The department would propose consideration be given to:

- amending the Act to allow disclosers to 'opt in' or 'opt out' of the PID process, particularly in the case of 'role reporters', and adjust the administrative requirements accordingly;
- consider the limited utility or benefit of incorporating additional reporting requirements for agencies communicating with disclosers.

3.7 Protections for disclosers, subject officers and witnesses

Examples of reprisal action

The department sees benefit in including specific examples of reprisal action (a non-exhaustive list) under section 40 of the Act, to clarify the nature of 'detriment' that needs to be present to constitute reprisal action.

The department would propose consideration be given to:

- including examples of reprisal action in the Act.

³ Clarke, P. (2017). Review of the *Public Interest Disclosure Act 2010*. Brisbane, QLD: Queensland Ombudsman. Recommendation 20

⁴ Ibid, Recommendation 19.

3.10 Practical considerations

Training and awareness

Best practice approaches to education, training and awareness take into consideration the frequency and fidelity of applied knowledge, as well as the risks of non-compliance based on an individual's role. The department recognises, for example, that the majority of public sector employees (including managers) primarily need general awareness of legislative requirements, with access to well-designed and easily accessible information and support structures to assist if required.

Conversely, dedicated information and/or integrity management experts need a more specific and detailed understanding of legislative requirements and processes, with access to central agency or other technical expertise (Queensland Ombudsman, PID Agency Network etc.) as required.

Accessible language

The department would support amending section 12 and section 13 of the Act to reflect plain English language, especially in sections 12(3) and 13(3).

The department would propose consideration be given to:

- supporting the implementation of tailored education and training that models best practice; and
- reviewing the Act to ensure accessible, plain English language is used throughout, with a focus on sections 12(3) and 13(3).