



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

**Submission to the Issues Paper**

**March 2023**



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## About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity and children and young people in the child protection system or staying at a visitable site.

OPG provides individual advocacy services to children and young people through the following functions:

- child advocacy, which offers person-centred advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them, and
- community visiting, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), and all children and young people staying at a visitable site (residential facilities, youth detention centres, watch houses and authorised mental health services).

OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. When performing these functions, OPG will seek and take into account the views and wishes of the child to the greatest practicable extent.

OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through the following functions:

- The guardianship function undertakes structured (supported and substitute) decision-making in relation to personal matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The community visiting function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, locations where people are receiving specified NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification and escalation of complaints for resolution by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, OPG will support the person to express their views and wishes and participate and make decisions where possible.

The *Public Guardian Act 2014* (PG Act) and *Guardianship and Administration Act 2000* (GA Act) provide for OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

## Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the *Review of the Public Interest Disclosure Act 2010 Issues Paper*. The views of the Public Guardian contained in this submission do not represent the views of the Queensland Government.

This submission and recommendations address the matters raised in the issues paper where they relate to the experiences of OPG and the people we support. A summary of the Public Guardian's recommendations appears below.

### The Public Guardian recommends:

1. The *Public Interest Disclosure Act 2010* (PID Act) should be amended to repeal section 12(1)(a), as disclosures about substantial and specific danger to the health or safety of a person with a disability are more appropriately addressed through existing mechanisms in relevant service systems.
2. The PID Act should be amended to define the information that may be disclosed as a PID, including, if section 12(1)(a) is not repealed, definitions of 'substantial' and 'specific', in accordance with recommendations 5 and 6 of the Queensland Ombudsman's 2017 review of the PID Act.
3. Section 15 of the PID Act should be amended to require agencies to refer disclosures to the 'proper authority' that has the power to investigate and remedy the matter. In addition or alternatively, section 31 of the PID Act should be amended to require consultation with the referral entity to confirm it has the power to investigate or remedy the matter before a referral is made.

## Types of public interest disclosures

*Questions 5, 6 and 39 of the Issues Paper*

The purpose of the *Public Interest Disclosure Act 2010* (PID Act) is 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. This purpose is reiterated in the main objects of the PID Act, which include to promote the public interest by facilitating public interest disclosures (PID) of wrongdoing in the public sector (section 3(a)). It is clear that the intent of the PID Act is to promote integrity and address wrongdoing *in the public sector*. This intent appears to be inconsistent with section 12(1)(a) of the PID Act, which provides that a person's action which causes a substantial and specific danger to the health or safety of a person with a disability may constitute a PID, whether or not the accused person is in the public sector. Because there is no requirement in section 12 for the alleged action to have been undertaken by someone in the public sector, the Act is often interpreted broadly to include actions undertaken by people *outside* the public sector, including alleged conduct by private sector disability service providers.

In recommending removing section 12(1)(a) in the *Review of the Public Interest Disclosure Act 2010* (January 2017) report (the Ombudsman's report) the Queensland Ombudsman noted that where the person accused of harming a person with a disability is not in the public sector, there may be little a public sector entity can do apart from referring the disclosure to another agency which can deal with conduct in the private sector. It is also difficult for the public sector entity to investigate the disclosure unless the matter falls within the entity's legislative remit. The Ombudsman found there are other



complaints mechanisms in place to address allegations of harm to a person receiving the services of a private sector service provider. The Ombudsman's report provided an extensive list of agencies who could receive complaints in Queensland, and which also have reprisal protections (as at January 2017). There are now several other state and national agencies that also have comprehensive complaint, investigation, and compliance functions, including the National Disability Insurance Agency (NDIA), National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission, Aged Care Quality and Safety Commission, Queensland Disability Services (where they fund services) and Queensland Human Rights Commission. Given the availability of alternative complaint mechanisms and the very limited use of section 12(1)(a), the Ombudsman concluded it could be removed without any significant detriment.

The Queensland Ombudsman recommended:

*Recommendation 4: The PID Act should be amended to remove the capacity for any person to make a PID about health or safety of a person with a disability or danger to the environment, by repealing s.12(1)(a), (b) and (c).*

The Ombudsman's findings and recommendation align with OPG's experience in addressing complaints which may fall under section 12(1)(a) of the PID Act. OPG does not respond to complaints about private sector organisations conduct in relation to adults with impaired decision-making capacity, as there are existing agencies that have the specific regulatory responsibility to do so, such as those outlined above. Further, public sector entities, such as OPG have limited ability to support the discloser, preserve confidentiality and prevent reprisal where they do not have remedial powers over private sector service providers. There is significant regulation in the NDIS and other relevant service systems which provide legislative protections and pathways for addressing harm to a person with a disability by people outside the public sector. Section 12(1)(a) of the PID Act is an unnecessary and inferior duplication of these mechanisms, which causes confusion and potential delays in making the disclosure to the most appropriate agency.

In the absence of legislative reform as proposed, the Ombudsman continues to apply a broad interpretation of section 12(1)(a). Consequently, the Ombudsman refers matters to OPG as PIDs that relate to allegations of harm to person by a private sector service provider. OPG has a specific legislative remit to investigate allegations about actions by an informal or formal decision-maker or carer for an adult with impaired decision-making capacity, which may constitute neglect, exploitation, abuse, or inappropriate or inadequate decision-making arrangements. This aligns with OPG's remedial powers which are focused on safeguarding the adult's decision-making arrangements. OPG is not empowered and therefore is not the proper authority to investigate the alleged conduct of service providers or others in the paid private sector. Similarly, OPG's community visitor program is not empowered to resolve complaints itself; rather, it facilitates individuals to raise issues or make formal complaints about the services they receive with the most appropriate agency.

When such matters are referred to OPG as PIDs, our only pathway is to refer the disclosure to the entity responsible for investigating such complaints with the discloser's consent. This creates additional work and unnecessary delays in the resolution of the matter and does not constitute an investigation or remedy for the purposes of the PID Act. Consequently, while a request for investigation or a complaint raised with a community visitor may technically constitute a PID under section 12(1)(a), OPG considers whether it is more appropriate to assess it as an issue or complaint under the functions and powers of the PG Act and refer it to the most suitable agency for action and resolution. Where a disclosure includes an allegation relating to OPG's services, we have a robust complaints management process in place to respond and take remedial action.

For these reasons, OPG supports recommendation 4 of the Ombudsman's report that section 12(1)(a) be repealed from the PID Act.

Should section 12(1)(a) be retained, OPG recommends it be amended to remove ambiguity by limiting its application to the public sector in accordance with the intent of the PID Act. Clear language and definitions are also required, together with additional training and guidance, to ensure consistent interpretation and application in policy and practice across the public sector.

#### Recommendation 1:

The PID Act should be amended to repeal section 12(1)(a), as disclosures about substantial and specific danger to the health or safety of a person with a disability are more appropriately addressed through existing mechanisms in relevant service systems.

## Meaning of *substantial and specific*

*Questions 6 and 39 of the Issues Paper*

Sections 12 and 13 of the PID Act use the phrase 'substantial and specific' to describe the extent of danger required for certain conduct to constitute a PID. However, the PID Act does not define the phrase or either term, and the absence of a clearly defined threshold results in diverse and subjective interpretations by different agencies. This not only creates inconsistency across the public sector, but also causes tension between agencies when referring matters that one agency would classify as a PID but the other would not.

This issue is discussed in the Ombudsman's report, which found neither the PID Act nor the *Acts Interpretation Act 1954* provide guidance on the meaning or application of the phrase or the individual words. The Queensland Ombudsman found the terms are difficult to interpret consistently, potentially resulting in considerable inconsistency in the application of the PID Act. Submissions to the Ombudsman's review indicated general support for a threshold of seriousness for disclosures to be assessed as a PID, and for the inclusion of examples in the legislation.

The Queensland Ombudsman recommended:

*Recommendation 5: The PID Act should be amended to define the information that may be disclosed as a PID in more specific and objective terms, and to include examples to assist in the interpretation and application of the Act.*

*Recommendation 6: The dictionary to the PID Act (Schedule 4) should be expanded to include definitions of 'substantial', 'specific' and any other key terms used to define information that may be disclosed under the Act.*

OPG supports recommendations 5 and 6 of the Ombudsman's report that the PID Act should be amended to define the information that may be disclosed as a PID, including definitions of 'substantial' and 'specific'.

**Recommendation 2:**

The PID Act should be amended to define the information that may be disclosed as a PID, including, if section 12(1)(a) is not repealed, definitions of ‘substantial’ and ‘specific’, in accordance with recommendations 5 and 6 of the Queensland Ombudsman’s 2017 review of the PID Act.

## Meaning of *proper authority*

### *Question 17 of the Issues Paper*

Section 15(1)(a)(ii) of the PID Act provides that a public sector entity is a ‘proper authority’ to receive a disclosure if the information that is the subject of the disclosure relates to anything the entity has a power to investigate and remedy. Section 31 provides that a public sector entity to which a PID is made under section 15, or referred under section 34, may refer the disclosure to another public sector entity (the ‘referral entity’). In practice, greater clarity is required to ensure disclosures reach the proper authority with the power to investigate or remedy at first instance or with as few referrals as possible.

For example, the term ‘remedy’ has been broadly interpreted to include referring a matter to another agency, without any requirement to determine whether the other agency has the legislative remit to action the matter. This necessitates a further referral to yet another agency, causing delays and creating an appearance of ineptitude in the public sector. OPG frequently experiences this issue, where a request for investigation or a complaint raised about the conduct of a private service provider is assessed as a PID by another agency and referred to OPG. As another government agency has the specific regulatory responsibility to receive the complaint, investigate and take remedial action (as discussed above), the only action available to OPG is to refer the disclosure to the primary agency in compliance with the PID Act so they may take remedial action, if necessary.

Section 11 of the PID Act provides that a ‘public interest disclosure’ is a disclosure under Chapter 2 and includes all information and help given by the discloser *to a proper authority* for the disclosure. One option is to prescribe that a disclosure should not be considered a PID until it is disclosed to a proper authority, and the PID Act should include a requirement under section 15 to identify the proper authority that is empowered to investigate and resolve the matter. This requirement could also be incorporated into section 31 which provides for the referral of disclosures. Further, if a referring agency has assessed a complaint as a PID and the new agency disagrees, the new agency should be able to make a fresh decision on the status of the PID, during which the complaint could hold prima facie PID protection.

**Recommendation 3:**

Section 15 of the PID Act should be amended to require agencies to refer disclosures to the ‘proper authority’ that has the power to investigate and remedy the matter. In addition or alternatively, section 31 of the PID Act should be amended to require consultation with the referral entity to confirm it has the power to investigate or remedy the matter before a referral is made.



## Other matters

### Clearing house for complaints

*Question 18 of the Issues Paper*

OPG supports in principle the concept of a clearing house in government for complaints. However, in some matters there is a need for sector expertise and quick action that may not be achievable in a central clearing house. Agencies would need to be able to retain the ability to submit complaints directly to the responsible agency for speedy resolution, if necessary, rather than going through a central clearing house that would add time and administrative burden. The clearing house process would also need to be simple and accessible for end users, particularly children. There is already a multitude of oversight bodies in the child protection and youth justice systems, which cause confusion around identifying the responsible agency for resolving incidents in these areas.

### Support for disclosers

*Questions 24 and 38 of the Issues Paper; Public Interest Disclosure Standard No. 1/2019*

The PID Act and Standard No. 1/2019 should be amended to define ‘support’ and provide clarity to help manage discloser expectations. The word ‘support’ is subjective and the type of support available can differ depending on whether the discloser is a public officer, client, or member of the community.

Without more clarity a discloser’s expectations may not align with what an agency is able to provide within their remit. For example, OPG can support a person other than an OPG employee, who is a discloser, by providing information and updates, whereas another agency may be able to provide a case management approach.

### Discloser’s state of mind

*Question 8 of the Issues Paper*

Section 13 of the PID Act requires the discloser to have an honest belief on reasonable grounds that the information they disclose demonstrates wrongdoing, or the information disclosed must in fact demonstrate the wrongdoing regardless of the person’s state of mind. OPG considers that the discloser’s state of mind is irrelevant to the disclosure and that it should be an objective test. It is difficult to attribute a state of mind to a public officer who is merely disclosing information as part of their role, which is then categorised as a PID. OPG notes it is an offence to intentionally give false or misleading information under section 66 of the PID Act.

### Protections for disclosers and subject officers

*Questions 26 and 27 of the Issues Paper*

OPG does not recommend a discloser be able to opt out of protections under the PID Act, but rather be given a choice not to access the protections. There is a risk a discloser may prematurely opt out of the protections in good faith because they trust the system and do not expect a reprisal, which may leave them exposed as the matter progresses.



OPG also considers there is insufficient support and protection for subject officers. A PID can have significant impacts on the subject officer while an investigation is underway and cause permanent detriment, especially in circumstances where the PID is ultimately unsubstantiated. It is particularly important that appropriate protections are in place for all parties where the subject officer is also a discloser of a legitimate concern but risks an allegation of reprisal for making the disclosure.

OPG notes the PID Act may duplicate the whistleblower protections found in other legislation. For example, the GA Act contains a framework for supporting whistleblowers (see sections 247, 247A, 247B and 247C). It would be beneficial for the PID Act to clarify how it interacts with like provisions in other Acts.

## Confidentiality

### *Question 28 of the Issues Paper*

In OPG's experience, confidentiality does not appear to be well understood by all agencies implementing the PID Act. The exceptions relating to confidentiality are broad and parties may not always understand the limitations of confidentiality. The Act also needs to strike a balance between the parties and affording natural justice to the subject officer. As such, further guidance in this area would be beneficial.