

Submissions
Department of Transport and Main Roads

Attachment 1

This attachment comprises responses to the set of questions contained within the submission received by the Ethical Standards Unit (ESU) on 30 January 2023.

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?

- The Ethical Standards Unit (ESU) is of the view the objects of the PID Act are valid. The PID Act is valuable legislation. It enlivens protections for members of the public and public officers, who have statutory obligations to report matters of suspected corrupt conduct, serious misconduct and serious wrongdoing in the workplace. Disclosers who report wrongdoing may be exposed to a greater risk of counter actions by subject officer(s) or their respective agency. These counter actions may include reprisal, civil liability, and defamation. The Department of Transport and Main Roads (TMR) has experienced incidents of both reprisal and defamation attributable to someone making a Public Interest Disclosure (PID). In those incidents, the PID Act was relied upon to address these counter actions.
- The protections in the PID Act have been effective in ensuring person(s) who report wrongdoing are supported and any party engaging in such conduct is dealt with accordingly.
- Further, confidentiality provisions in the PID Act support Human Rights considerations of reputation and privacy for all persons in accordance with the section 25 of the *Human Rights Act 2019*.

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?

- The ESU is of the view that the legislation is aptly named in its current form. The definition of a disclosure is *'the act of making something known or public that was previously secret or private'*. While the title does not reference wrongdoing itself, the terminology aligns with the purpose and spirit of the PID Act.
- The terminology 'wrongdoing' is currently referenced in *Public Interest Disclosure Standard No. 1/2019* (the Standard), and is further defined in section 6, 'Definitions' of the Standard. The Standard is binding on all public sector entities within the meaning of section 6 of the PID Act. Further reference in the legislation may be considered, although it is not essential.
- It is acknowledged that the terminology 'whistleblower' is widely known and used due to its exposure to a global audience., It is further suggested that the word was introduced to replace common words such as 'snitch' and 'informer'. During delivery of Ethical Awareness sessions in 2022 to approximately 2000 staff, the ESU noted, there was a consensus amongst employees suggesting the word 'whistleblower' does have a negative connotation. There is a sense that in being labelled a 'whistleblower' the person disclosing the information may be subject to adverse criticism by others.

On this basis, it is considered that the terminology used to refer to someone who reports wrongdoing as a 'discloser' is appropriate.

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

- It is considered that the current review of legislation is appropriate and necessary to ensure public confidence that the PID Act achieving its purpose.
- A Queensland Industrial Relations Commission (QIRC) process recently highlighted a matter involving the release of identifying information. The PID Act does refer to circumstances where confidentiality provisions do not apply. It is reasonable to acknowledge that a judicial or tribunal process cannot be fully concluded without being privy to specific information. It is suggested consideration should be given as to whether the publication of identifying particulars in those decision documents meets the public interest test.
 - With reference as to whether the public disclosure of identifying information is in the best interest of the public, consideration was given to the fact that responsible and open government supports the public interest test. This acknowledges the presumption in favour of disclosure of information. However, when using information subject to a PID in another judicial or tribunal process, consideration should be given to identifying whether disclosing identifying particulars of a person subject to the PID meets the public interest test, i.e. was the disclosure of that information necessary to maintain open and honest government, did it enhance government accountability, or contribute to positive and informed debate on issues of public importance.
- It is suggested that the public's confidence in the integrity of the PID regime may be compromised by the knowledge that someone's identifying information can be published. This action may impact the individual(s) concerned. It is recommended that an assessment be conducted considering whether the release identifying information meets the public interest test and if it does not, then the identifying information should be redacted.
 - In support of this view, it was noted in a recent matter that, by virtue of a discloser exercising their right to challenge a workplace decision in the QIRC, a subject officer, who had no previous knowledge of the PID, was exposed publicly. This left the subject officer with concerns that their reputation had been tarnished both publicly and professionally. The subject officer had no knowledge of the matter as preliminary enquiries identified there was no evidence to support the disclosure. A decision was made that no further action was required.
 - It is important to note in this matter, that more than one complaint formed part of the application before the QIRC and the PID only formed a small part of that application. Further, the application was not about the PID itself, but a decision made by the agency about the discloser's work location.

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

- Yes, section 25, of the *Human Rights Act 2019*, refers to a person's reputation and privacy. As mentioned above in question 3, by virtue of a discloser exercising their right to challenge workplace decisions in the QIRC, a subject officer who had no previous knowledge of the PID was exposed publicly. This left the subject officer with concerns their reputation had been tarnished both publicly and professionally.
- In instances where decisions are to be published, it is recommended the PID Act should consider the subject officer. In terms of whether the release of those identifying particulars is necessary to ensure the open and honest administration of government. If the release of that information does not meet the public interest test those identifying particulars should be redacted to protect the reputation and privacy of persons subject to the PID.

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?

- In its current form the PID Act does not apply to individual grievances such as sexual harassment and bullying by colleagues in the workplace. These matters may not meet the definition of corrupt conduct as outlined in the *Crime and Corruption Act 2001*. However, in serious sexual harassment and or bullying incidents, employees reporting these matters are often the most vulnerable. This is particularly the case if a person the allegation is raised against is a supervisor/manager. Further, the report of wrongdoing which may commence as an individual grievance, may later expose larger systemic concerns. These matters should be afforded protections under the PID Act.
- It is noted that similar findings were identified in the review of the Commonwealth PID Act indicating that '*occasionally, a personal employment-related grievance can be symptomatic of a larger, systemic concern... Such concerns should attract the protection of the PID Act.*'
- Currently, the only mechanism to deal with these concerns is reliance on the *Code of Conduct for the Queensland Public Service*. This option may suffice for individual employee grievances to be dealt with in the first instance. Unfortunately, it does not adequately address systemic concerns. In these circumstances, there are inadequate protective provisions in place to mitigate adverse action(s) toward the complainant. These types of concerns should attract the protection of the PID Act.
- It is noted, that in these cases, witnesses who come forward to inform inquiries into this type of wrongdoing are also vulnerable. The PID regime should cover incidents.

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?

- Yes, although the Ombudsman identifies that a low percentage of reports are made by this group of reporters, they are still exposed to counter actions and vulnerable to harm.
- The ESU is of the view that the protections should remain for this type of disclosure.

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

- There would be a benefit to a risk of harm test being include in the PID Act. It has been identified that in some instances, individual grievances may lead to broader systemic concerns; this is specifically noted in incidents involving harassment, intimidation, and sexual harassment in the workplace.
- It is also noted that complainants subject to serious individual grievances, and vulnerable witnesses who participate in the investigation process, are vulnerable to counter actions in the workplace. This may be due to their participation in the grievance process. The emotional stress experienced by those witnesses should not be overlooked or understated just because they did not provide the initial disclosure. Reprisal action is often a deciding factor in reporting such concerns.
- The alternative option explored by the Queensland Ombudsman in deciding PID status has merit. This option is based on the risk of harm the conduct creates rather than the criminality or illegality of the conduct.

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?

- No, the PID Act is appropriate in its current format. It provides broad consideration for a person who may report a matter that the information disclosed demonstrates wrongdoing.
- A person's state of mind could be situational and subjective dependent on the person reviewing the disclosure. An over emphasis on a person's state of mind could expose the agency to discrimination and or the opportunity to expose wrongdoing in the workplace.

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?

- Yes, the three categories of disclosers should be retained. Information provided by a discloser(s) ensures that the Government is able to deal with all matters pertaining to corrupt conduct and serious wrongdoing in the first instance to effect open and honest administration.
- The ESU submits that all three categories of disclosers should be protected by the PID scheme.

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, the definition should be expanded to include those performing services for the public sector, whether paid or unpaid. Persons performing those services for the public sector may be exposed to conduct that is reportable and or observe conduct that does meet the definition of a PID.

- TMR has investigated concerns raised by individuals who are not within scope of the definition of a public officer. The concerns raised included fear of counter actions involving threats to future employment or career opportunities.
- The PID Act in its current form adequately covers the timeframe for public officers to report.

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?

- Yes, during the course of investigating a matter there are incidents whereby a witness has also been subject to the same conduct or has witnessed the conduct under question. To only afford witnesses protection from reprisal under the PID Act does not afford them adequate protection against counter actions, such as defamation and civil liability for participating in the investigation process.
- Any person making a disclosure and/or providing information as a witness may be reluctant to do so for fear of being subject to reprisal. Therefore, consideration should be given to expanding the scope concerning who is eligible to make PIDs. This will ensure greater protections are afforded to those persons under by the PID regime and opportunities to deal with corrupt conduct and or serious misconduct are not missed.
- Further, any person deemed a PID should have the option to opt out of the PID process if they feel it is unnecessary in their circumstances.

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

- It is suggested that a measured approach should be undertaken for a role reporter. A role reporter is not only a person who may audit or review data as part of their duties, and therefore the necessity for PID provisions would be minimal, they are also a person who has to be part of an administrative process in the management or resolution of a PID, such as a Human Resource Officer.
- A role reporter should be provided the option to opt out of protections afforded under the PID Act. However, consideration needs to be given to the fact that in their role those persons are also subjected to complaints because of the PID reported. Therefore, they may be subject to counter actions, such as civil, reprisal and or defamation action.

Experiences of people who witness and report wrongdoing

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

- The ESU retains responsibility for the assessment and management a PID and is not a discloser. The ESU is of the view that firsthand experience of being a discloser will be provided by those disclosers making submissions to Honourable Alan Wilson KC.

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?

- The ESU retains responsibility for the assessment and management a PID and is not a discloser. The ESU is of the view that firsthand experience of being a discloser and the factors that impacted their decision to report wrongdoing will be provided by those disclosers making submissions to Honourable Alan Wilson KC.

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

- The ESU retains responsibility for the assessment and management a PID and is not a discloser. The ESU is of the view that firsthand experience of being a discloser, and the support they received during the management and resolution of a PID process, will be provided by those disclosers making submissions to the Honourable Alan Wilson KC.

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

- The ESU retains responsibility for the assessment and management a PID and is not a discloser. The ESU is of the view that firsthand experience of being a discloser will be provided by those disclosers making submissions to Honourable Alan Wilson KC.

Making, receiving, and identifying PIDs

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

- The requirements 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?

- TMR has a robust complaint process that allows for multiple reporting pathways. There are mechanisms in place to ensure those PIDs are referred to and managed by the ESU.
- The ESU sees no impediment to a third-party PID hotline.

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

- Protections should come into effect once the initial disclosure is made. The receiving agency may need time for the matter to be fully assessed, such as reporting matters under the *Crime and Corruption Act 2001*. However, this should not mitigate the protections available under the PID Act until such matters have been fully reviewed.

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?

- The current format for acknowledging a PID is appropriate.
- As current PID assessments are not binding agreements, it does allow for an agency to assess a disclosure based on initial information and to be formally re-assessed as part of a Crime and Corruption Commission (CCC) assessment. An additional benefit,

as outlined by the Queensland Ombudsman, is the retrospective acknowledgement of a PID.

- The Ombudsman suggestion for a written decision to be incorporated into the PID Act does provide transparency regarding the receipt and management of a complaint/disclosure. However, the onus on further managing employees' expectations, outside of an already robust complaint process, is onerous and further depletes a tired workforce; specifically post COVID-19. To have employees self-diagnosing what they consider their complaint to be and then to manage their perceptions and expectations can be quite difficult on agencies.

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 provisions in their current form are effective.

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?

- The current arrangements are appropriate and effective.

Managing, investigating, and responding to PIDs

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

- Yes. The requirements for managing, investigating, and responding to PIDs is appropriate and effective.

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

- The Department is positioned to provide support to disclosers, subject officers and witnesses.

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? – Action is usually taken post investigation to implement effective controls or require specific training to resolve the wrongdoing and prevent recurrence.

b. provide procedural fairness to the discloser, subject officer and witnesses? – current process is sufficient.

c. assess and minimise the risk of reprisals? –action is usually taken at the time a disclosure is received to assess the risk of reprisal and implement protection strategies commensurate with those risks.

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?

- A discloser should be able to opt out of protections afforded under the PID Act. However, consideration should be given to any change in circumstances which may alter the wellbeing and safety of the discloser in the workplace or the discloser's access to information and or support.

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 PID Act does not currently provide adequate protections for witnesses who participate in investigations.
- Witnesses are vulnerable to counter actions as the result of a PID and appropriate protections should be available in the PID Act to protect those persons. This may further ensure the integrity of the PID regime.
- Relying on protections available under other legislation, that may or may not address some or all the needs of these individuals, may not assist in ensuring the safety and wellbeing of those individuals who participate in a PID.
- Consideration should be given to issuing subject officers more detailed information including a cautionary letter and fact sheets specifically outlining the PID process and removing any doubt about the consequences of engaging in any conduct which may constitute a reprisal.

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

- There appears to be some inconsistency with the provisions of the PID Act and a person's right to natural justice. Balancing the subject officer's right to natural justice and the release of confidential information is subjective. Although confidentiality may be done well in the investigative process, the same considerations may not be applied during an administrative process undertaken by the agency.
- This lack of clarity can leave witnesses, who may be at serious risk of harm, exposed to counter actions in the workplace as they are considered to not have the same protections as the discloser or subject officer regarding confidentiality.

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

- The definition of reprisal is appropriate.
- However, there has been some issue in identifying reprisal action, specifically in the case of defamation action whereby other justifications were provided for the basis of such action.
- In reprisal matters it has been observed that a 'Decision Maker's' understanding of the intricacies of law may be limited. Therefore, accepting findings in a report may be subjective, given that proving, in some instances, that a person has knowledge and or belief is arguable and often direct knowledge or belief cannot be proven. In these instances, an investigation may rely upon facts known, including the circumstances surrounding those facts. This may lead a reasonable person to draw no other conclusion than that the subject officer was aware that a complaint had been made and particular persons would or may be involved in that process.
- It is noted that the word knowledge is not used in the grounds of reprisal. However, the inference that knowledge must exist, with reference to *because, or in the belief that-* is arguably inferred.

- It is recommended that education and training be provided to delegates/decision makers to assist in the resolution of a PID.

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

- TMR provides several options to a discloser to ensure appropriate support and or access to support is provided. Options will include the provision of an independent support officer and access to confidential support from the department's Employee Assistance Service, Benestar. Benestar offers confidential support, debriefing and counselling services.

Remedies

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

- The remedies currently available are reasonable and effective.

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

- Yes, there are evidentiary considerations that would benefit from a review and some amendment. The issues that a discloser may be subject to, such as, proving detrimental action was taken '*because of a PID, or an intention to make a PID*' can be difficult to prove.
- The issues paper does reference that the PID legislation in New South Wales and New Zealand have attempted to address this matter with a balanced approach. This does appear to have reasonable merit. Issues such as natural justice are a consideration. However, natural justice considerations should be a right to all parties subject of the PID and reversing the onus to the defendant when a prima facie case has been presented is not dissimilar to a notice to show cause pursuant to section 188 of the *Public Service Act 2008*.

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?*

- Yes, provisions are appropriate and effective.
- Alternative dispute resolution remains a valid option to resolve disputes.

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

- Yes, an administrative redress scheme affords disclosers who have been reprised against with an option to seek redress.

Role of the oversight agency

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

- Yes, the Queensland Ombudsman's functions and powers are suitable and effective for the purpose of an oversight body.

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?*

- None that has been identified.

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

- The roles of integrity bodies do have some overlap, however, the existing arrangements work effectively.

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

- The Standards are effective and provide some much needed organisational and procedural guidelines in order to establish and give effect to the requirement under section 28(1)(d) of the PID Act.

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

- Yes.

Practical considerations

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

- Yes, notwithstanding a person's right to information or a right to a hearing regarding decisions made by their respective agency. The PID Act should be taken into consideration before a person subject of the disclosure, or who provided evidence as a witness in a disclosure investigation, is publicly exposed. The damage to a person's reputation and or exposure to counter actions may leave them at risk of harm. The disclosure of such information should be taken into consideration when weighing the public's right to know.

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

- No, as public sector employees there is a statutory obligation that is imposed to report wrongdoing in the workplace. An incentive may be considered an inducement and may also further highlight or bring into question the intent behind the disclosure in the first instance.

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

- Training offered by the Queensland Ombudsman is effective, easy to access and a great resource. PID information is included in Ethical Awareness Training provided by the ESU.

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?*

- There is no differentiation or discrimination that forms part of the PID scheme. The same protections apply to all. However, further education and support for training of agencies and or support officers to acknowledge the needs of First Nations people may assist in appropriately managing cultural sensitivities.

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

- The PID Act is very accessible and the PID Act itself is easy to understand. However, the application of the PID Act in conjunction with other judicial or tribunal processes, and or the provision of natural justice, seems often to be misunderstood.