



Our reference: BNE5413712

28 February 2023

The Honourable Alan Wilson KC
Public Interest Disclosure Review

By email: PIDActReview@justice.qld.gov.au

Dear Mr Wilson

REVIEW OF THE *PUBLIC INTEREST DISCLOSURE ACT 2010*

Thank you for consulting with me and Commission officers about the review of the *Public Interest Disclosure Act 2010* (the **PID Act**). This written submission is to confirm and supplement information that the Commission has provided to you and your team.

As you know, the Commission provided a submission to the Queensland Ombudsman's review of the PID Act in 2016. The focus of that submission was dealing with complaints of reprisal, the status of public interest disclosures, and review rights. The submission identified issues in dealing with complaints of reprisal (assessing whether there has been a public interest disclosure and ambiguous terms) and other concerns (definitions, lack of definitions, complexity, difficulty in navigation, and achieving the objects of the PID Act). Those issues and concerns remain.

In late January 2023 an Issues Paper was released which identifies issues for consideration. This submission is focused on the following issues:

- The policy objectives of the PID Act.
- The definition of a public interest disclosure and who may make a public interest disclosure.
- Remedies for reprisal.
- Suggestions for reform.

Policy objectives of the PID Act

The Terms of Reference for the Review describe the PID Act as an Act that facilitates the disclosure of information about wrongdoing in the public sector and provides protections for those who make disclosures.

The main objects of the PID Act are set out in section 3 as:

- (a) to promote the public interest by facilitating public interest disclosures in the public interest;
- (b) to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with;

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- (c) to ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and
- (d) to afford protection from reprisals to persons making public interest disclosures.

In respect of the objects of the PID Act, the Terms of Reference require the Review to consider:

- (a) whether the objects remain valid;
- (b) whether the PID Act is achieving the main objects;
- (c) whether the provisions of the PID Act are appropriate for achieving its main objects; and
- (d) whether the PID Act and its provisions are consistent with and complement the aims and provisions of the *Human Rights Act 2019*.

Human rights

The aim of the *Human Rights Act 2019* (the **HR Act**) is to protect and promote human rights in the acts and decisions of public entities, in the interpretation of legislation, and in making legislation. It provides for obligations on our three arms of government: the executive, the judiciary, and the parliament.

Although the obligations on parliament apply to legislation introduced since 1 January 2020, the spirit of the HR Act is that all Queensland legislation should be compatible with human rights other than in exceptional circumstances.

A statutory provision will be compatible with human rights if it does not limit any of the human rights in the HR Act, or limits a human right only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality, and freedom.¹ A limitation must be proportionate to and necessary to achieve a legitimate purpose that is consistent with such society.

The Issues Paper identifies the following human rights as relevant to the objectives of the PID Act:

- freedom of expression (section 21);
- taking part in public life (section 23);
- privacy and reputation (section 25);
- liberty and security of person (section 29);
- fair hearing (section 31).

The right to freedom of expression includes the right to seek, receive, and impart information and ideas. This right is limited by the requirement in section 65 of the PID Act for everyone with knowledge of a PID to maintain confidentiality. The purpose of confidentiality includes the protection of the privacy and reputation of the discloser and the subject officer. This is a legitimate purpose, however the limitation on the right to freedom of expression could be less restrictive by providing exceptions to confidentiality, such as participating in Royal Commissions of Inquiry and external reviews of the relevant agency, and seeking support including professional legal and health services.

Freedom of expression extends to the disclosure of alleged wrongdoing in government to appropriate persons. This freedom is not unlimited as there are restrictions on the disclosure of certain types of information outside the public sector, as well as procedural restrictions on

¹ *Human Rights Act 2019* sections 8 and 13.

public disclosure.² The restrictions on disclosure to journalists would promote the right to privacy and reputation of subject officers as well as disclosers and other individuals such as witnesses.

The right to take part in public life encompasses:

- having the opportunity to participate in the conduct of public affairs, either directly or through freely chosen representatives, without discrimination; and
- for each eligible person:
 - the right to vote and be elected at State and local government elections, without discrimination; and
 - to have access to the public service and to public office, on general terms of equality and without discrimination.

While access to the public service and to public office may be limited if certain disciplinary action is taken against a subject officer because of a public interest disclosure, the right will only be limited if discrimination is involved, and the officer otherwise remains eligible for the position. The objects and provisions of the PID Act do not of themselves limit this right. Arguably, the reporting of wrongdoing that is in the public interest is consistent with the right to participate in the conduct of public affairs. Confidentiality might limit this aspect of the right; however, the limitation is likely to be compatible with human rights.

The right to privacy and reputation protects a person's privacy, family, home, and correspondence from being arbitrarily interfered with, and protects a person's reputation from being unlawfully attacked. The confidentiality provisions protect the privacy of both the discloser and the subject officer, as well as protecting their reputations. As noted above, it would be a proportional limitation on the right to privacy and reputation for there to be exceptions to confidentiality for certain purposes, such as participating in systemic reviews and seeking support services.

The right to liberty and security of person generally protects against unlawful or arbitrary deprivation of liberty. Neither the objects nor the provisions of the PID Act envisage or provide for the deprivation of liberty. Under international law, the right to security is recognised as a separate right and imposes a positive obligation on public entities to take reasonable and appropriate measures to protect the security of persons under their jurisdiction, for example, when a person has received death threats.³ The confidentiality and immunity provisions, the right to apply for relocation to avoid reprisal, and the right to apply for an injunction would be consistent with this right. Any exceptions to confidentiality and immunity should be particularly mindful of the impact on the protection of this right.

The right to a fair hearing requires that criminal and civil proceedings be heard by a competent, independent, and impartial court or tribunal after a fair and public hearing where it is in the public interest or in the interests of justice. There are exceptions for a public hearing. The right to fair hearing is concerned with the procedural fairness of a decision but is not merely procedural in nature.⁴

² Parliamentary Joint Committee on Human Rights, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 18-21 March 2013: Sixth Report of 2013*, (May 2013), Part 1 Public Interest Disclosure Bill 2013 (1.192 & 1.193)

³ Judicial College of Victoria, *Charter of Human Rights Bench Book*, 6.15.2 (8) <https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm>.

⁴ *Ibid*, 6.18.2 (4) and (8).

The PID Act includes provisions relating to reprisal that:

- make the taking of a reprisal an indictable offence;
- state a reprisal is a tort and provides that a claim for damages may be brought in a court, and that a trial in the Supreme or District Court must be decided by a judge sitting without a jury;
- provides an alternative remedy of a complaint of reprisal dealt with under the *Anti-Discrimination Act 1991*;
- makes reprisal a ground of appeal or review of certain actions taken against a public officer;
- gives a public service employee a right to apply to the Queensland Industrial Relations Commission for relocation to remove the danger of reprisal;
- provides a right to apply for an injunction about a reprisal, except where a complaint of reprisal has been made under the *Anti-Discrimination Act 1991*⁵;
- allows the court or tribunal deciding an application for injunction to prohibit or restrict publication of documents and evidence in the proceeding, or the whole of the proceeding; and
- allows an injunction to be heard *ex parte*.

Most of these provisions are beneficial and consistent with practices and procedures.

- The creation of an offence does not of itself engage the right to fair hearing. Criminal offences will be dealt with by the courts and the right to fair hearing will apply to those proceedings.
- The creation of a tort of reprisal for which action may be taken in court is beneficial to the person who has experienced reprisal. Most civil claims are decided by a single judge and arguably the requirement that an action for reprisal is to be decided by a single judge does not limit the right to fair hearing.
- The recreation of an alternative form of redress by way of complaint under the *Anti-Discrimination Act 1991* is also beneficial. There is public interest in requiring choice of jurisdiction so that there is not a duplication of claims and burden on the administration of justice. This type of restriction is not uncommon⁶ and arguably does not limit the right to fair hearing.
- Making reprisal a ground for appealing or reviewing certain actions taken against a public officer and giving a public service employee a right to apply to the Queensland Industrial Relations Commission for relocation to remove the danger of reprisal, are both beneficial to a person who has experienced reprisal and do not limit the right to fair hearing.
- Providing a right to apply for an injunction in relation to reprisal is also beneficial and does not limit the right to a fair hearing. There is an existing right to apply to the tribunal for injunctive type relief in respect of a complaint made under the *Anti-Discrimination Act 1991*.
- Provisions that enable a court or tribunal to prohibit the publication of evidence, documents, and the proceeding potentially limit the right to fair hearing. However, the power exists in other legislation: see for example section 66 of *Queensland Civil and Administrative Tribunal Act 2009*. The PID Act provides that the basis for a non-

⁵ The *Anti-Discrimination Act 1991* allows a complainant to apply to the tribunal for an injunctive type order to protect their interests both before and after referral of a complaint – sections 144 and 190.

⁶ See for example the *Fair Work Act 2009* (Cth) section 725, *Anti-Discrimination Act 1991* section 153.

publication order is either that the disclosure is not in the public interest or that persons other than the parties do not have a sufficient legitimate interest in being informed of the report, evidence, or thing. These are legitimate purposes. In exercising the discretion whether to make a non-publication order, the court or tribunal will be obliged to consider the right to fair hearing.

- An application for an injunction may be heard *ex parte* if the industrial commission or the Supreme Court considers a hearing without notice is necessary in the circumstances. The right to fair hearing will apply to the exercise of the discretion.

In summary, I consider that the objects of the PID Act are not inconsistent with the HR Act, and that the provisions themselves are generally compatible with the human rights in the HR Act. The rights will of course be relevant in the application of the powers provided for in the PID Act.

The objects of the PID Act and achieving the objects

While the objects of the PID Act remain valid, the Act does not achieve all of these objectives.

One of the objects of the PID Act is:

to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with.

The way the PID Act seeks achieve this is to:

- require chief executive officers to establish reasonable procedures to ensure that public interest disclosures made to the entity are properly assessed and, where appropriate, properly investigated and dealt with – section 28(1)(b);
- require the procedures to be published – section 28(2);
- enable the oversight agency to make standards about the way in which public sector entities are to deal with public interest disclosures, and to make the standards binding on public sector entities – section 60(1) and (6); and
- require chief executives to develop and implement a management program consistent with any standard made by the oversight agency – section 28(1)(d).

As the Commission said in its 2016 submission, the system is largely an internal complaint management process for wrongdoing by an agency's officers that is in the public interest.

The PID Act itself does not prescribe the assessment of information as to whether it is a public interest disclosure, or any other decision-making. There is no finality in a decision whether a disclosure is a public interest disclosure and no right of review, other than complaint to the Queensland Ombudsman under the *Ombudsman Act 2001*.

The PID Act defines a public interest disclosure and provides to whom it may be made and how it may be made. Given there is no provision requiring an assessment decision to be made, it is likely that it is not a decision that could be subject to review under the *Judicial Review Act 1991*.⁷

The result is that the PID Act does not achieve the object of ensuring that public interest disclosures are properly assessed.

⁷ See *Sandy v Queensland Human Rights Commissioner* [2022] QSC 277 (9 December 2022).

The lack of finality or binding nature of an assessment decision of an agency has consequences for the Commission in dealing with complaints of reprisal. Most complaints of reprisal allege that the impugned action was taken because the complainant has made a public interest disclosure, rather than the action being taken because the person *believed* the complainant had made a public interest disclosure.

The making of a public interest disclosure is an element of reprisal, and usually requires the Commission to make an assessment as to whether a complaint or disclosure is a public interest disclosure. If a complaint of reprisal is not resolved at the Commission and is referred to the relevant tribunal, it may be necessary for the tribunal to decide whether information is a public interest disclosure. This occurred in *Baragan v State of Queensland & Ors*⁸ where the complainant alleged he had made six public interest disclosures. The tribunal examined each of those and determined that two were not public interest disclosures.

A review mechanism for assessment decisions would provide certainty for all participants, including if there is an allegation of reprisal in a complaint, a criminal proceeding, action in tort, or public interest disclosure of reprisal, and would alleviate the number of times an assessment needs to be made.

The definition of public interest disclosure and who may make a public interest disclosure

In his report on the 2016 review of the PID Act (the **First review report**), the then Queensland Ombudsman found:

The current legislative scheme, which distinguishes between two classes of discloser in terms of the types of disclosures they can raise, is inherently problematic. It may cause confusion in the community in terms of understanding individual rights and protections. It creates challenges for agencies responsible for implementing the legislation.⁹

It has been the Commission's experience that the community is confused about what they can make a public interest disclosure. Part of this may be due to a lack of understanding of terms such as 'substantial and specific' and the special meaning of 'disability'. For example, the Commission deals with complaints of impairment discrimination, and we find that some of these complainants claim that they are also making a disclosure about danger to their health and safety even though the person's impairment does not meet the definition of 'disability' in the PID Act.

It is also difficult to understand the environmental dangers about which any person may make a public interest disclosure unless the person has specialist knowledge.

The distinction in the classes of discloser is illusionary in some respects. For example, a member of the public can make a complaint of corrupt conduct of a public officer or a chief executive officer under the *Crime and Corruption Act 2001* but not a public interest disclosure to the agency. If the Crime and Corruption Commission assesses the complaint as alleging corrupt conduct, the complaint may be referred to the agency for investigation.

The following is an example of misunderstanding by a member of the public and the additional resources expending in dealing with layers of different processes. The Commission accepted a complaint under the *Anti-Discrimination Act 1991* and conducted a conciliation conference. The complainant complained about how the conference was

⁸ *Baragan v State of Queensland & Ors* [2022] QCAT 202 (27 May 2022).

⁹ Queensland Ombudsman, *Review of the Public Interest Disclosure Act 2010*, January 2017, p24.

conducted and a manager responded to those concerns. The complainant then made a human rights complaint alleging that the Commission had not properly considered their human rights. After the Commission acknowledged the complaint, the complainant then said they are also claiming that they were treated less favourably because of their disability and/or that the Commission had failed to make reasonable adjustments in accordance with the *Anti-Discrimination Act 1991*. After the Commission acknowledged that the complaint would be treated as both a human rights complaint and a complaint under the *Anti-Discrimination Act 1991*, the complainant then responded that as the complaint also contains details of a public interest disclosure it should be dealt with in accordance with the Commission's public interest disclosure policy. This necessitated recording and assessment as to whether the complaint was a public interest disclosure. So, the same subject matter is being dealt with under three processes.

The Commission agrees with Recommendations 3 and 4 in the First review report that:

The provisions of the PID Act should be focused on enhancing public sector integrity by facilitating disclosure of wrongdoing by public sector officers.

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 primary objective of the PID Act is to encourage the reporting of wrongdoing in the public sector that is in the public interest and to provide protections to people who report wrongdoing. The information about which a public officer may make a public interest disclosure is extremely broad. Maladministration includes administrative action that is wrong or unlawful. This means it includes allegations of discrimination, sexual harassment, and victimisation in the public sector. Anyone who experiences either of these will inevitably feel that it has adversely affected their interests in a substantial and specific way.

It means that every time the Commission accepts a complaint of discrimination, sexual harassment, or victimisation in the public sector, the agency should assess the complaint as a public interest disclosure. Although the PID Act enables the agency to decide not to investigate or deal with the disclosure on the basis there is another appropriate process for dealing with the disclosure (that is, the process under the *Anti-Discrimination Act 1991*),¹⁰ the agency is still required to assess the complaint as a public interest disclosure, record it as such in their internal recordkeeping, and report it in the Queensland Ombudsman's database (**RaPID**).

The coverage of what may be the subject of public interest disclosure overlays other existing processes for dealing with wrongdoing in the public sector. These include processes under grievance policies, the *Industrial Relations Act 2016*, the *Crime and Corruption Act 2001*, criminal processes, and the civil claim process under the *Anti-Discrimination Act 1991*. The reporting obligations apply regardless of whether another process is utilised. This can lead to unnecessary administrative burden and bureaucracy. An example is a complaint or request for review by a public officer about a decision of the Commission under the *Anti-Discrimination Act 1991*, such as a decision to reject a complaint. The request for review is considered a public interest disclosure because it constitutes a complaint that the decision is wrong, and therefore maladministration. As well as reviewing the decision, the Commission is required to record the complaint/request as a public interest disclosure and enter the requisite detail into RaPID.

¹⁰ *Public Interest Disclosure Act 2010* section 30(1)(b).

The Commission agrees with the findings in the First review report that:

Workplace complaints and grievances, by their very nature, frequently concern the private or personal interests of a single individual. There are other mechanisms, both administrative and statutory, that public sector officers can utilise to address workplace complaints and grievances.

The Commission also agrees with Recommendation 7 that:

Section 13(1)(ii) of the PID Act should be amended to exclude PIDs that solely concern personal workplace grievances, but permit the exercise of discretion on the part of a proper authority to accept a disclosure if in the circumstance it is reasonable to do so.

In the submission to the 2016 review the Commission raised concerns about ambiguity in the PID Act and lack of definitions and examples. The First review report included recommendations that the information that may be disclosed in a public interest disclosure should be defined in more specific and objective terms, and that examples to assist in the interpretation of the PID Act should be included, and that there should be definitions of key terms such as 'substantial' and 'specific'.

Although these amendments have not been made, the Model Public Interest Disclosure Procedure published by the Queensland Ombudsman includes definitions of 'substantial' and 'specific' based on their ordinary meaning. Notwithstanding this guidance, it remains appropriate to make the amendments about language, examples, and definitions that were recommended in the First review report.

Remedies for reprisal

A person who has experienced reprisal has the option of making a complaint to the Commission that is dealt with under the *Anti-Discrimination Act 1991*. Although the complaint process is relatively simple,¹¹ it is a civil claim that, if accepted by the Commission, may be referred to the relevant tribunal for hearing and determination. If a referred complaint is upheld, the tribunal may make one or more of the orders set out in section 209 of the *Anti-Discrimination Act 1991*. These orders include compensation for loss or damage, an apology, requiring the respondent not to commit further reprisal, and requiring the respondent to do specified things to redress loss or damage.

The Commission is required to reject complaints that are misconceived or lacking in substance.¹² This necessitates the Commission assessing the complaint as to whether the information in it indicates an alleged reprisal. As outlined earlier in this submission, this task often involves assessing whether the disclosure is a public interest disclosure. Complaints of reprisal usually have a long history and can be difficult to navigate, and the additional assessment as to whether there has been a public interest disclosure can make the assessment process somewhat resource intensive.

¹¹ A complaint must be made in writing to the Commission, include an address for service, and indicate an alleged contravention – see *Anti-Discrimination Act 1991* section 136. A complaint may be made online through the Commission's website. A complaint does not need to be in any particular format, it is not required to be in the form of a pleading, and there is no requirement to produce evidence in support – see *Beanland v State of Queensland* [2007] QADT 16 at [21]; and *Toodayan v Anti-Discrimination Commissioner Queensland* [2018] QCA 349 at [42].

¹² *Anti-Discrimination Act 1991* section 139 – the requirement extends to complaints that are frivolous, trivial, or vexatious. A complaint will be *misconceived* if it is based on a false conception or notion and *lacking in substance* where the detail provided in the complaint fails to point to conduct that is capable, if proved, of amounting to a contravention of the Act – see *Toodayan v Anti-Discrimination Commissioner Queensland* [2018] QCA 349 at [42].

The Commission's function is to try to resolve the complaint through conciliation. It does not extend to deciding the complaint. By the time a complaint of reprisal is made to the Commission the relationship between the parties has inevitably deteriorated, and this can make resolution more difficult. However, some complaints of reprisal do resolve at the Commission stage.

Complaints made to the Commission often allege more than one contravention, or the Commission might identify an alleged contravention that the person has not claimed. For this reason, statistics for complaints that are disaggregated by the type of allegation are not representative of the number of complaints.

In the period 2019-2020, there were 37 allegations of reprisal in complaints received by the Commission, and six were assessed as indicating reprisal. Two of the matters were conciliated and four were referred to a tribunal. This represents a conciliation rate of 33% compared to the overall conciliation rate of 54%, and a referral rate of 67% compared to the overall referral rate of 32%.

In the period 2020-2021, there were 82 allegations of reprisal in complaints received by the Commission, and nine were assessed as indicating reprisal. Two of the matters were conciliated and three were referred to a tribunal. This represents a conciliation rate of 22% compared to the overall conciliation rate of 44%, and a referral rate of 33% compared to the overall referral rate of 27%.

In the period 2021-2022, there were 98 allegations of reprisal in complaints received by the Commission, and eight were assessed as indicating reprisal. Two of the matters were conciliated and three were referred to a tribunal. This represents a conciliation rate of 25% compared to the overall conciliation rate of 40%, and a referral rate of 37% compared to the overall referral rate of 30%.

It is possible that the high number of allegations of reprisal in the past two financial periods might reflect the complainant ticking this item on the complaint form without having an understanding of the meaning of reprisal.

Of the six matters that were conciliated across the three years, three included other alleged contraventions. One included sexual harassment and victimisation; one included sexual harassment, discrimination, and victimisation; and one included discrimination.

The Commission is aware of only three published decisions of the tribunals on complaints of reprisal. The decisions and their outcomes are set out in the table below.

Case name	Outcome
<i>Flori v State of Queensland & Ors</i> [2016] QCAT 80 (15 June 2016)	Dismissed. The respondents were not aware of the PID at the time of the impugned conduct, therefore the conduct was not reprisal.
<i>Baragan v State of Queensland & Ors</i> [2022] QCAT 202 (27 May 2022)	Dismissed. Six PIDs were alleged to have been made and various actions in consequence. Two of the disclosures were held not to be PIDs, and for three the conduct occurred before the PID. For the other, the tribunal was unable to draw an

Case name	Outcome
	inference that the conduct was because of the PID.
<i>Flori v Carroll and Anor (No. 3)</i> [2022] QIRC 328 (18 August 2022)	Dismissed. Motivation for the alleged conduct is necessary. The PID was not the reason for the conduct therefore it was not reprisal.

The Commission is not aware of any decisions of the courts on actions for reprisal, other than one matter that was set aside on appeal, and not aware of any prosecutions for the offence of reprisal.

The option of utilising the processes under the *Anti-Discrimination Act 1991* is a low-cost option for people who have experienced reprisal and who seek civil redress. The processes include the ability to apply to the relevant tribunal for an injunctive type of order to prohibit conduct that might prejudice the conciliation of the complaint or orders that a tribunal may make. Although the number of reprisal complaints that are conciliated is lower than the overall conciliation rate, the statistics show that some do resolve at the Commission.

Referral of an unconciliated complaint is at the option of the complainant.¹³ The statistics for reprisal complaints show that not all of the unresolved reprisal complaints were referred to a tribunal. In the 2019-2020 period all four unresolved complaints were referred, in the 2020-2021 period three of the seven unresolved complaints were referred, and in the 2021-2022 period three of the six unresolved complaints were referred.

Proving a complaint of reprisal at the tribunal is made more difficult due to the complexity of the definition of reprisal and of public interest disclosure.

The Issues Paper discussing the 'reasons' test as the causal link between the detriment and having made a public interest disclosure or being involved in a proceeding, or because of a belief that the person has made a public interest disclosure. The current test is a 'substantial reason'. This is also currently the test for direct discrimination¹⁴ and for victimisation¹⁵ under the *Anti-Discrimination Act 1991*.

In its recent review of the *Anti-Discrimination Act 1991* the Commission heard from submitters that the evidential burden on complainants in proving direct discrimination should be reduced by making it only necessary that the protected attribute was 'one of the reasons' for the treatment, rather than a substantial reason. Except for Queensland, Victoria, and South Australia, federal and State discrimination laws in Australia only require the attribute to be 'one of the reasons' for direct discrimination. In its report on the review, the Commission recommended that the substantial reason test should be replaced with 'one of the reasons' test.¹⁶

In many ways reprisal is analogous to victimisation under the *Anti-Discrimination Act 1991*. Both are offences that also give rise to a civil claim, and both involve detriment with a causal link to behaviour that includes making a complaint or involvement in proceedings. However,

¹³ *Anti-Discrimination Act 1991* sections 164A and 166. There are limited options for a respondent to refer a complaint under section 167.

¹⁴ *Anti-Discrimination Act 1991* section 10(4).

¹⁵ *Cockin v P & N Beverages Australia Pty Ltd* [2006] QADT 42 (13 December 2006).

¹⁶ Queensland Human Rights Commission, *Building Belonging: Review of Queensland's Anti-Discrimination Act 1991*, July 2022, pp94-96, and Recommendation 3.4 at p110.

victimisation is less complex because it is sufficient that the person has complained, for example, that conduct or a requirement is discrimination even if the conduct or requirement did not constitute unlawful discrimination. For reprisal, the person must prove that their complaint was a public interest disclosure or that the person who caused the detriment believed that that the person had made a public interest disclosure or was involved in proceedings. The limited case law has focused on establishing that the disclosure is a public interest disclosure without consideration of whether the person who caused the alleged detriment believed that the complainant had made or been involved in a public interest disclosure.

The Commission suggests that reprisal might be made less complex by aligning it more with victimisation under the *Anti-Discrimination Act 1991* and making the test 'one of the reasons' instead of a 'substantial reason'.

If there is evidence that a person's family or associates experience detriment because of the person been involved in a public interest disclosure (or purported public interest disclosure) there would be an argument to extend the protection to those people.

Suggestions for reform

Scope

As discussed earlier in this submission, the scope of matters that can be the subject of a public interest disclosure is extremely broad, some of which is covered by other regulatory processes. The duplication of processes with additional reporting obligations creates another layer of resources and unnecessary bureaucracy. For small agencies such as the Commission this can have a significant impact, particularly where the functions do not extend to investigation in the sense of interviewing witnesses etc. and support. There is an additional burden for agencies where their workforce does not have those skills because they are not required for the performance of the agency's primary functions. The cost of outsourcing investigation and support services may not be provided for in budget allocations.

Given that the primary purpose of the legislation such as the PID Act is to encourage and facilitate the reporting of wrongdoing in the public sector that is *in the public interest*, the scope of wrongdoing needs to be narrowed. As discussed earlier in this submission, workplace grievances should be excluded from the matters that can be the subject of a public interest disclosure. So too should be subject matter that is being, or can be, dealt under another regulatory process.

This approach is consistent with the policy behind similar statutory provisions that seek to ensure that the most appropriate entity deals with the subject matter and to preserve government resources by preventing duplicate processes.¹⁷

In terms of who may make a public interest disclosure, the meaning of public officer should be expanded to include volunteers, contractors, students, people on work experience placement, and anyone taking part in the work of the agency. All of these people who are engaged in performing the functions of the agency have the ability to witness or otherwise

¹⁷ See for example the Explanatory Notes for amendments made to section 140 of the *Anti-Discrimination Act 1991* at page 4 (amendments to allow the Commissioner to stay or reject complaints where the subject has been, or could be, dealt with by another entity). Also, the *Industrial Relations Act 2016* section 465 allows the QIRC to stay or dismiss an application if the subject is or has been dealt with in another proceeding; and the *Human Rights Act 2019* section 70(1)(a) and (b) allows the Commissioner to refuse to deal with a human rights complaint if there is a more appropriate course of action or the subject has been appropriately dealt with by another entity.

become aware of the type of conduct that may be the subject of a narrowed public interest disclosure.

Centralised assessment and investigation

The scheme of the PID Act is to require each agency to have and to implement an internal complaint management system for the reporting and investigation of wrongdoing within the agency. It is for the agency to assess complaints about itself and to investigate those that it considers constitute a public interest disclosure.

Historically there has been criticism of a body dealing with complaints about itself. In evidence to the Parliamentary Crime and Corruption Committee in 2021, the Clerk of the Parliament warned that ‘... it must be remembered that public confidence is undermined by agencies investigating themselves’.¹⁸ Additionally, there is at least a perception of bias in an agency assessing complaints about itself, and it has been said that ‘a siloed approach to assessment of jurisdiction leads to lack of transparency’.¹⁹

A central body responsible for the assessment of public interest disclosure, and possible investigation, would alleviate these concerns and would ensure greater consistency in assessment decisions. The Commission considers that the most appropriate agency for this role is the Queensland Ombudsman. The independence of the Queensland Ombudsman and separation from the subject agency would likely improve confidence in reporting wrongdoing.

The Queensland Ombudsman is also better placed than many agencies to conduct investigation of public interest disclosures. This too would contribute to improving confidence in the reporting of wrongdoing. The Queensland Ombudsman is also better placed to identify those matters that should be escalated to the Crime and Corruption Commission for investigation.

Review of assessment decisions

There needs to be a requirement in the PID Act that an agency, or preferably a central body, determine whether information which is purported to be a public interest disclosure does in fact amount to a public interest disclosure.²⁰ An assessment decision could then be reviewed under the *Judicial Review Act 1991*. However, there should be a more accessible review option such as application to a tribunal. As most disclosures occur in the workplace, the appropriate tribunal would be the Queensland Industrial Relations Commission. Powers on review should include making a substitute decision.

The assessment decision or review decision should be final and binding. This would provide clarity about rights and obligations for the discloser, the subject officer, and the agency. It would also eliminate the necessity for others, such as the Commission where there is a complaint of reprisal, to also assess whether the information is a public interest disclosure.

Simplify the PID Act

The Issues Paper asks whether a public interest or harm test should be introduced, whether a discloser should be required to have a particular state of mind when reporting, and whether

¹⁸ Parliamentary Crime and Corruption Committee, *Review of the Crime and Corruption Commission's activities*, Report No. 106, 57th Parliament, June 221, p 80.

¹⁹ Professor Peter Coaldrake AO, *Let the sunshine in: Review of culture and accountability in the Queensland public sector*, Final Report, 28 June 2022, chapter 8.

²⁰ Queensland Ombudsman, *Review of the Public Interest Disclosure Act 2010*, January 2017, p52.

a subject officer should have the right to challenge a disclosure on the basis it is vexatious or malicious.

The Commission considers that introducing additional elements of a public interest or risk of harm test will make the definition more complex, making understanding and assessment more difficult. The complexity may deter reporting of wrongdoing and thus fail in the objective of encouraging and facilitating the reporting of wrongdoing. As to motivation, if there is in fact wrongdoing in the public interest, the motivation for the reporting is irrelevant.

The Commission's submission to the 2016 review identified issues with navigation of the PID Act. This could be improved by making definitions comprehensive and including definitions of terms such as 'substantial' and 'specific'. Including definitions of these terms was recommended in the First review report. Narrowing the scope of maladministration with appropriate definitions in the one place would also assist in the understanding and effectiveness of the PID Act.

Re-defining reprisal so that it is more analogous to victimisation under the *Anti-Discrimination Act 1991* will contribute to simplifying the PID Act and making it more effective.

As outlined earlier in this submission, the Commission supports Recommendation 5 in the First review report that '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'.

Support and Administrative address scheme

The PID Act requires the chief executive of a public sector entity to establish reasonable procedures to ensure that public officers who make a public interest disclosure are given support and that public officers of the entity are offered protections from reprisals.²¹ The Public Interest Disclosure Standard No. 2/2019 prescribes organisation systems and procedures that agencies must establish to give effect to these requirements.

The Standard requires, amongst other things, the assignment of an independent PID Support Officer to the discloser. The Issues Paper asks whether agencies are able to provide effective support for disclosers, subject officers, and witnesses, and whether there is a role for an independent authority to support disclosers.

For small agencies such as the Commission it is very challenging to try to provide a designated support officer to a discloser and to maintain confidentiality. It is even more challenging for Commission in its regional offices in Cairns, Townsville, and Rockhampton, where staff numbers are around four to five, with some working part-time.

There is also a challenge in assigning an officer who not only has appropriate skills to provide support, but who can also be diverted from their primary roles and tasks to provide the support. This is a challenge that would not be confined to small agencies.

In these circumstances the Commission considers that there is a role for an independent authority to support disclosers. In the absence of a Victims' Commission this role might be able to be taken up by Victims Assist.

In terms of remedies, the Issues Paper refers to the recommendation in the First review report for the introduction of an administrative address scheme that would allow a discloser to apply to their agency for redress rather than pursuing civil or criminal proceedings. The

²¹ *Public Interest Disclosure Act 2010* section 28(1)(a) and (e).

Issues Paper asks whether there is support for an administrative redress scheme for disclosers who consider they have experienced reprisal.

The Commission supports in principle an administrative redress scheme provided however that it is operated independently of the agency. Victims Assist currently provides financial assistance for people who have experienced violent crime or domestic and family violence. Given this experience, and in the absence of a Victims' Commission, the role of an administrative scheme might be appropriate for Victims Assist. Potential difficulties include attributing the detriment to the public interest disclosure (causation and liability) and billing the relevant agency for the financial assistance that is given. A final and binding decision on the assessment of information as a public interest disclosure would be imperative to the successful operation of administrative redress scheme.

Conclusion

The PID Act is a key component of Queensland's integrity framework. I am grateful for the opportunity to contribute to this important review.

Yours sincerely

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Human Rights Commissioner