

Issues Paper Feedback

Title of Issues paper: Public Interest Disclosure Act 2010

Sponsoring Agency: Department of Justice and Attorney-General

Department of Tourism, Innovation and Sport (DTIS) comments:

A. DTIS notes the issues paper with submissions.

Background information for DDG:

The *Public Interest Disclosure Act 2010* (PID Act), formerly the *Whistleblowers Protection Act 1994* has been referenced in multiple reviews over the past six years. In June 2022, Professor Peter Coaldrake identified in his report on culture and accountability in the Queensland public sector that there was a need to expedite amendments. The following submission of the Honourable Alan Wilson KC (Mr Wilson) 2023 Issues Paper is provided for consideration.

Mr Wilson's review of the PID Act examines topics inclusive of the following matters:

- whether the objects of the PID Act are valid and are being achieved;
- the scope of public interest disclosures (PIDs) and persons who may make a PID, protections for disclosers and processes for dealing with PIDs;
- the roles of the Queensland Ombudsman and other integrity bodies for PIDs, including the Crime and Corruption Commission (CCC);
- arrangements for education and training about the PID Act in the public sector;
- recent whistleblowing reviews and developments in other jurisdictions which represent good practice and recent research about public integrity; and
- whether the PID Act is consistent with the Human Rights Act 2019

The Issues paper poses 44 questions, although it is noted that an individual, groups or organisations responses may take any form or structure and may respond to some or all of the questions. The author of this paper, Mr Adam Jewell, Manager of Integrity Services provides the following submission based on experience as an investigator, including involvement with the PID Act for approximately six years. Whilst provided by Mr Jewell, as an employee of the Department of Tourism, Innovation and Sport, the responses incorporate personal experiences as both a discloser, investigator and support officer.

Response to select questions:

Approving Officer: Sarah Vandersee, Deputy Director-General, Corporate Services
Agency: Department of Tourism, Innovation and Sport

Phone: [REDACTED]

Date: 24/2/2023

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?

A. The PID Act is a valuable legislative mechanism which provides support and confidence to those who may disclose wrongdoing, although in itself does not uncover wrongdoing in the public sector. Amendments, as considered in this issues paper will strengthen and, it is hoped to simplify some of the administrative burdens.

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?

A. In the author's experience, many witnesses, complainants, or 'disclosers' are confused by the title of the PID Act. Referencing the former title, 'Whistleblower Act' is often sufficient for people to immediately recognise its purpose. A change to the title of the existing PID Act is supported, to explicitly identify its purpose for members of the community.

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

A. The PID regime is a well respected strategy for providing confidence to members of the public sector and other community members when reporting wrongdoing. Conducting this review and implementing amendments to the robust program will further public confidence.

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?

A. As recommended by the Queensland Ombudsman (QO) in their 2017 review, low numbers of disclosures have been made in respect to public officers, or other members of the public about specific or substantial dangers to the environment or persons with a disability. Whilst these matters are important, perhaps protections could be better placed within relevant environment and disability legislation, enabling the PID Act to focus on its primary purpose of public sector wrongdoing.

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

A. Yes, there is benefit if assessing risk of harm could reduce the administrative burden associated with managing disclosers who have minimal risk, such as persons in a supervisory role over the alleged subject officer or work independently. Perhaps, it is possible to notify a 'low risk' (or preferred terminology) discloser that PID Act protections exist, but no further correspondence will occur in respect of their management, unless further information is provided, to amend the risk level?

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?

A. It is the authors recommendation that the current state of mind provisions are maintained, as the current provisions are appropriate. In the author's experience no disclosures have raised concern with the state of mind provisions.

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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?

A. In the author's experience, there have been occasions where students, contractors and work experience participants have provided information that would have otherwise categorised them as disclosers. There is value in including contractors, especially when they are employed on long term basis, sometimes up to five years, and are for most practical purposes equivalent to a permanent employee. Whilst the author supports an expansion of the definition to include contractors, it becomes problematic to provide protections for persons who are not employees, as is the case for the vast majority of all disclosures.

No, it is impractical for former public service employees to be covered.

For simplicity, it is proposed that public interest disclosure legislation could be limited to protecting public sector employees, or those engaged in some manner, such as volunteers, students, contractors or work experience participants rather than 'any person'. Reprisal against people external of the public sector could be better managed by alternative legislative frameworks, such as the Criminal Code.

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?

A. No, the author does not support PID Act protections expanded to relatives. In the authors experience, information is rarely provided, or sourced from a relative and whilst protections can be provided by an employer, to an employee, it is impractical to extend those to a relative. Any action that could be considered 'reprisal' against a relative may be more appropriately managed through civil or criminal action.

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

A. Yes – role reporters are typically involved in matters purely for administrative purposes, often progressing, or forwarding matters as a responsibility of their duties. Identifying such people, including investigators as disclosers, appears non-sensical, particularly where an investigator ultimately drafts investigation outcome letters to themselves.

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

A. Reporting matters of alleged wrongdoing that may be protected by the PID Act is essentially the same process as any other matter. One observation made by the author, is that there is no option to 'opt out' from PID Act process. An opt out option is strongly supported.

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

Approving Officer: Sarah Vandersee, Deputy Director-General, Corporate Services
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A. Yes, overall the system is effective although would be strengthened by an independent body such as recommended by Professor Coaldrake.

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?

A. Smart Service Queensland has a process for taking complaints on behalf of all government entities.

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

A. It is the authors suggestion that protections are retrospective; reprisal may occur at a point where a subject officer believes an allegation has been made, yet not yet reported, although similarly, reprisal may occur at the time of the alleged inappropriate behaviour, as a strategy to deflect investigations despite the wrongdoing not yet being discovered.

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?

A. The author supports the QO's 2017 recommendation that a written decision is provided to persons making a disclosure within a month, although proposes 30 business days is a suitable timeframe and consistent with other practices. However, it is proposed this written decision of an assessment is limited to those matters where a person specifically references the information as a disclosure under the PID Act. It is important to differentiate that only certain reports of alleged wrongdoing initiate a responsibility under the PID Act, otherwise there may be a significantly larger administrative burden for un-related matters.

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?

A. Whilst confidentiality is very important, allowing disclosers to access support from friends, colleagues, union representatives or legal advisors as a trauma informed and victim centric approach is supported. In the author's experience, when disclosers are instructed about confidentiality provisions, they can feel isolated. It is proposed that a flexible framework enabling a discloser to discuss their matter with select confidants is important, although limitations must be imposed. For example, discussion with colleagues in the same agency (particularly the same unit) should be discouraged, and in most cases it is appropriate to maintain privacy of the alleged subject officer's identity. A careful balance is required to maintain integrity of an investigation, restrict reputational harm to relevant parties, but support a disclosers mental health and wellbeing.

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

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A. Yes – the PID Act requires each agency’s procedures ‘ensure that... appropriate action is taken in relation to any wrongdoing that is the subject of a public interest disclosure made to the entity’ but does not prescribe the action. It is the authors opinion that prescribed action is adequately addressed by the relevant Public Service Directives and should not be included in the PID Act, which is designed to protect disclosers, rather than prescribe outcomes.

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

A. Yes, agencies are capable of supporting their employees, although are limited in respect to other members of the public, or those from external agencies.

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?

A. (a) As referenced in question 23, appropriate action in respect to an investigative or disciplinary action is adequately prescribed by the relevant PSC directives. (b) It is similarly proposed that an agencies requirement to apply procedural fairness to all parties is relevantly addressed in associated directives and further elaboration is not required beyond the existing PID Act. (c) As referenced in question 7, the author proposes the PID Act should include reference to assessing and minimising risk of reprisal, which is one of the key components of the legislations purpose.

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?

A. Yes. In the authors experience, disclosers have specifically requested not to be classified as a PID and queried how to opt out. On some occasions the inability to ‘opt-out’ caused distress to the discloser and reduced the persons engagement in the investigative process.

An alternative to ‘opt-out’ from information and support should apply to all parties, whether role reporter or otherwise.

As a converse approach, the author proposes that a person not declared as a discloser , after an assessment process should have recourse to seek protections through an independent agency. An independent agency should also be provided with a unique, or special circumstances clause to protect those by exception. If implemented, a clearing house could facilitate this aspect of an independent assessment, or application of special considerations.

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

A. As identified by the QO during the 2017 review, the PID Act does not adequately address protection for witnesses. Amendments to further elaborate on the protection of witnesses is supported.

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

A. Yes, currently fit for purpose, although there is potential to better support a disclosers mental health and wellbeing.

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

A. Reprisal is broadly defined in the PID Act as 'detriment' which is a wide definition and would benefit from further particularisation, including examples. The current description of action that is not reprisal (reference section 45 PID Act) is sufficient, although could be simplified further by defining, with examples 'reprisal' and 'not reprisal'.

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

A. Yes, as referenced in the issues paper, calls have been made in Australia and overseas for the establishment of an independent authority responsible for ensuring the welfare of disclosers. The author supports such an authority, which could potentially exist within the PSC or QO offices. Such a body could advise and support disclosers, receive complaints about and investigate alleged reprisals and mediate with disclosers.

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

A. The author proposes that existing remedies are sufficient, although an independent body may have greater capacity to effectively manage dispute resolution.

34. Do you support an administrative redress scheme?

A. The author proposes that the current redress strategies are sufficient, and a further redress scheme is not required.

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

A. The QO currently provide an effective role as an oversight body, although if an independent authority is established for managing disclosures independently, legislative amendment would be required.

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

A. The author largely supports the QO 2017 recommendations.

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

A. The author proposes that incentives, whether financial or otherwise are not required to encourage potential disclosers. It is proposed that a whole of government education program on mandatory reporting would be a valuable strategy to encourage participation.

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

A. The training program offered by the QO is effective and the support provided is well respected.

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?

A. The current PID Act was drafted approximately 13 years ago and may not specifically consider the needs of First Nations Peoples, including people in regional or remote communities. Support is often restricted to electronic communication, particular where the PID supports officers are centrally based. Perhaps partnering with a wellbeing assistance program provider could offer more personalised service, which may be more appropriate for certain culturally diverse peoples.

It is proposed that individual agencies capacity to provide resources targeted towards culturally and linguistically diverse people would be supported by a whole of government resource package.

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

A. It is the authors contention that consistency across states is important, and therefore consideration of the eleven Acts across Australia will enable Queensland's legislation to be congruous.

It is proposed that clarity of the PID Act could be improved by maintaining its focus on the public sector, with protections for those employees, rather than attempting to capture the few percent of matters that are reported by the general public.

We consider the revised proposals of the PID Act are likely to strengthen the existing practices and the department offer support during subsequent engagement once the Act is drafted.

The contact officer's details to be added for further consultation are:

Name & Title: Adam Jewell, Manager Integrity Services, Corporate Services
Contact Phone: [REDACTED]
Date: 21 February 2023

Approving Officer: Sarah Vandersee, Deputy Director-General, Corporate Services
Agency: Department of Tourism, Innovation and Sport

Phone: [REDACTED]
Date: 24/2/2023