Review of the Public Interest Disclosure Act 2010

Submissions of

Together Queensland

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Introduction

1. Together is one of the largest public sector unions in Queensland, representing over 28, 000 workers from across the public sector in health, education, public service departments and statutory authorities, as well as workers in the private sector. Together has consistently advocated for a fairer industrial relations system in the state, and our members have been at the forefront of improving the conditions of Queensland public sector workers and the services they deliver.

2. Together Queensland:

    a. is an Industrial Organisation of Employees under the *Industrial Relations Act 2016* (Qld).

    b. is a counterpart of the Australian Municipal, Administrative, Clerical and Services Union, Queensland Together Branch (Queensland Together Branch of the ASU). The ASU is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

3. Together welcomes the opportunity to respond to the Issues Paper and provide submissions to the Review of the *Public Interest Disclosure Act 2010*.

4. Together is generally supportive of the recommendations of the review undertaken by the Ombudsman in 2017 (*Ombudsman Report*)[1], other than as set out int e submission below and supports the need for improvement in the following key areas proposed by the Ombudsman:

    - stronger but streamlined requirements for managing PIDs
    - more effective support for disclosers and practical mechanisms to address reprisal
    - a more rigorous oversight role

5. Together generally supports the conclusions and recommendations on best practice by Brown et al in *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government (Clean as a Whistle)*[2] and Brown and Pender in *Protecting Australia's Whistleblowers: The Federal Roadmap (Federal Radmap)*[3].

[1] Clarke, P. (2017). *Review of the Public Interest Disclosure Act 2010*. Queensland Ombudsman: Brisbane.
[2] Brown, A J et al. (2019) *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Key findings and actions of Whistling While They Work 2. Griffith University: Brisbane.
[3] Brown, A. J. & Pender, K. (2022). *Protecting Australia's Whistleblowers: The Federal Roadmap*. Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne.

Policy objectives of the PID Act

6. The Union considers that the current objects are valid but suggest that expanding the scope of these objectives may support some of the suggestion in our submissions and the initiatives proposed by the Ombudsman in 2017 and recommendations of the Reviewer.

7. The Union suggests that an amendment of the objects to provide for the protection *and "support"* of disclosers is required.

8. There are also significant concerns across the sector about the timeframes for the management of corrupt conduct investigations and disciplinary processes reference to "timely" assessment, investigation and action may be beneficial.

9. The Union suggests that the Act should expressly reference the *Human Rights Act 2019* and the obligations that a decision maker under the Act has as well as the rights of subject officers and disclosers. The objects may also be strengthened by reference to the HR Act and Australia's commitments under international frameworks.

10. The Union supports the recommendation of the Ombudsman Report to amend the name of the Act to refer to Whistle-blowers.

11. The "Clean as a Whistle" report in 2019 published key findings of research between 2016 and 2018 and suggested "for the public sector…no fundamental improvement since our earlier research in 2006" and that 42% of all whistle-blowers report being treated unfavourably because of their disclosure[4].

12. The data presented by the Ombudsman in 2017 about the number of formal reprisals and the data from Brown at al about the proportion of disclosers who believe they've been treated poorly speaks to a system that fundamentally under-recognises and under-protects disclosers from the detriment suffered and perceived by whistle-blowers.

What is a public interest disclosure?

13. The Union shares the concerns expressed in the issues paper that "[n]avigating the definitions in the Act could be a potential barrier for some disclosers if they are unsure whether the relevant conduct meets the necessary threshold".

14. The Union also supports the Ombudsman Report recommendation 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.*

[4] *Clean as a whistle,* p 16

Individual employee grievances and PIDs

15. The Union acknowledges the discussion in the Issues Paper and the research re individual employee grievances and the desire to provide for fast and appropriate responses to workforce grievances. However, the Union also notes the commentary in the "Clean as a whistle" report[5] about the high rate of disclosures containing a mixture of both public interest and individual grievances and the damage that can be done when disclosures are mischaracterised – which is a frequent occurrence.

16. The mischaracterisation of a workplace or individual grievance as a PID may detriment the complainant, subject officer and other employees including due to the delay in assessment and investigation processes and also the potential inability for action to be taken locally and immediately which may resolve the issues or support or protect the complainant or workers.

17. Once a matter is accepted as a PID or a corrupt conduct matter, the options for managers and HR in agencies to provide support and protection to staff may be limited by the perception (or reality) of the rights of the subject officer and the seriousness of the matter and potential consequences. For example, action taken in a workplace to improve workplace culture, address alleged bullying or systemic issues or to prevent the potential for reprisals by changing reporting lines may be prevented or discouraged.

18. However, commentary about efficient and fit for purpose processes for workplace grievances assumes that a workplace grievance will be managed well or appropriately and that such action will be taken.

19. The "Clean as a Whistle" research supports that workplace grievances tend to be handled with less investigative competence, procedural justice and organisational interpersonal justice, allow complainant (or subject officer) confidentiality to be breached or allow breaches to be "swept under the carpet" and for additional inappropriate conduct to occur[6].

20. For a mischaracterised PID this has significant detrimental consequences for the discloser including longer timeframes to resolve, and these issues would need to be addressed in the legislation and/or the policy response from the Office of the Ombudsman and the public sector including addressing the significant capacity gap within the public sector identified by Professor Coaldrake in "Letting the Sunshine in", which may compound these issues.

21. The Union agrees with Brown et al, that if these disclosures are removed from PID protection, "active regulatory oversight will be needed, to ensure other regulators and organisations know how to assess and respond to cases that involve a range of disclosable and non-disclosable matters[7]".

22. It is not sufficient however to respond to these clear deficiencies in workplace grievance processes only by ensuring PIDs are not managed under these substandard processes. The issues raised under workplace or individual grievance processes are not insignificant and include bullying, harassment, racism, sexual harassment and violence, and other misconduct and wrong doing by officers of the state. The processes and protections for employees raising issues of concern in the Queensland public sector and the protection and support provided to employees who raise issues are inadequate and action is required to improve the identified failings of process regarding these complaints.

[5] *Clean as a whistle,* p 44.
[6] *Clean as a whistle,* p 16.
[7] *Clean as a whistle,* p 43.

Grievances in practice

23. The Public Service Act grievance process limits the issues that can be the subject of a "workplace grievance", contains no status quo provisions, has strict time frames which limit the right to raise issues and in practice fundamentally fails to support and protect complainants and timeframes and delays are detrimental to all parties.

24. Complainants are often subjected to scrutiny of their own conduct and motivations in having made a complaint or a granular analysis of their actions in how they have responded to the alleged conduct of the subject officer, are routinely refused access to the investigation reports or findings and can be counselled or warned (at the least) for minor imperfections in how they have applied agency policies or procedures, in the response to their own complaint.

25. The most common outcome for an individual workplace grievance by an employee against their manager or other senior public servant about the subject officer's conduct is the allegations not to be substantiated due to a lack of evidence because of the "he said - she said" nature of the allegations. When this occurs it is common practise for the organisation to proceed as if the complaint was proven to not be true and take no action to support the alleged victim or to ensure that the alleged conduct did not reoccur. Complainants are often left working with, or for, the subject officer with no systems or procedures in place to protect them and with the subject officer responsible for a huge range of administrative decisions which affect their employment on a day-to-day basis.

26. It is very difficult or impossible for an employee to prove that management action taken has been taken because of a previous allegation or complaint, and this leaves complainants at the mercy of the subject officer. The employer generally takes no responsibility for the employee because the allegations were "not substantiated".

27. Even where allegations are substantiated this does not protect the complainant from actions by the employer which follow from either the misconduct against them or the complaint or investigation.

> ***Example/Case Study 1.***
>
> *An employee of the State of Queensland a in a government department complained of being harassed by her manager including being touched without her consent. Some of her allegations were substantiated and some were not. As the complainant, she was not entitled to the details of whether any disciplinary action was taken against the subject officer but he remained in his role as her manager. The complainant suffered a workplace injury as a result of the harassment and was medically certified as unable to work in her substantive role under the harasser. She took a series of other roles or secondments within the public service which she has performed with no medical or performance issues.*
>
> *As a result of her being unable to work in her substantive role her employer has taken action seeking to medically retire her from the public service which would involve her employment being terminated with no financial recompense for her loss of permanent employment.*

28. Public servants often consider that making a complaint about their manager or a senior public servant or official is a death sentence for their career and the protection for employee making a complaint is ineffective.

Recommendations

29. It is the Union's view that the employee grievance and appeals system and protections for complainants as well as review and appeal rights need urgent and significant reform to strengthen the rights and protection for public sector workers.

30. The Union submits that any recommendation of this Review to remove individual grievances from the overview of the PID Act should be accompanied by associated recommendations (or, if out of scope, with strong commentary) to this effect.

31. The Union also has concerns about a disclosure made as a purported PID being assessed as an individual matter and therefore denied PID protection but also being denied protection as a workplace right under the Industrial Relations Act because it was disclosed as a PID.

32. It should be ensured that no complaints fall through gaps between the various pieces of legislation and are therefore denied protection from reprisal. The clearinghouse for complaints in the public sector and/or the role of an enforcement body under the PID Act may be appropriate mechanisms to facilitate consistent support and protection at the initial stage of making a complaint across different types of employee complaint in the public sector.

Who can make a public interest disclosure?

33. The Union supports the 2017 recommendations of the Ombudsman Report to expand the definition of public officer to include volunteers, contractors, trainees, students and others in employment-like arrangements in the public sector. The Union also supports eligibility to make a disclosure and protection being provided to former employees.

34. There should also be the capacity for a person working for a company providing service on behalf of the government (such as outsourced services) to make a PID.

Experiences of people who witness and report wrongdoing.

35. The Union agrees with the concerns in the Issues Paper that support provided do a discloser may be outcome dependent and therefore either delayed or not provided to someone who made the disclosure where they had an obligation to do so, or they believed they were eligible for protection. This may discourage reporting and/or allow detriment to disclosers. There are also significant delays reported by members in the assessment of their PID and/or outcome of the matter.

36. In his report "Let the Sunshine In" Professor Coaldrake reinforced the submissions to the Ombudsman review of the PID Act in 2017 and the research also cited in the Ombudsman Report "showing that, while regulatory focus is usually on deliberate retaliation, collateral impacts such as stress, impacted performance and isolation are prevalent[8]".

37. This data suggests that 42% of people who make a disclosure report being treated badly because of the disclosure. This is a damning statistic in terms of the operation of the current Act and systems.

[8] Coaldrake, P. (2022) *Let the sunshine in: Review of culture and accountability in the Queensland public sector*, report, Queensland, p 67.

38. The Union's experience is that the established agency position in relation to these issues in the Queensland public sector is the existence of, or template reference to an "employee assistance service" (EAS). Anecdotally, there is often very little actual support provided to complainants, witnesses, or subject officers in grievance, discipline or PID processes or any attempts to assess or establish the need for (additional) support.

39. The avenues to address a perceived lack of support or protection also remain largely ineffective[9] despite longstanding acknowledgement of these obligations under workplace health and safety, and general employment law[10].

40. Any person making a disclosure, and any witnesses, should be provided with genuine support and assistance to minimise and mitigate the impacts to them of making the disclosure from the moment they make the disclosure, regardless of the assessment or final outcome of the disclosure as a PID and without needing to provide that reprisal is "likely".

41. There should also be avenues of internal and external review in relation to support provided.

Making, receiving and identifying PIDs

Making a PID

42. Together supports continuing the availability of multiple avenues of reporting to provide a "no wrong door" approach as well as a 'clearing house' model for complaints regardless of origin or reporting avenue which maximises the provision of support, advice and protection to all disclosers.

43. The Union also supports the proposal for the New Zealand approach that technical non-compliance is not a barrier to protection.

Deciding PID status

44. The Union supports consideration of the case flow model proposed by Brown et al[11], which underlines the importance of an initial case assessment and immediate risk assessment:

> *Addressing disclosures is not a simple linear process where an organisation first responds to wrongdoing and only worries about the welfare of reporters later – instead, the right steps for both must be considered upfront;*
>
> *Initial assessment must recognise exactly what mixture of wrongdoing issues is raised by the report, in order to determine the right responses – including assessment of the true risks facing the staff-members involved…*

[9] There appear to be limits to the jurisdiction of the Queensland Industrial Relations Commission.
[10] E.g., *Wheadon v NSW* (2001), *Koehler v Cerebros (Australia) Ltd* [2005] HCA 15, *Hayes & Others v State of Queensland* [2016] QCA 191 and discussion in Brown, A J et al, *Clean as a whistle: a five step guide to better whistleblowing policy and practice in business and government*. Key findings and actions of Whistling While They Work 2, Brisbane: Griffith University, August 2019, p 23.
[11] *Clean as a whistle*, Note 1, p 14.

45. The Union agrees with the Ombudsman Report recommendation that "the PID Act be amended to require an agency that assesses a disclosure to provide a written decision to the discloser within a month about whether it has been assessed as a PID, including reasons and information about review rights".

46. The Union tentatively supports deeming a retrospective acknowledgement or updating of PID status, however, suggests that once PID status has been acknowledged it should not be able to be revoked.

47. The Union also suggests that there should be a presumption that a disclosure is a PID and protection afforded until and unless a decision is made that this is not the case, subject to employee appeal rights.

48. The Union also suggests that where an employee is compelled to make a disclosure or give evidence relating to a matter that may be a PID that they be given PID status and protection.

Disclosures to Union officials and support persons

49. The Union supports the discussion in the Issues Paper regarding "reforms to enable disclosers to repeat their concerns to limited members of their usual support network, which may assist to alleviate feelings of isolation that have been reported by some disclosers during the PID process".

50. The Union notes the support for this position in the 2017 Ombudsman review of the PIDA[12] the Griffith University "Federal Roadmap"[13] and the New Zealand legislation which also allows disclosure for the purpose of seeking advice about whether or not to make a formal disclosure.

51. The Union contends that the legislation should clarify confidentiality requirements and strengthen them in relation to protecting disclosures, however, there should be an express exception to the confidentiality provisions to allowing disclosure by the discloser, subject officer or witness to allow them to receive advice from their Union or lawyer, including about whether or not to make a disclosure, to obtain support (for example, consult with a counsellor, employee assistance service, union or support person), or to seek treatment or health care.

Managing, investigating and responding to PIDs

52. The Union agrees that the legislation or binding standard should include the sort of procedural matters set out in the discussion paper and address interactions between agencies.

Support for disclosers

53. The support provided for disclosers appears to be insufficient and inconsistent and overly reliant on individual officers of an entity to which a disclosure is made, in a system facing capacity and resourcing constraints. The standards do not appear effective (or effectively followed).

54. It appears that, in practice, a discloser will often need to actively seek support or protection from reprisal and have to demonstrate that a reprisal is "likely". There doesn't appear to be a clear, efficient and effective avenue for a discloser to raise concerns about inadequate support other than by making application in a cause of action for example under an industrial law.

[12] *Ombudsman Report*, pp 67-68, Recommendation 31.
[13] *Federal Roadmap*, 15.

55. While employer liability has been demonstrated under WHS and employment law[14] these avenues for remedy or enforcement remain time consuming, uncertain and potentially costly.

56. Brown et al[15], propose a model for proactive management of the potential repercussions for whistle-blowers, not merely direct reprisals or retaliation risk. They identify key actions which can significantly reduce the detriment suffered by whistle-blowers including that:

    a. a risk assessment be conducted at the time of report,

    b. a support plan be developed immediately,

    c. confidentiality be maintained as a key protective factor and

    d. "robust support" be provided through case management by trained staff independent of the chain of management

57. The Union submits that these responsibilities be provided for in the Act along with internal and external review and appeal rights for support decisions.

58. The Union supports the recognition in the Act of a positive duty of care on receiving agencies and contends that despite the duty identified in *Hayes*[16], this is not routinely acknowledged and the avenues for practical action by disclosers, particularly to prevent or mitigate harm, is limited.

Support for subject officers and witnesses during the PID process

59. The Union supports the Ombudsman's 2017 recommendations that the PID Act be amended to:

    a. require agencies to have reasonable procedures to ensure procedural fairness to all parties;

    b. require investigating agencies to provide reasonable information in writing to subject officers in addition to disclosers; and

    c. protect employees who are the subject of an unsubstantiated PID from detriment.

60. The Act, standards and procedures should also ensure that the discloser and witnesses are still protected where the PID was not substantiated.

61. Currently there are potentially significant delays in the finalisation of corrupt conduct matters and the public sector frame work for this is insufficient and appears to carve out corrupt conduct matters from the mechanisms designed to monitor and enforce good practice and timeliness.

62. The power of agencies to suspend employees without pay without appropriate limits is also a concern.

[14] E.g., *Wheadon v NSW* (2001), *Koehler v Cerebros (Australia) Ltd* [2005] HCA 15, *Hayes & Others v State of Queensland* [2016] QCA 191 and discussion in *Clean as a whistle,* p 23.
[15] *Clean as a whistle,* p 23.
[16] *Hayes v State of Queensland* [2017] 1 Qd R 337 at 348-349.

Protections for disclosers, subject officers and witnesses

Protection against reprisals – in practice

63. In practice, it is generally the employer who entirely controls the PID process and outcomes and what support and protection is provided to employees . The employer also has a vested interest in minimising, ignoring or discrediting the public interest disclosure which will generally relate to wrongdoing on behalf of the employer or agency.

64. At the same time, it is the employer, the employee's manager, the subject officer or another employee or officer of the employer who is taking the purported reprisal action.

65. This is an inherent conflict.

66. Without a proactive duty to protect against detriment (which we contend is required), too often the only risk assessment undertaken relates to risk to the employer rather than the risk to the discloser. The best way for the employer to mitigate the risk to itself is if there is no protected disclosure, and no reprisal action being taken. It is the view of this Union that in practise the consideration of many decision makers is "could this be something else" rather than "could this be a reprisal" or "could this be a detriment" and the decisions and outcomes for disclosers reflect this.

67. In practise, therefore, the only sort of reprisal that is given any genuine consideration by employers appears to be direct reprisal from the person who is the subject officer and any action taken by other individuals is ignored.

68. It is too easy for employers and managers to use the shield of reasonable management action to take action against disclosers. Combined with bearing the high burden of proof, and the cost and complexity of taking action through the courts this means that in practice, only a perfect employee with the resources to take action in the courts appears protected from reprisal. If there is any imperfection in performance or conduct this will be enough to provide a presumptively lawful basis for taking action against them.

69. Union members regularly identify that performance or conduct issues previously never mentioned suddenly get raised after they have made a complaint or disclosure. While this is based on mostly anecdotal account, what is demonstrated is that at the least there is a strong perception that there is management action being taken against employees because of their public interest disclosure or other complaint. This is directly contrary to the object of the act to encourage disclosure.

70. The employer response to these concerns is almost invariably that these actions taken are reasonable management action unrelated to any complaint or disclosure. There appears to be very little an employee can do practically to challenge that decision.

71. An employee who makes a public interest disclosure or some other complaint is almost always subject to investigation of their own motives, conduct or other allegations. Investigators often scrutinise the complainant, their reasons for making the complaint, any potential inconsistencies in when or how they raised the complaint, who they spoke to first, whether they perfectly followed a process or a policy and their own conduct and make recommendations or findings in that regard.

72. Is it very common for the subject officer in a PID investigation to make counter allegations against the discloser or allege a lack of good faith or malicious complaint. These allegations appear to be taken at face value and invariably lead to a formal investigation against the discloser.

73. Despite an investigation not being considered detrimental action it is clear that it can have significant detrimental impacts on employees. The Union can attest that public sector investigatory processes often provide very little practical support to complainants or subject officers, beyond references in correspondence to an employee assistant service. Therefore, if an investigation process is instigated because of a disclosure then there is detriment suffered by an employee because of that disclosure but there is very little recourse. And once the investigation is instigated, the outcome of that investigation is very hard to link back to the disclosure.

74. In reality any employee put under the microscope of such an investigation is going to have some imperfection in conduct or performance that is then subject to formal findings. It is the Union's experience that because these matters are raised in the context of this serious corruption investigation they are given much greater weight than they otherwise would and are much more likely to lead to a formal process and detrimental outcome. Often these matters would be handled informally and resolved locally in other circumstances but lead to formal disciplinary processes when raised in this context. While it is very difficult for an employee to challenge a disciplinary finding for an actual but relatively minor wrongdoing on the basis of the PID, the reality is that the outcome is very different than if they had not made the disclosure.

75. Once a matter becomes subject to a formal court or tribunal process, the employer's interest is in defending the claim in order to avoid liability and regardless of the existence of model litigant principles, the employer is no longer seeking to protect the discloser. Combined with the burden of proof on the discloser as well as the costs implications, this renders court processes largely out of reach for the ordinary public servant and are their own source of significant detriment in terms of stress, isolation, cost, impact on reputation and the other detriments set out in the research.

76. The sum of these concerns is that at least in perception, but the Union contends also in fact, it is common for a person who makes a PID or workplace complaint to be subjected to a disciplinary investigation and/or action that would not have occured if they had not made the complaint and that this significantly discourages disclosing.

Example/Case Study 2

A [redacted] made a disclosure of alleged wrongdoing by the acting general manager of a [redacted]. The Subject Officer made counter allegations including that the PID allegations were vexatious and a range of unrelated allegations about the discloser's use of [redacted] work email.

The allegations made by the subject officer were largely unsubstantiated but the sweeping investigation of the discloser's emails identified potential grounds for discipline and disciplinary action has been proposed against the discloser. The Union has raised concerns with [redacted] who advised that the PID Act provides no protection for subsequent actions which flow from a reprisal unless those actions themselves meet the definition of a reprisal and have themselves been taken because of the PID.

Relevant correspondence is included in Attachment A.

77. This case study demonstrates the ease with which a Subject Officer can make baseless allegations in order to instigate a fishing expedition and use the employer as a vehicle for detrimental action which appears to be unprotected by the PID Act. It also demonstrates how public sector agencies position themselves to "defend" a claim by a discloser rather than to protect the discloser.

Proposed Reform

78. The Union does not consider the current protection provisions in the PID Act to be sufficient in policy or practice.

79. As discussed above there needs to be a legislative requirement for the employer to undertake a risk assessment and put in place a support and protection plan for the employee. It would be rare for it to be appropriate for a discloser's manager to continue to manage the employee or make decisions about the employee's employment. The outcome and decision-making in relation to support and protective measures should be the subject of administrative review and external appeal. The focus of these reviews must be the welfare and protection of the discloser and the burdens and onus of proof should reflect that. The discloser should not have to prove that reprisal is likely to have action taken to protect them. The rights of the subject officer in relation to natural justice are also relevant but given the employer is almost always the State of Queensland in these matters the balance of convenience to the employer should be a very minor consideration when balanced against the stated objects of the Act to protect whistle-blowers. External bodies should be given powers to make orders.

80. The Union strongly supports a positive duty to assess the risk of detriment occurring as a result of a disclosure and also to prevent or minimise any actual detriment, similar to amendments made to the NSW *Public Interest Disclosures Act* in 2022 and notes this as an element of best practice "to clearly recognise an enforceable organisational duty to protect whistle-blowers from preventable indirect and collateral damage, not simply direct reprisals[17]".

81. The positive duty would also remove the requirement to prove the respondent's state of mind or the reason for the action, instead requiring evidence that the respondent failed to meet their duty of care and allow for liability to be established for omissions (which don't generally have "reasons").

82. The Union also proposes that the definition of detriment be reviewed considering the amendments proposed in the *Public Interest Disclosure Amendment (Review) Bill 2022* (Cth) and the *Moss Review* to align with the definition in the Commonwealth Corporations Act as well as the inclusion of "examples… to match the types of preventable detriment most frequently suffered, including stronger recognition that these often occur through omission or negligence in organisations, not only through design to punish[18]".

83. In the absence of the introduction of a positive duty or in relation to any remaining requirement to identify the reasons for an action, the Union supports amendment of the requirement for a PID to be a "substantial reason" to merely a "contributing" factor such as has occurred in NSW and also the reversal of the onus of proof in relation to protection provisions.

84. Current remedies are also inadequate, the thresholds and burdens of proof are too high, the onus of proof is unfairly on the employee and the decision-making criteria borrowed from the common law principles regarding the use of interlocutory powers by courts overly favours the employer as a litigant in the process rather than focusing the tribunal on the protection of the employee.

85. There needs to be administrative reviews available to employees through the Office of the Ombudsman or existing tribunals that provide for a stay of any action while an independent review is undertaken of any decision taken under the act or in relation to a PID or reprisal.

[17] *Federal Roadmap*, p 14.
[18] *Clean as a whistle,* p 44.

Deficiency in protections in the IR Act

86. Public sector employees (and others) have obligations to report corrupt conduct and other wrongdoing as part of their statutory employment for example pursuant to the Code of Conduct for the Queensland Public Service. However under the current provisions of the PID Act and the IR Act, employees who comply with these obligations are not protected from adverse action taken against them.

87. The protections in the IR Act are framed around workplace rights and the definition of an industrial law or body and the Courts have determined that industrial laws are only those that go to the regulation of the relationship between employers and employees.

88. In *Kelsey v Logan City Council*[19] the QIRC held that "the PID and CC Act are not industrial laws for the purposes of the IR Act. Whilst each piece of legislation imposes obligations upon either an employee or an employer, neither Act seeks to regulate the relationship between employees and employers.

89. This deficiency significantly undermines the capacity for an employee to prevent a reprisal against them. A simple rectification could be to insert new subclause (d) in s 284(1) IR Act as follows:

> ***284 Meaning of workplace right***
>
> *(1)A person has a workplace right if the person—*
>
> *(a) has a right to the benefit of, or has a role or responsibility under, an industrial law, industrial instrument or order made by an industrial body; or*
>
> *(b) is able to start, or participate in, a process or proceedings under an industrial law or industrial instrument; or*
>
> *(c) is able to make a complaint or inquiry—*
>
> *(i) to an entity having the capacity under an industrial law to seek compliance with that law or an industrial instrument; or*
>
> *(ii) if the person is an employee—in relation to the person's employment.*
>
> *(d) is obligated by any law to report conduct or information obtained in or in connection with their employment.*

[19] [2021] QIRC 114

Remedies

Legal remedies

90. The Union acknowledges the need for both civil and criminal sanctions for reprisals against disclosers for the most serious of cases and supports clarification of the interaction between criminal and civil remedies and other employment proceedings and claims which maximises the actions available to disclosers.

91. The Union acknowledges the difficulties in a discloser proving the reasons that someone else took action against them and supports (to the extent required in the context of positive duties) reversing the onus of proof as appropriate in the civil and criminal jurisdictions including regarding immunity. In regards to proceedings in tribunals or administrative redress or review matters as set out below the Union very strongly contends that reversed onus of proof and lower thresholds are appropriate.

92. The Union very strongly supports measures taken to improve access to justice for disclosers including state funded legal representation and provisions limiting costs against disclosers.

Tribunals

93. Both "Clean as a whistle" and the "Federal Roadmap" acknowledge access to lower cost avenues for remedy such as employment tribunals as a feature of best practise. However the federal roadmap also specifically calls out that the conventional industrial relations approach has caused problem in Queensland and advocates for the need for such tribunals to have a specialised jurisdiction with proper resourcing and expertise to hear whistle-blower protection claims, taking into account the special considerations and safeguards appropriate to dealing with matters of public integrity and accountability[20].

94. So called lay tribunals they can nonetheless be complex and legalistic for a lay person and there is a considerable power disparity where the State of Queensland has access to extensive resources and lawyers and barristers through Crown Law and is often given leave by the tribunal to be legally represented by outside council. This significantly impacts on the access to justice for employees.

95. Where industrial and other tribunals are making decisions relating to reprisals or reviewing administrative decisions particularly which do not involve civil or criminal penalties for alleged contraveners, these matters should not be subject to costs, legal representation should be available only by mutual agreement, and legislation should set out legal thresholds and tests to favour the protection of the employee and the simplicity of the process rather than rely on complex legal tests designed to protect the rights of litigants in other contexts

[20] *Federal Roadmap,* p 14.

Interlocutory relief

96. The Act provides for the Industrial Relations Commission to issue an injunction if the reprisal:

    a. has caused or may cause detriment to an employee; and

    b. involves or may involve a breach of the Industrial Relations Act 2016 or an industrial instrument under that Act.

97. The application of these provisions by the tribunal significantly limits their utility.

98. The Commission has interpreted its jurisdiction under s 48 narrowly, to only apply to a technical breach of the IR Act or an industrial instrument, and not to other detrimental action that would otherwise fall under the Commission's jurisdiction as an industrial matter[21].

99. The Commission has also held that its similar injunctive power under s 473 of the IR Act to restrain or prevent a contravention, of an industrial instrument, a permit or the IR Act does not extend to disciplinary procedures, and presumably any other process, pursuant to the *Public Service Act 2008*[22].

100. Similarly, the Commission has found it does not have the power to issue injunctive relief when dismissal is contemplated[23], or in relation to a denial of natural justice or other unfairness[24].

101. As set out above the Commission has interpreted the CCC Act and the PID not to be Industrial Laws preventing the exercise of its injunctive jurisdiction in certain circumstances[25].

102. That being the case, it is difficult to see the circumstances where the Commission could exercise its jurisdiction to issue an injunction with respect to serious PID reprisals which are likely to relate to action taken under the Public Service Act or other employing legislation or be management action.

103. The Commission should have the jurisdiction to issue injunctive relief in relation to any industrial matter in line with their general powers and industrial jurisdiction or any matters relating to employment, for example action taken under the Public Sector Act or another employing act.

104. In addition, a tribunal or another body should be able to make orders to stay or temporarily stop the administrative actions of the employer or a purported reprisal while an administrative review or employment matter is heard on the basis of a much lower threshold than the legal test for injunctive relief (see below).

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[21] See for example *Davis v Chief Executive Officer, Department of Community Safety - Queensland Fire and Rescue Service* [2013] QIRC 136.

[22] *Morgan v State of Queensland (Queensland Health)* [2020] QIRC 184.

[23] *Darlington v State of Queensland (Queensland Police Service)* [2016] ICQ 20.

[24] *Currie v Brisbane City Council* [2011] QIRC 70.

[25] *Kelsey v Logan City Council* [2021] QIRC 114.

Review and appeal rights and administrative actions

105. The Union supports that the Act expressly provides for internal and external review rights for administrative decisions made under the PID Act.

106. The body responsible for external review should have appropriate powers including to make orders to ensure protection for disclosers which are to be exercised in the context of the objects of the PID Act. Decisions under review should be "stayed" until an external review or appeal is decided. Processes should be simple, and the balance of convenience should favour the employee rather than the State, in line with the objects of the Act. There should be no costs for employees seeking a review and there should be no right for representation by lawyers, particularly for the State of Queensland. Employees should have access to their Union, however, to support and represent them in these matters.

107. The thresholds of proof and the onus of proof should be appropriate to the objects of the Act and the nature of administrative review rather than aligned with court processes and precedent. For example, the requirement to prove that reprisal ***because*** of the PID is ***likely*** in order to succeed in a public service appeal in relation to the failure of the employer to relocate the discloser is a very high bar and is not consistent with the best practice recommendations of the research which suggest that proactive risk assessment and mitigation is what is required.

Administrative redress

108. The Union supports an administrative redress scheme with external review rights and appropriate supports and protection for applicants for relief including by an independent support agency.

Role of the oversight and support agencies

109. The Union supports expanding the role of the Office of the Ombudsman as the oversight agency including to streamline the administration of the PID regime address overlaps or gaps and a "clearing house".

110. The Union supports the creation of an authority responsible for ensuring the welfare of disclosers either within or outside of the Office of the Ombudsman.

Accessibility of legislation

111. The Union supports addressing challenges that may arise for people in regional and remote communities or people from culturally and linguistically diverse backgrounds when reporting wrongdoing or navigating making a PID.

112. In particular challenges that arise for Aboriginal and Torres Strait Islander peoples in relation to reporting wrongdoing and navigating PID process should be acknowledged and addressed. Agencies and oversight bodies should have culturally safe processes and procedures.

113. People with disability should be adequately supported to make application and receive support in a way that takes into account their communication and other needs.

114. The Union supports simplified processes or explanatory material or improvements to the accessibility of the legislative provisions.