

Department of State Development, Infrastructure, Local Government and Planning  
Review of the *Public Interest Disclosure Act 2010* submissions

The numbering below reflects the numbering in the Issues Paper

### 3. Issues for consideration

#### 3.1 Policy objectives of the PID Act

1. Are the objects of the PID Act valid and is the Act achieving these objects? Has the PID Act been effective in uncovering wrongdoing in the public sector?

Consideration should be given to amending object (d) (reference 3 (d) of the PID Act) as follows:

(d) to afford protection from reprisals to persons making **and involved in the management and/or investigation** of public interest disclosures.

This wording more accurately reflects the intent of the Act especially in relation to possible reprisal against witnesses and others which the subject officer, or subject officer supporters, may believe to have made the PID – see especially section 40 (1)(a):

#### **40 Reprisal and grounds for reprisal**

(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, **or in the belief that**—

- (a) the other person or someone else has made, or intends to make, a public interest disclosure; or
- (b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.

Including ‘or investigation’ will give protection to internal investigators who are also employees of the public entity.

Widening this definition to refer to the ‘administration’ of the PID Act is consistent with wording throughout the Act.

2. Is the title of the legislation suitable? Should any other terms, such as ‘whistleblower’ or ‘wrongdoing’, be included in the title or used in the legislation?

Our experience is that more people understand the terms ‘whistleblower’ and ‘whistleblowing’ more than the terms ‘discloser’ and ‘public interest disclosure’. To increase understanding of the PID Act and its purpose, it is recommended that the title be amended to the *Public Interest Disclosure (Whistleblowers Protection) Act 2023*

3. Are changes needed to ensure public confidence in the integrity of the PID regime?

It may be difficult for legislative change alone to address public perception that associates whistleblowing with negative repercussions for the whistleblower. The abovementioned change to the title of the Act may somewhat assist by clarifying and focussing on protection of whistleblowers.

#### 4. Are any changes needed to the PID Act to make it more compatible with the *Human Rights Act 2019*?

It is considered that the PID Act at it stands has an appropriate balance between the human rights of disclosers and subject officers.

### 3.2 What is a public interest disclosure?

#### 5. What types of wrongdoing should the PID regime apply to? Should the scope be narrowed or broadened? Why and how?

Given that one of the main objects of the PID Act is to *promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector*, the scope of the PID Act should cover the range of services provided by Government.

The definition of what constitutes a PID does not always lead to clear and practical guidance on whether to consider a matter a PID, which potentially results in a wider scope of reported PIDs than is intended by the PID Act and can subsequently also affect the design of, and subsequent resourcing required to implement, investigation of matters.

The department acknowledges the overlap at times of employee grievances assessed as PIDs, and other mechanisms for dealing with the employee grievance concerns. As an example, the department has experienced an employee grievance about an officer bullying their staff and others. Given the position of power of the employee, the matter was assessed as meeting the definition of corrupt conduct (misuse authority in the workplace to threaten / cause a detriment (including bullying), which meant the matter was also a PID.

The department acknowledges the QO's recommendation that, to strike a balance between addressing administrative challenges and ensuring that PID protections are not lost, the PID Act should be amended so that disclosures solely about personal workplace grievances are not protected except in specific circumstances, such as if the grievance is indicative of a wider systemic issue. The department supports this recommendation. While allegations of workplace bullying are serious, personal conflict in the workplace may not constitute a public interest matter, and there are other mechanisms to appropriately address such behaviour.

#### 6. Should a PID include disclosures about substantial and specific dangers to a person with a disability or to the environment? Why or why not?

While acknowledging the Queensland Ombudsman (QO) found that low numbers of PIDs about substantial and specific dangers to people with disability or the environment have been made by members of the public, any future unintended consequence of removing these elements from the PID Act should be very carefully considered. As noted above, the PID Act is in place to cover reports of wrongdoing across the public sector.

The phrase 'substantial and specific' is used to describe types of PIDs. While it is acknowledged that the ordinary dictionary meaning is to be applied to define the words 'substantial' and 'specific', it may be useful to provide some guidance on these words.

Given the range of services provided by government agencies and their impact on people's lives and livelihoods, it is important that anyone who raises wrongdoing in these areas be protected from reprisal and have all the relevant legal protections under the PID Act.

### 7. Is there benefit in introducing a public interest or risk of harm test in the definition of a PID?

There is benefit in considering the introduction of a public interest test. This would help to properly assess whether the substance of an employee grievance would be a public interest matter, or a personal workplace matter.

A risk of harm' test would be more subjective, and may increase subjectivity and complexity of assessing a matter.

### 8. Should a person be required to have a particular state of mind when reporting wrongdoing to be protected under the PID regime? Are the current provisions appropriate and effective?

To require a person to have a particular state of mind would suggest that the person would need to provide some evidence of their state of mind. This requirement would create significant barriers and could impact the ability to address the substance of the matter in a timely way. Careful consideration should be given to all unintended consequences of including this requirement.

In any event, the state of mind of a discloser is qualified by the requirement that the *information disclosed must in fact be sufficient to demonstrate the wrongdoing* regardless of the person's state of mind. On this basis, it is considered that the current provisions are sufficient.

## 3.3 Who can make a public interest disclosure?

### 9. Who should be protected by the PID regime? Should the three categories of disclosers (public officer, employees of government owned corporations or Queensland Rail, and any person) be retained? Why or why not?

It is in the public interest for as broad a range of persons as possible to be afforded the protections of the PID Act. Therefore, there should be no distinction or categorisation based on a person's type of public sector employment. All persons working in or for the public sector with knowledge of wrongdoing should be encouraged to report matters without fear of reprisal or victimisation or negative consequences for doing so in order to uphold integrity and ensure confidence in public administration.

### 10. Should the definition of public officer be expanded to include those performing services for the public sector whether paid or unpaid, for example volunteers, students, contractors and work experience participants? Should former public officers be covered?

Yes. Contractors have an integral role in public administration in Queensland. Some private sector companies and not for profit or non-government organisations provide services to members of the public on behalf of Queensland Government departments. Additionally, some labour hire companies and organisations provide employees to work for Government agencies, and some individuals contract their service to Government agencies to perform a range of administrative and professional services in lieu of public service employees. Furthermore, some companies provide professional staff to work on short term or specific projects being undertaken by Queensland Government departments. That being the case it is likely that such private sector or contracted employees may witness wrongdoing by public servants or other contractors or be involved in such matters to some degree.

Contractors to Queensland Government departments are bound by the Code of Conduct for the Queensland Public Service which requires: "As part of demonstrating our commitment to uphold this Code, we need to identify and report conduct that is not consistent with this Code."

It is unfair and not in the spirit of the PID Act that contractors, often working alongside their public service peers and performing similar duties, are not able to make PIDs about corrupt conduct and the other matters listed in section 13 of the PID Act and receive the same protections as public officers.

Therefore, it is recommended that **section 7(1)** of the PID Act be amended to include **persons employed on a contract basis performing any function or service for or on behalf of a public sector entity**.

11. Should relatives of disclosers, or witnesses be eligible to make PIDs? Should they, or anyone else, be entitled to protection under the PID regime?

At present relatives could make a PID if a family member was subject to reprisal. Given family members are not in workplaces and do not have firsthand evidence or information it is unlikely they would be ideally placed to make PIDs. Family members should feel some degree of protection knowing their member would be afforded all current protections under the Act.

12. Should different arrangements apply to role reporters? Why and how?

There is merit in carefully considering introducing specific arrangements for role reporters, a role it appears is not defined in the PID Act or in any of the QO Standards. For example, a member of the public may report corrupt conduct to a role reporter. While the member of the public cannot make a PID about corrupt conduct, consideration should be given to what the position of the role reporter is in this situation.

Further, any role reporter could be in a situation where they are subject to reprisal because of their role in the administration of the PID, and the protections under the Act should apply.

### 3.4 Experiences of people who witness and report wrongdoing

This question is seeking input from the perspective of disclosers. The department has no specific information to provide from the specific perspective of a discloser.

13. How would you describe your experience in reporting wrongdoing under the PID Act? Do you have any suggestions for improvements?

14. What factors impacted your decision to report or not report wrongdoing? Did you encounter any barriers or obstacles during the process? How can the PID regime encourage disclosers to come forward?

15. Were you supported effectively during the process? Would alternative or additional support have been helpful?

16. Did you feel your disclosure was taken seriously, assessed in a timely way, investigated fairly and addressed appropriately?

### 3.5 Making, receiving and identifying PIDs

17. Are the requirements for making, receiving and identifying PIDs appropriate and effective?

The discloser is able to make a PID to a 'proper authority', which is clearly defined as a public sector entity or member of the Legislative Assembly. Further, the discloser is not required to make their disclosure to a specific agency. The department considers the requirements for making, receiving and identifying PIDs are appropriate and effective.

18. Who should be able to receive PIDs? Do you support having multiple reporting pathways for disclosers? Is there a role for a clearing house or a third party hotline in receiving PIDs?

The department is fortunate to have a dedicated team to assess and manage PIDs, however understand that other agencies do not have such a team. Generally, managers are not often sufficiently trained or experienced to identify and respond to PIDs.

The department understands that there is an Integrity Taskforce looking at the Coaldrake Report's recommendation for a complaint 'clearing house', however understand that the focus of this Integrity Taskforce is customer complaints only. There may be benefit for the sector to consider a clearing house or third-party hotline specifically for PIDs.

Multiple pathways to report PIDs are supported. The sector should make it as easy as possible for PIDs to be reported.

19. At what point in time should the obligations and protections under the PID regime come into effect?

As soon as practically possible after the report has been assessed as a PID by the appropriate authority.

20. Should the PID legislation require a written decision be made about PID status as recommended by the Queensland Ombudsman? What would the implications be for agencies?

When a matter is assessed as a PID, the PID Act then applies as well as the three Standards which prescribes how to manage a PID process. For the requirements of the PID Act and PID Standards set by the QO to be effectively discharged, the PID matter must be clear and in writing.

Nothing prevents early notification by phone or in-person to the discloser, however this should be followed up in writing as soon as possible. Clarifying matters in writing is best practice for any complaint. It is also obligatory under the *Public Records Act 2002* and the PID Standards.

21. Are the provisions for disclosures to the media and other third parties appropriate and effective? Are there additions or alternatives that should be considered?

The department has no firsthand experience of this happening but acknowledges the ability to report the media and other third parties exist under the PID Act. The department views this is beneficial in terms of ensuring public trust/the primacy of the public interest.

22. Should the PID process for government owned corporations or Queensland Rail be different to those for public sector entities? Why or why not? Are the current arrangements appropriate and effective?

Please refer to comment in 3.3.9 and 3.3.10. The department considers that the PID process should be consistent for all entities which provide Government services to the public.

### 3.6 Managing, investigating and responding to PIDs

23. Are the requirements for managing, investigating and responding to PIDs appropriate and effective?

The department considers the current requirements are appropriate and effective, especially as guided and supported by best practice advice/information/publications from the Qld Ombudsman and the Crime and Corruption Commission.

24. Are agencies able to provide effective support for disclosers, subject officers and witnesses? Are any additional or alternate powers, functions or guidance needed?

In most cases agencies are able to deal with the support needs of affected parties. However assessing a matter as meeting the threshold of a PID can have serious and long lasting unintended consequences for all parties involved. It is the experience of this department that, because of the very nature of a PID and language used in the PID Act (ie, 'reprisal action'), parties involved in a PID investigation can become focused on the negative connotation of such phrases. The Department understands that the assessment of a PID may change with the introduction of new evidence. However, it is the department's experience that the stigma of being the subject officer in a PID remains.

The Department agrees with the recommendations in the Ombudsman's Report.

25. Should the PID Act include duties or requirements for agencies to:

a. take steps to correct the reported wrongdoing generally or in specific ways?

Some PIDs are overseen by the CCC if they are subject to review by the CCC. For those PIDs which are not subject to this review, there would be merit in requiring agencies to take steps to correct the reported wrongdoing. There would need to be a balance between being too general and too prescriptive in this requirement.

b. provide procedural fairness to the discloser, subject officer and witnesses?

Procedural fairness is a requirement of any Queensland public sector decision-making process, workplace investigation process, and CCC process. The procedural fairness provisions are appropriate. The effectiveness of such provisions can only be identified by how the provisions are applied. Given the range of different capacity in managing PIDs across the sector, information to help entities apply a minimum standard would be beneficial.

c. assess and minimise the risk of reprisals?

This is prescribed by QO Standards.

26. Should a discloser be able to opt out of protections afforded under the Act, such as the requirement to receive information or be provided support? Should this only apply to role reporters, or to any type of discloser?

It should be open to any type of discloser to opt out of protections afforded under the PID Act. However, this decision, and the impacts of this decision, should be clearly communicated in writing to the discloser.

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

27. Are the current protections for disclosers, subject officers and witnesses appropriate and effective? Should additional or alternative protections be considered?

The current protections for disclosers are appropriate in that they outline what protections can practically be afforded to them.

As there is also a duty of care for subject officers (given that they are generally also employees of the public service), there would be merit in outlining the protections that could be afforded to the subject officers, and the support to be provided to them.

28. Are the current provisions about confidentiality adequate and fit for purpose? Should any improvements be considered?

While common sense would prevail in considering what information may need to be legitimately disclosed to relevant persons for business continuity purposes (ie, relevant managers of staff involved in a PID, etc) and in

consultation with the discloser, experience suggests that without some more specific guidance in the PID Act or PID Standards, managing operational activities around PID matters can become onerous and complex for agencies and all parties involved.

Additionally, there has been discussion that disclosers are not subject to the confidentiality provisions under section 65 of the Act, with the argument being they are not involved in the “the Act’s administration”. That view is not shared by the current Oversight Agency, or many practitioners. To remove the issue from doubt it **is recommended that section 65 be amended to make it clear that disclosers are subject to the confidentiality provisions of the Act**

In relation to confidentiality considerations when consulting with other entities while assessing a disclosure, the department agrees with the Ombudsman’s recommendation that the PID Act be amended to clarify this.

**29. Is the definition of reprisal appropriate and effective? Do any issues arise in identifying, managing and responding to reprisals?**

Reprisal can be a complex area of the PID Act to manage. The absence of prosecutions and QIRC cases deeming agency actions as either reasonable management action or action taken against a discloser that is not directly related to the PID reinforces that view.

The definition of ‘reprisal’ is sufficiently clear so as to enable a reasonable consideration of the elements that may make up reprisal action.

**30. Is there a role for an independent authority to support disclosers in Queensland? If so, what should its role be?**

Given the varying capacity of public sector entities to provide PID administration and support, an independent authority in Queensland to support disclosers would ensure there was a consistent support approach across the sector.

It would be envisaged that such an authority would not engage in addressing the subject of the PID matter itself, but rather would provide the more standard support of:

- Providing advice and support to disclosers about their rights and options
- Promoting best practice policy in collaboration with existing oversight agencies
- Supporting facilitated mediated outcomes if disclosers experience reprisals

The Department acknowledges the Coaldrake Report’s indicated reluctance to recommend the creation of new integrity bodies within the Queensland Government and would support for such a function to sit within an existing integrity body such as the QO.

### 3.8 Remedies

**31. Are the remedies available to disclosers under the PID Act reasonable and effective? Are any changes needed?**

The Department has no experience of a discloser seeking a remedy for reprisal action. The Department acknowledges a reprisal is actionable in both criminal and civil law, as well as via complaint under the *Anti-Discrimination Act 1991*, however the PID Act does not include provisions about the interaction of civil and criminal remedies.

The Department considers it would be beneficial for the PID Act to clarify interaction of all relevant remedies.

### 32. Do the evidentiary requirements for remedies need amendment?

Given the interplay of civil and criminal remedies, the department recommends legal advice is sought on this question.

### 33. Are the provisions permitting complaints to the Queensland Human Rights Commission appropriate and effective? What role should alternative dispute resolution play in resolving disputes?

The Department supports disclosers submitting complaints of reprisal to the QHRC. The Department notes that in recent years the QHRC has dealt with only a small number of these complaints. There is no information available to determine if the small number of complaints may be due to disclosers not knowing that they can complain to the QHRC.

Alternative dispute resolution (ADR) is a significant course of action to resolve disputes. However, ADR is usually most effective when the parties to disputes are open and willing to discuss the issue in good faith. The widely established view of a PID is that a PID is of such significance that it must be some misconduct of the most extreme. Because of this view, the most risk adverse risk management strategies can include the removal of a person from the workplace / work unit, which can commonly result in a total breakdown in workplace relationships.

Given this dynamic, it is unlikely that ADR would be a resolution method to which the discloser and / or subject officer would agree. If ADR were to be utilised for maximum benefit, it would be best implemented at the beginning of a process. Of course, careful risk/benefit consideration would need to be given to the nature of the matter and the circumstances of the parties involved.

### 34. Do you support an administrative redress scheme for disclosers who consider they have experienced reprisals?

As described in the issues paper, it is envisaged that a redress scheme would be an administrative process for *disclosers or other parties who have experienced detriment as a result of making a disclosure or their involvement in a PID*. There would need to be specific information on what 'involvement in a PID' means.

If such a scheme were run by an appropriately authorised and experienced agency, the department would support such an initiative in the interest of supporting accountability and transparency of Government agency decision making.

## 3.9 Role of the oversight agency

### 35. Are the Queensland Ombudsman's functions and powers suitable and effective for the purpose of the oversight body?

The training and advice efforts and assistance to practitioners by the very small unit of the QO devoted to the PID Act's oversight are greatly appreciated and very professional.

Consideration of potential conflicts of interest that may arise as a result of the QO having advisory functions for both disclosers and proper authorities, as well as compliance and adjudication functions, is acknowledged.

It is also acknowledged that the QO carries out its review functions using its powers under the *Ombudsman Act 2001* to investigate administrative actions and make recommendations and reports.

Notwithstanding, it seems unusual that with over 85 % of PIDs being about corrupt conduct (based on numbers published in QOO Annual Report 2021/22) and operational actions of CCC officers outside the jurisdiction of the Ombudsman, that the QOO remains the oversight agency. Add to that argument that the CCC is the body



approved under the Act to investigate breaches of the Act by public officers. Oversight should be done by an agency such as the CCC that can investigate the very serious corruption and criminal matters involved in PIDs and that has the powers to review their investigation and management by agencies.

36. Are there any conflicts between the Queensland Ombudsman’s advisory and review functions for PIDs? If yes, how could these be managed or resolved?

As noted above, it is acknowledged there may be potential conflicts of interest in the different roles the QO plays. However, given those functions are provided by different teams and persons within the QO the conflict should be able to be managed by typical “glass wall” and governance/delegation arrangements.

37. Do the roles of integrity bodies overlap during the PID process? Are changes needed or do the existing arrangements work effectively?

The Department acknowledges there may be overlap during a PID process given the QO is the oversight body for PIDs, however around 85% of PIDs are corrupt conduct matters<sup>1</sup>, with the CCC as the oversight body for that corruption matter. There is also the Public Sector Commission Directive on managing employee grievances, and customer complaint processes. These different elements can present some complexity for how a matter is managed, given that these processes are attached to different legislation.

However, this complexity may be simplified with some more guidance tools on how the different requirements interact. For example, an employee grievance has a prescribed process to follow. If the matter is determined to be corrupt conduct and a PID, there is consideration of some extra requirements that need to be applied under the CC and PID Acts.

38. Are the Standards published by the Queensland Ombudsman effective? Are changes needed?

The PID standards are considered to be comprehensive and represent best practice. However, the Standards would of course need to be updated to reflect any changes to the PID Act.

39. Do you agree with the recommendations of the Queensland Ombudsman’s 2017 review?

The department is supportive of the Ombudsman’s findings and recommendations of his 2017 review, namely:

- focus the PID Act on disclosures by public sector officers of internal wrongdoing
- broaden the coverage of the Act to protect from reprisal all those persons who are engaged in public sector workplaces, and thereby have access to information about wrongdoing, including contractors, volunteers, trainees and students
- improve the administration of the PID Act by public sector agencies
- provide review rights for administrative decisions made by public sector agencies under the PID Act
- enhance the clarity of the PID Act
- strengthen oversight of the PID Act.

### 3.10 Practical considerations

40. Should the PID legislation be more specific about how it interacts with any other legislation, process or scheme?

It would be beneficial if there was clarity on how the PID Act interacts with other relevant legislation (as discussed above). It would also be beneficial to clarify how to consider PID information with the requirement to respond to a Workers Compensation claim (*Workers’ Compensation and Rehabilitation Act 2003*), Right to Information application (*Right to Information Act 2009*) and/or privacy complaint (*Information Privacy Act 2009*).

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<sup>1</sup> Queensland Ombudsman Annual Report 2021-22

**41. Should the PID legislation include incentives for disclosers? If so, how should they operate?**

A reward scheme such as those used in the United States, Canada, United Kingdom, Malaysia and South Korea where a discloser is awarded a portion of funds recovered in proceedings made possible by their disclosure is not supported. This may encourage false and vexatious complaints. It may also perpetuate a litigious culture in the public sector.

A reward scheme should be unnecessary, given it is public servants duty to report serious wrongdoing.

However, the department would support considering the other forms of non-monetary rewards, such as public honours or publication of 'success stories' (subject to confidentiality requirements) where reporting has led to the uncovering of systemic issues. Such reporting would also have a broader impact of communicating the positive side of 'whistleblowing'.

**42. Are current arrangements for training and education about the PID Act effective? How could they be improved?**

As stated above, the training and advice efforts and assistance to practitioners by the very small unit of the QO devoted to the PID Act's oversight are greatly appreciated and very professional.

It would be beneficial if the Training, including the Ombudsman's "PIDant" network meetings for agency PID Coordinators and Government agency personnel involved in PID management could be more regular.

Training and awareness raising for Government agency staff is a constant effort made difficult in a crowded agenda of mandatory training for public servants. A more considered education/information sharing approach where central agencies provide de-identified success stories to CEOs to share within their entities may be a useful initiative and show support/tone from the top.

**43. How could an effective PID scheme provide for the needs of First Nations Peoples, culturally and linguistically diverse people and those in regional or remote communities?**

Experience suggests that managing PIDs in small communities is inherently more complex due to social and familial relationships.

The PID Act will need to align with the Queensland Government's commitment to reframe the relationship with Aboriginal and Torres Strait Islander people. It is considered that the close and extensive use of cultural advisors to support the entire PID process would be needed as well as extensive education and awareness campaigns run by local personnel with assistance from the oversight agency to explain the PID process and the rights and obligations of all parties.

Similarly from a diversity and inclusion lens, how to approach and engage with a party who is culturally and/or linguistically diverse should be one of the first considerations when a matter is received. The Queensland sector's framework for managing complaints is silent on how to be proactive in considering the diverse needs of people. Perhaps the PID Act, or the Standards, can provide some more guidance on how to build this in to the initial assessment phase.

**44. Is the PID Act accessible and easy to understand? How could the clarity of the Act be improved?**

The PID Act is complex and drafted in a way that does not permit easy reading or comprehension. A redraft with a focus on ease of reader understanding would be in order.