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Queensland Health

The Honourable Alan Wilson KC  
Public Interest Disclosure Review Secretariat  
Strategic Policy and Legal Services  
Department of Justice and Attorney-General

Email: [PIDActReview@justice.qld.gov.au](mailto:PIDActReview@justice.qld.gov.au)

Dear Mr Wilson

Thank you for your correspondence dated 30 January 2023, inviting the Department of Health (the Department) to provide a submission in relation to the review of the *Public Interest Disclosure Act 2010* (the PID Act).

The PID Act is an important part of the integrity framework in the Queensland public sector therefore I would like to thank you for this opportunity to provide feedback and further inform the review process.

The Department's Ethical Standards Unit is responsible for the management and administration of public interest disclosures for the Department. The Ethical Standards Unit has reviewed the published issues paper.

Please find attached the Department's response to some of the questions posed within the issues paper for your consideration.

Should you require further information, the Department's contact is Ms Jess Byrne, Director, Ethical Standards Unit who can be contacted on telephone [REDACTED] or via email [REDACTED]

Yours sincerely

Shaun Drummond  
**Director-General**  
17/02/2023

# Review of Public Interest Disclosure Act 2010

## Department of Health response to issues paper

### 3.1 Policy objectives of the PID Act

Question posed in issues paper	Department of Health response
<p>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?</p>	<p>The PID Act has been valuable in its objective to uncover wrongdoing in the public sector through the protections that apply to those that come forward with relevant information or concerns.</p> <p>However, the PID Act in isolation is not a sole motivator for employees making complaints. There are legislative and policy requirements that place positive obligations on employees to report wrongdoing (i.e. Code of Conduct, mandatory notifications for registered health practitioners etc).</p> <p>The majority of complainants do not make reference to the PID Act when submitting complaints, and often are unaware that what they have raised is a public interest disclosure.</p>
<p>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?</p>	<p>Although the terminology 'public interest disclosure' has been in effect since 2011, many people still aren't familiar with it, even after completing mandatory training. Many people remain much more familiar with the terminology 'whistleblower'.</p> <p>There is possibly some stigma attached to words like 'whistleblower' which may contribute to complainants hesitancy to make disclosures. It would be important for the title of the legislation to adequately reflect the content of the legislation.</p>
<p>Are changes needed to ensure public confidence in the integrity of the PID regime?</p>	<p>While the Act under s59 provides for the oversight agency to monitor compliance and review the way in which public sector entities deal with PIDs generally, the oversight agency needs to be resourced sufficiently to perform these functions.</p> <p>Queensland Ombudsman facilitates agencies to perform an annual self-assessment against the PID Standards, however this is the agency assessing itself. The process lacks independence and doesn't provide opportunities for feedback or continuous improvement.</p> <p>Public confidence in the integrity of the PID regime may be strengthened if people were aware that the actions of agencies were subject to scrutiny and audit by an external agency.</p>
<p>Are any changes needed to the PID Act to make it more compatible with the Human Rights Act 2019?</p>	<p>Human rights should always be considered as part of any decision-making process, so there is no real need to make changes to the PID Act for the purpose of the Human Rights Act.</p>

## 3.2 What is a public interest disclosure

Question posed in issues paper	Department of Health response
<p>What types of wrongdoing should the PID regime apply to? Should the scope be narrowed or broadened? Why and how?</p>	<p>Section 12 and 13 of the PID Act are quite prescriptive as to the types of wrongdoing that can be reported. The overwhelming majority of matters assessed as PIDs relate to corrupt conduct and, and on occasion, maladministration and/or reprisal.</p> <p>Consideration should be given to why specific types of wrongdoing were included in the PID Act over other types of wrongdoing that may be of equal seriousness. Perhaps there is an argument to be less prescriptive about the types of wrongdoing generally to ensure the Act fulfils its obligations and doesn't preclude a report of serious wrongdoing that serves the public interests. The New Zealand concept of defining serious wrongdoing seems like a good approach.</p> <p>The use of the terminology 'substantial and specific', where those terms aren't defined in the Act, can be subjective. There would be a benefit to having defined terms and a specific measure or threshold to assist in the assessment process. The current legislation has many elements around 'public interest information' which are difficult to interpret and measure leading to inconsistency and confusion.</p> <p>Consideration should also be given to ensuring the tests being applied are consistent across legislation. For example, the Queensland Ombudsman take the view that the test for a PID under s13(1)(a)(i) is lower than the reasonable suspicion test that is used by the Crime and Corruption Commission.</p>
<p>Should a PID include disclosures about substantial and specific dangers to a person with a disability or to the environment? Why or why not?</p>	<p>The danger to the environment and danger to person/s with a disability are very specific types of wrongdoing. Within the Department there have been very few examples of PIDs being assessed under these public interest information types.</p> <p>In the health context, concerns about danger to a person with a disability would often be captured in the serious professional misconduct space, which would generally reach the threshold of suspected corrupt conduct anyway.</p>
<p>Is there benefit in introducing a public interest or risk of harm test in the definition of a PID?</p>	<p>A risk of harm test may be useful to capture serious or systemic matters.</p> <p>It should also be noted that given the widening of the definition of corrupt conduct, there is a range of conduct that is captured as a PID that may not necessarily be a serious public interest issue (eg. A health practitioner inappropriately accessing their own record using a departmental system). It also means that some grievances (eg. Bullying complaints about a line manager toward a subordinate employee) may also be getting captured, which probably wasn't the intention of the PID Act.</p> <p>By having to satisfy a certain threshold in terms of seriousness and impact may alleviate some of the more minor or individual issues that would be better dealt with through other existing complaint or performance management pathways being inadvertently captured.</p>

<p>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?</p>	<p>The PID Act could be simplified by limiting protections where there is a level of objective information that tends to demonstrate the wrongdoing.</p>
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### 3.3 Who can make a public interest disclosure?

Question posed in issues paper	Department of Health response
<p>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?</p>	<p>The department's response will be limited to commentary on two categories of disclosers, being public officers and any person.</p> <p>When looking at the objectives of the PID Act in relation to promoting the reporting of wrongdoing in the public sector and ensuring PIDs are properly investigated and dealt with, it makes sense to allow PIDs to be made by either a public officer or any person. Both could have information that serves the public interest.</p> <p>However, the difficulty arises in relation to the objective of affording protections from reprisals because an agencies ability to protect a member of the public from reprisal is very difficult. For this reason, there would be an argument for limiting the categories of disclosers to public officers.</p>
<p>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?</p> <p>Should former public officers be covered?</p>	<p>The department agrees the definition of public officer should be expanded to include those performing services for the public sector whether paid or unpaid (eg. volunteers, students, contractors and work experience where there is employer-employee like arrangement) in place.</p> <p>For instance, currently, the PID Act does not provide protections for a student (eg paramedic, doctor, nurse) who may identify wrongdoing whilst on 'prac' or 'training' at a facility, or even volunteers who work alongside employees in these environments. In these situations there is often a power imbalance, and this cohort may be more at risk of reprisal in terms of future employment prospects. While agencies can err on the side of caution and provide protections, by having the definition expanded in legislation would assist those students and volunteers providing health care whilst working within hospitals, Ambulance services and other health care placements to disclose wrongdoing within the workplace .</p> <p>Providing PID protections to former public officers may not serve in the public interest if employees wait until they resign or retire or have secured employment elsewhere to report wrongdoing. These complaints may not be made until 'well after the fact' where evidence may not be readily available, recollection of events unclear and risk of reprisal would be seemingly 'nought'. The ability to protect former officers from reprisal (if it did exist) would also be an issue due to no ability to oversee in workplace/have constant communication.</p>
<p>Should relatives of disclosers, or witnesses be eligible to make</p>	<p>No, relatives of disclosers/witnesses should not be eligible to make PIDs. This may facilitate 'hearsay' evidence being</p>

<p>PIDs? Should they, or anyone else, be entitled to protection under the PID regime?</p>	<p>admitted into complaint material. The ability to protect relatives (members of the public) from reprisal in this scenario would also be an issue due to no ability to oversee in workplace/have constant communication.</p> <p>Witnesses who participate in an investigative process are generally already captured in the provisions of reprisal (i.e. if the subject was to engage in reprisal because they believe somebody has been involved in a proceeding).</p> <p>Any expansion to the PID Act to cover relatives and witnesses individually could create an administrative burden with limited benefit.</p>
<p>Should different arrangements apply to role reporters? Why and how?</p>	<p>Yes, different arrangements should apply to role reporters. By virtue of their position, role reporters are likely to make numerous PIDs through the audits they conduct or information they generate. There is often no risk of reprisal identified in these matters. An easing of the administrative burden for these PIDs is necessary to deal with repeated interactions with PID role reporters. For instance, an easing of written correspondence, assigning PID Support officers and provision of outcome advice to PID role reporters who frequently audit and report on matters that are assessed as PIDs (i.e. information access matters). An opt in/out option would be beneficial in these circumstances.</p>

### 3.5 Making, receiving and identifying PIDs

Question posed in issues paper	Department of Health response
<p>Are the requirements for making, receiving and identifying PIDs appropriate and effective?</p>	<p>The requirements for making, receiving and identifying PIDs are generally appropriate and effective.</p>
<p>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?</p>	<p>Having multiple reporting pathways is helpful in ensuring a no wrong doors approach to raising wrongdoing.</p> <p>The ESU concurs with the views expressed in the issues paper regarding the implications of two agencies concurrently assessing/managing a matter and suggests the Act be amended such that in the first instance the matter should be referred internally unless special circumstances exist.</p> <p>Having a clearing house or third party hotline would appear to be duplication of the mechanisms that each agency already has in place.</p>
<p>At what point in time should the obligations and protections under the PID regime come into effect?</p>	<p>At the time of the disclosure.</p>
<p>Should the PID legislation require a written decision be made about PID status as recommended by the Queensland Ombudsman? What</p>	<p>The PID Act should require written decisions to be provided about PID decisions. Caution should be exercised in terms of prescribing timeframes, given the complexity of complaints can impact on the timeframe for assessment.</p>

would the implications be for agencies?	<p>Consideration should also be given to how this would work with role reporters or even senior executives if there are opt out mechanisms.</p> <p>The PID Act (or standards) should also make clear the appeal or review mechanisms available should someone not be satisfied with the original PID decision. This should include what the internal or external reviews is looking at (eg. Is it only considering whether the original decision was fair and reasonable, or is there the ability to overturn a decision).</p>
Are the provisions for disclosures to the media and other third parties appropriate and effective? Are there additions or alternatives that should be considered?	<p>While s20 provides for when an officer may make a disclosure to a journalist it does not consider penalties for inappropriate disclosure of relevant information to journalists.</p> <p>Consideration could be given to expanding this provision to include penalties for inappropriately disclosing relevant information to journalists where a department is dealing with the matter.</p>

### 3.6 Managing, investigating and responding to PIDs

Question posed in issues paper	Department of Health response
Are the requirements for managing, investigating and responding to PIDs appropriate and effective?	<p>Overall, the requirements in the Act for managing, investigating and responding to PIDs is appropriate and effective. The Act should not be too prescriptive as these decisions should be made on a case by case basis depending on the nature of the matter.</p> <p>Consideration could be given to providing more information in standards or guidance material regarding the application of various pieces of the Act, such as the situations or scenarios where the identity of the discloser is required to be disclosed (i.e. to provide natural justice to the subject officer, to inform a delegate etc).</p>
Are agencies able to provide effective support for disclosers, subject officers and witnesses? Are any additional or alternate powers, functions or guidance needed?	<p>The Department is in position to provide effective support for disclosers, subject officers and witnesses when they are a current Departmental employee. This can be challenging when they cease employment or are a member of the public in terms of monitoring the risk and on occasion, maintaining contact and engagement from the individual that is external to the Department.</p>
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?	<p>The PID Act should continue to place a general obligation or requirements to deal with the reported wrongdoing. However, the delegated decision maker almost always has the discretion on a case-by-case basis to decide the steps taken to deal with the matter i.e. investigation, discipline process, managerial action or no action at all, unless the conduct is such that it needs to be reported to another entity i.e. QPS in instances of criminality. Providing specific steps to address wrongdoing in legislation could limit the prerogative of the delegate decision maker/typecast certain matters to certain outcomes.</p> <p>As for procedural fairness/natural justice, these are complex legal concepts which may or may not benefit from inclusion specifically in the PID Act. Often these aspects are referred to in</p>

	<p>correspondence to the PID and the subject officer on a somewhat general basis.</p> <p>c. The PID Act already requires agencies to afford protections from reprisals. This could be extended to specifically require agencies to assess and minimise the risk of reprisal. However, this is largely already contemplated in agency policy and procedures.</p>
<p>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?</p>	<p>Role reporters should have the ability to opt out of certain processes in relation to receipting information (such as introductory letters and phone calls). There may also be a case for high level PIDs e.g. Director level and above who make PIDs about subordinate officers opting out of certain processes under the PID Act. This should be able to be determined on a case by case basis on the basis of risk.</p>

### 3.7 Protections for disclosers, subject officers and witnesses

Question posed in issues paper	Department of Health response
<p>Are the current protections for disclosers, subject officers and witnesses appropriate and effective? Should additional or alternative protections be considered?</p>	<p>The protections for disclosers are appropriate and effective where the discloser is an employee. It remains difficult for the Department to ensure adequate protections for former employees and members of the public.</p>
<p>Are the current provisions about confidentiality adequate and fit for purpose? Should any improvements be considered?</p>	<p>The ESU agrees with recommendation 16 of the 2017 Queensland Ombudsman review which recommended "Section 65(3) of the PID Act should be amended to clarify that making a record of confidential information or disclosing it to someone else is permitted for the purpose of taking reasonable steps to assess disclosures, including consultation with other public sector entities."</p> <p>Section 65 could be expanded to include examples involving the disclosure of confidential information to other entities outside of the complaints process, but in the interest of assisting disclosers, such as WorkCover to assist with the disclosers claim for workers compensation. It is unclear in the PID Act whether the disclosure of complaint information that also forms part of a WorkCover claim is an inappropriate disclosure or whether this is considered 'an appropriate discharging of a function under another Act'. Further guidance within the PID Act regarding this issue is recommended.</p>
<p>Is the definition of reprisal appropriate and effective? Do any issues arise in identifying, managing and responding to reprisals?</p>	<p>In the first instance, the definition of reprisal in Section 40 of the PID Act is satisfactory particularly as it captures any act, attempt or conspiring to cause a detriment.</p> <p>However there appears to be some differing interpretation of section 40(a)(b) which defines: A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that the other person or someone else</p>

	<p>is, has been, or intends to be, involved in a proceeding under the Act against any person.</p> <p>While the ESU previously considered the intent of this provision was to consider witnesses providing supporting information through a process (i.e. witness in an investigation), previous advice suggested this can apply more broadly as the definition from the Acts Interpretation Acts defines proceeding as 'legal or other action'. In a scenario where the HR officer assisting with a discipline process or correspondence received a detriment (verbal abuse) the ESU has been advised that this may be considered 'reprisal' as a result of 'another person' raising a PID, despite no obvious connection to disclosing information originally. This may be an overreach of the intent of the PID Act.</p>
Is there a role for an independent authority to support disclosers in Queensland? If so, what should its role be?	Having a separate body to support disclosers would add another layer of bureaucracy, double handling and confusion between the agency and the independent authority.
Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?	<p>There are already numerous channels to address concerns of reprisal without adding in an administrative redress scheme.</p> <p>The PID Act would benefit from providing clarity about how reprisals should be addressed rather than adding in additional elements.</p>

### 3.8 Remedies

Question posed in issues paper	Department of Health response
Are the remedies available to disclosers under the PID Act reasonable and effective? Are any changes needed?	<p>The management of reprisals would benefit from clarity.</p> <p>There are administrative, civil and criminal options in relation to the management of reprisals that could be taken:</p> <ul style="list-style-type: none"> <li>- Under section 41 of the Act, reprisal is deemed an indictable offence so could be referred to the QPS (however there have been limited prosecutions that have occurred in relation to reprisal. In our experience, when matters have been referred to QPS they tend to be considered under other sections of the Criminal Code rather than 'reprisal' per se.</li> <li>- Under section 42 of the Act a reprisal is a Tort and a claim for damages can be made to a court.</li> <li>- Under section 44 of the Act a person may make a complaint under the Anti-Discrimination Act about a reprisal.</li> <li>- Under section 67(1) of the Act the offence of taking reprisal is deemed misconduct so could be investigated by an agency and dealt with through a disciplinary process;</li> <li>- Under section 67(2) of the Act the CCC may investigate the contravention.</li> </ul> <p>Consideration should be given to simplifying the Act in relation to the remedies available. While the intent would not be to</p>



	<p>minimise or weaken the remedies available, the Act could be amended to make it clearer that there are a range of choices and what happens if you choose one option over another, what prevails etc. It would also make it clearer for agencies what their responsibilities are in relation to dealing with matters of reprisal.</p>
<p>Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?</p>	<p>There are already numerous channels to address concerns of reprisal without adding in an administrative redress scheme.</p> <p>The PID Act would benefit from providing clarity about how reprisals should be addressed rather than adding in additional elements.</p>

### 3.9 Role of the oversight agency

Question posed in issues paper	Department of Health response
<p>Are the Queensland Ombudsman's functions and powers suitable and effective for the purpose of the oversight body?</p>	<p>The ESU is of the view that the Queensland Ombudsman's functions and powers are suitable and effective for the purpose of the oversight body. The PID Review may consider the level of involvement required from the Queensland Ombudsman to ensure the PID Act remains effective and their powers to audit agencies on their assessment and management of PIDs.</p> <p>The biggest issue for the Queensland Ombudsman is the resourcing of the PID function. At present, the resourcing of the function is not conducive for them to be able to adequately perform their functions under the Act.</p>
<p>Are there any conflicts between the Queensland Ombudsman's advisory and review functions for PIDs? If yes, how could these be managed or resolved?</p>	<p>While the Department hasn't experienced or had any concerns with this ourselves, there could be a perception of a conflict between the Queensland Ombudsman's advisory and review functions for PID. If required, this could be resolved by having the advisory function taken out of the QO and placed in another central agency.</p>
<p>Do the roles of integrity bodies overlap during the PID process? Are changes needed or do the existing arrangements work effectively?</p>	<p>There is a large degree of overlap between integrity bodies during the PID process. The overlap probably can't be avoided, however there needs to be clarity of roles to avoid duplication and ensure the respective requirements of each integrity body can be appropriately managed.</p>
<p>Are the Standards published by the Queensland Ombudsman effective? Are changes needed</p>	<p>Guiding resources always provide benefit and advice to Departments, however section 60 of the PID Act, determines how public sector entities are to perform their functions under this Act. This then requires Departments to refer to the legislation and 3 separate documents (standards) to comply with legislative requirements. While a Departments ESU or PID liaison officer may be across these documents, it can be difficult for an employee with limited PID knowledge to navigate.</p> <p>The Standards can be very prescriptive and bind agencies to a range of administrative processes. The right balance needs to be reached to ensure the requirements for managing PIDs aren't overly burdensome.</p>

<p>Do you agree with the recommendations of the Queensland Ombudsman's 2017 review?</p>	<p>The Department agrees, in the most part with the recommendations of the Queensland Ombudsman's 2017 review.</p> <p>The recommendations that the Department believe warrant further thought or consideration include those that relate to:</p> <ul style="list-style-type: none"> <li>- Whether PIDs should be accepted after an employee's resignation from the agency and any timeframe that may be attached;</li> <li>- Whether specific timeframes should be mandated for providing a written reason for an assessment decision;</li> <li>- Whether specific timeframes should be mandated for providing status reports to disclosers during the management of their PIDs.</li> <li>- Whether the subject of a PID that has not been substantiated is offered protection from detriment by the entity</li> <li>- whether there should be an administrative redress scheme.</li> </ul>
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### 3.10 Practical considerations

<b>Question posed in issues paper</b>	<b>Department of Health response</b>
<p>Should the PID legislation be more specific about how it interacts with any other legislation, process or scheme</p>	<p>There would be value in the PID Act being specific about how it interacts with other complaint processes.</p>
<p>Should the PID legislation include incentives for disclosers? If so, how should they operate?</p>	<p>No. The provision of incentives could potentially lead to the submission of purported PIDs for false or malicious purposes (i.e to receive incentives/rewards on baseless claims).</p>
<p>Are current arrangements for training and education about the PID Act effective? How could they be improved?</p>	<p>Current training offered by the Queensland Ombudsman has been a great benefit for Department staff who are able to participate.</p>
<p>Is the PID Act accessible and easy to understand? How could the clarity of the Act be improved?</p>	<p>Less legalistic terminology would assist employees and members of the public alike. More defined terms would assist those involved with the administration of the Act i.e. complaint managers, assessment officers. Addition of flowcharts and list of responsibilities and obligations for various levels involved with administration of Act including the public official/DGs, assessment function, disclosers, support officers, subject officers.</p>

