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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

Dear Mr Wilson KC,

Review of the Public Interest Disclosure Act 2010 - submissions

1.1 Gadens appreciates the opportunity to make a submission in relation to the review of the *Public Interest Disclosure Act 2010* (Qld) (the **PID Act**) (the **Review**).

1.2 Gadens is a leading law firm which regularly advises public sector entities on managing, investigating and responding to public interest disclosures (**PIDs**). The nature of our engagements varies from the assessment of PIDs, assisting with correspondence to disclosers, witnesses and subject officers, conducting investigations, drafting legal advice as to whether allegations can be substantiated, and where appropriate, preparing notifications to oversight bodies such as the Queensland Ombudsman or the Crime and Corruption Commission (**CCC**).

1.3 In preparing this submission, Gadens has had regard to its experiences as set out above, and has consolidated the various learnings arising from matters involving State government departments, local councils, and Government-owned corporations. We are aware that the Review has received, and is likely to receive, a number of submissions in support of changes to the PID Act to strengthen the protections available to whistle-blowers and requiring greater accountability on those public sector entities tasked with dealing with disclosures. In making this submission, Gadens does not seek to take issue with the position taken by pro-disclosure groups and advocates. Rather, this submission is intended to put forward the perspective of those persons tasked with managing, investigating and responding to PIDs.

1.4 While this submission largely focusses on the experiences of Gadens as an adviser to public sector entities, Gadens acknowledges the significant role that whistle-blowers play in an open and transparent public sector and the need to have suitable legislation to provide protection to those persons who make disclosures.

1.5 The Review is of course already aware of the importance of properly balancing a number of competing factors including adequate protection for disclosers, procedural fairness for parties to a disclosure, and the resource constraints on those public sector entities tasked with managing, investigating and responding with disclosures. The legislative regime that is developed must be comprehensive enough to encapsulate each of these factors, while also being flexible enough to allow practical implementation across the Queensland public sector.

2. Manipulation of the PID process

2.1 It is Gadens' experience that the current regime permits individuals to manipulate the protections provided under the legislation to "weaponise" the PID process. Put another way, we have seen numerous examples of allegations made under the cloak of anonymity that are, when tested with appropriate rigour and investigation, unable to be substantiated. In some instances, it is clear that the allegations are either vexatious or frivolous and the protections available under the PID regime have been used to engage in personal vendettas. Allegations, and subsequent

investigations, of this nature are of particular concern to public sector entities given the significant expense, time, and resources that are required to be dedicated by the public sector entities to properly close out these allegations.

2.2 In addition to the significant resources that are expended by public sector entities in managing, investigating and responding to PIDs, a serious imposition is also placed upon those persons who become the subject of an investigation. Often, a subject officer may be suspended or transferred from their substantive position for the duration of the investigation. In circumstances where investigations can be upwards of 12 months, the impact upon a subject officer should not be underestimated. This impact can of course be exacerbated where the allegations are subsequently unable to be substantiated. Even where a subject officer does return to their substantive role, the stigma associated with the investigation is often unavoidable.

2.3 As the Review has identified, there is an inherent tension between the objectives of the PID regime, that encourages disclosure and seeks to implement confidentiality protections to disclosers, with the principles of procedural fairness and natural justice that would ordinarily apply to parties the subject of a PID. In our experience, the confidentiality protections that are afforded to disclosers are often artificial, given the nature or particulars of the allegations that are put to a witness or subject officer are likely to reveal the identity of the discloser, even if a name is not revealed. This is particularly the case in smaller public sector entities where roles and responsibilities are often shared by only a select number of persons.

2.4 Gadens submit that some discrete changes to the PID regime may wish to be considered by the Review. These changes are proposed with a view to improving the practical application of the PID regime having regard to both our experiences in managing, investigating and responding to PIDs, as well as the issues raised by the Review in its Issues Paper released in January 2023.

3. Preventing improper disclosures

3.1 In our experience, there exists, rightly or wrongly, a perception that the current PID regime does not adequately expose the improper conduct that is intended under the legislation. Rather, the regime appears somewhat bogged down by the lodging of frivolous or baseless allegations, or personal workplace grievances – and not the serious and systemic issues that ought properly be treated as PIDs.

3.2 We submit that the Review may wish to consider implementing mechanisms that discourage the submission of allegations that are ultimately proven to be baseless and/or cannot be supported by any reasonable evidence. In making this submission, we are in no way seeking to discourage or silence those persons seeking to lodge legitimately-founded PIDs. Rather, we believe that such mechanisms would increase the likelihood of legitimate disclosures being treated with the importance they deserve.

3.3 One such mechanism that may influence the volume of PIDs received, is the implementation of a form of notification into the PID regime, whereby disclosers are made aware that there is a possibility that the public sector entity the subject of the disclosure may be the same entity that ultimately investigates the matter. In our experience, there is a perception by some disclosers that a complaint made against a public sector entity or employee will be subsequently investigated by the CCC or the Queensland Ombudsman. For a variety of reasons, including the devolution principle and the requirement to devote resources to the most serious allegations of corrupt conduct, this is often not the case and the allegation is referred back to the originating entity to manage. In our submission, informing disclosers of the practical reality of how the PID regime operates may influence the number of inappropriate PIDs ultimately being made.

3.4 The form of notification, whether it be positively stated in the PID Act, highlighted in a standardised complaint form, or captured as part of ongoing education around the PID regime, requires further consideration. The notification should not be used as a lever to discourage legitimate disclosures.

4. Introduction of a clearing house

4.1 It is our view that the use of a centralised clearing house for the assessment of PIDs ought to be the subject of further consideration by the Review. For the reasons sets out below, there is merit

to the introduction of a clearing house, however the limitations of such a system would require careful management.

4.2 As proposed in previous reviews and set out in the Issues Paper, a clearing house could, for example, make preliminary inquiries into an allegation to determine whether or not it holds any substance and should properly be investigated. It is only at this stage that an allegation might then be passed onto the relevant public sector entity or oversight body (e.g. the CCC or the Queensland Ombudsman) to investigate further. It is submitted that the use of a clearing house to initially triage complaints may reduce the resource demand on often small integrity units within public sector organisations.

4.3 There are several additional benefits of using a central clearing house, including:

(a) it may encourage a person who is hesitant to bring a disclosure to their workplace directly, perhaps fearing retribution, to come forward;

(b) the clearing house could develop uniform and templated forms for both the lodging of a disclosure and the response to be issued to disclosers. This would ensure a consistent process is applied to all disclosers. Issues of timeframes, and the tracking of an allegation through the regime, could all be built into this process. In our experience, consistency and uniformity of approach is important as what one assessor might consider to be, for example, a reasonable suspicion of corrupt conduct, differs between public sector entities;

(c) the clearing house could close those allegations that require no further action without the relevant public sector entity having to expend unnecessary resources;

(d) it would allow agencies to adopt a central reporting portal, as suggested in the Coaldrake Report, for reporting and complaint handling efficiencies;

(e) providing a single touchpoint for disclosers to ensure duplicate complaints are not lodged with multiple agencies, removing both the risk of inconsistent responses and duplicated administrative burden; and

(f) the statistical data collected by the clearing house could be used to analyse trends in complaints[1] and inform future reforms in the integrity space.

4.4 Notwithstanding the potential benefits listed above, we also hold concerns with introducing a clearing house. For example:

(a) a centralised clearing house would prevent a public sector entity from triaging PIDs internally before they are referred or notified to oversight bodies. In our experience, the knowledge and context that can be brought to an allegation by an internal assessor should not be underestimated, and such knowledge and context would be lost where a centralised assessor within a clearing house triaged a complaint. This could lead to additional costs and resources being expended where a disclosure could have been closed out much earlier;

(b) the use of a centralised clearing house may hinder the ability of public sector entities to monitor any trends emerging from the PIDs it receives – for example, whether a particular department or individual is receiving more complaints than others. While such details may be able to be reported to entities by the clearing house, any delays associated with the reporting process may prevent public sector entities from addressing potentially minor issues in a timely and efficient manner, and prior to any escalation of the issue; and

(c) similarly, internal integrity units are likely to be better placed than the clearing house to assess and resolve potentially minor disclosures.

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[1] Much like the CCC's Corruption Allegations Data Dashboard.

4.5 Given that there are both benefits and drawbacks to a centralised clearing house, it is our view that the concept requires further consideration by the Review. Consultation with integrity units within public sector entities may be helpful in this regard.

5. Expansion of 'Public Officer' definition

5.1 Gadens supports the 2017 recommendation that the definition of 'Public Officer' be expanded to include volunteers, contractors, trainees, students, and others in employment-like arrangements in the public sector, for the purposes of PIDs. Those holding these positions are, for all intents-and-purposes, serving as public officers, and should be afforded the protections of the PID regime. The expansion of the definition would, we submit, improve the integrity (and perception) of the PID regime and better allow for inappropriate conduct in the public sector to be exposed.

5.2 In supporting an expansion of the definition of 'Public Officer,' we note that consideration should be given to carving out from the PID regime, those persons who are merely passing on information in the course of their roles that incidentally meets the PID threshold, and who are not seeking to avail themselves of the protections afforded under the PID Act (for example, QPS officers referring information to oversight bodies). PIDs of this nature add to the administrative burden that exists under the current PID regime.

6. Additional education and training

6.1 Gadens supports the suggestion that further training and education is needed on the PID Act and the PID regime. We acknowledge the excellent work that the Queensland Ombudsman has taken in training public sector agencies on the PID regime, however some aspects of education and training remain the responsibility of agencies themselves. In circumstances where agencies may have limited resources, adequate training may be difficult or costly to obtain. Expanded and standardised training would, we submit, assist in addressing the lodging of the frivolous or baseless allegations that we have observed, and provide clarity for staff on the distinction between personal workplace grievances and systemic issues that ought to be treated as PIDs. We note the Queensland Ombudsman has highlighted the delays caused by improper disclosures being made.[2]

We once again thank you for the opportunity to make a submission and very much look forward to reviewing the final report.

Please do not hesitate to contact the writers to discuss the matters above further.

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Lionel Hogg
Partner
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Daniel Maroske
Director

[2] Clarke, P. (2017). *Review of the Public Interest Disclosure Act 2010*. Brisbane, Qld; Queensland Ombudsman. p. 29.