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Review of the

Public Interest Disclosure Act 2010

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A review pursuant to s.62 of the *Public Interest Disclosure Act 2010*

January 2017

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10 January 2017

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Minister for Training and Skills
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The Honourable Peter Wellington MP
Speaker
Parliament House
George Street
BRISBANE QLD 4000

Dear Attorney and Mr Speaker

In accordance with s.62 of the *Public Interest Disclosure Act 2010*, I hereby furnish to you my report on the review of the operation of the Act.

Yours faithfully


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Foreword

Disclosures about wrongdoing in the public sector are an essential element in Queensland's system of accountability.

Queensland's *Public Interest Disclosure Act 2010* (the PID Act) has been in operation since 1 January 2011 to 'facilitate disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection to those who make disclosures'.¹

As required by s.62 of the PID Act, the Office of the Queensland Ombudsman, as the oversight agency, has undertaken a review of the operations of the PID Act. The terms of reference for the review were approved on 2 November 2015.

The review process has included release of an issues paper, consideration of written submissions from stakeholders, informal consultations with stakeholders, research into the arrangements for public interest disclosures (PIDs) in other jurisdictions and consideration of national and international studies about whistleblowing.

There is a strong case for Queensland to continue to have a stand-alone Act that encourages PIDs and provides protections for those who make disclosures. This is in line with international best practice and stakeholders were in favour of maintaining an Act for this purpose.

Through consideration of stakeholder feedback, further research and consultation, I have identified four key areas for improvement in the PID Act:

1. a sharper focus on wrongdoing in the public sector
2. stronger but streamlined requirements for managing PIDs
3. more effective support for disclosers and practical mechanisms to address reprisal
4. a more rigorous oversight role.

This report provides information about issues considered in the review process and makes recommendations for improving the functionality and effectiveness of the PID Act.

This review has benefited from the input of public sector agency representatives, members of the public and academics who have communicated their different observations, insights and perspectives. I thank all those who have contributed to the review for their assistance.

Phil Clarke
Queensland Ombudsman

¹ *Public Interest Disclosure Act 2010 Purpose.*

Dictionary

Term	Meaning
ACT PID Act	<i>Public Interest Disclosure Act 2012 (ACT)</i>
ADCQ	Anti-Discrimination Commission Queensland
Commonwealth PID Act	<i>Public Interest Disclosure Act 2013 (Cth)</i>
corrupt conduct	Has the same meaning as in s.15 <i>Crime and Corruption Act 2001</i>
CCC	Crime and Corruption Commission
discloser	A person who makes a PID
GOC	Government Owned Corporation. For the purposes of the PID Act this is defined at Schedule 4 as 'a GOC and a prescribed GOC subsidiary under the <i>Government Owned Corporations Act 1993</i> '
issues paper	Issues paper for the review of the <i>Public Interest Disclosure Act 2010</i> , published by the Office of the Queensland Ombudsman in November 2015
NSW PID Act	<i>Public Interest Disclosures Act 1994 (NSW)</i>
NT PID Act	<i>Public Interest Disclosure Act (NT)</i>
PID	A public interest disclosure
PID Act	<i>Public Interest Disclosure Act 2010 (Qld)</i>
PID Coordinator	An officer nominated by the chief executive officer of an entity, in accordance with the PID Standard, with responsibility for issues related to the management of PIDs
PID Standard	Public Interest Disclosure Standard No. 1, issued by the Queensland Ombudsman under s.60 of the <i>Public Interest Disclosure Act 2010</i> , effective 1 January 2013
proper authority	Is defined at s.5 of the PID Act and includes a public sector entity and a member of the Legislative Assembly
public sector entity	Is defined at s.6 of the PID Act and includes a department, a local government, a registered higher education provider or TAFE Queensland, an entity established under an Act or under State or local government authorisation for a public, State or local government purpose
public officer	Is defined at s.7 of the PID Act and includes an employee, member or officer of a public sector entity
purported PID	A complaint that is claimed to be a PID but has not been assessed as meeting the requirements under the PID Act to be assessed as a PID
the Office	The Office of the Queensland Ombudsman
OHO	The Office of the Health Ombudsman
Ombudsman	The Queensland Ombudsman, appointed under the <i>Ombudsman Act 2001</i>
oversight agency	Section 58 of the PID Act provides that the Office of the Queensland Ombudsman is the oversight agency
QCAT	Queensland Civil and Administrative Tribunal
subject officer	The person about whom a PID is made
TAS PID Act	<i>Public Interest Disclosures Act 2002 (Tas)</i>
VIC PD Act	<i>Protected Disclosure Act 2012 (Vic)</i>
WA PID Act	<i>Public Interest Disclosure Act 2003 (WA)</i>
whistleblower	A commonly used term for 'discloser', drawn from the repealed <i>Whistleblowers Protection Act 1994 (Qld)</i>

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Executive summary

This report presents the findings and recommendations from the review of the *Public Interest Disclosure Act 2010*, conducted pursuant to s.62 of the Act. Section 62 of the PID Act requires that the oversight agency commence a review of the Act within five years of the commencement of that section. Section 62 sets out the objects of the review, including:

- deciding whether the main objects of the Act remain valid; and
- deciding whether the Act is achieving its main objects; and
- deciding whether provisions of the Act are appropriate for achieving its main objects.

The objects of the PID Act are set out at s.3 and include to:

- promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector
- ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with
- ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure
- provide protection from reprisals to persons making public interest disclosures.

Review process

In November 2015, I published an issues paper, the purpose of which was to inform stakeholders about the current operations of the PID Act, identify issues for consideration during the review and call for submissions.

Twenty six submissions were received in response to the issues paper, of which 23 were published on the Office's website.² The majority of submissions were received from public sector entities responsible for implementing the PID Act, including 11 State Government departments, two local governments and two public universities. Five submissions were received from parties outside the public sector, including two from people who had previously made PIDs, and two from advocacy groups.

Analysis of the submissions demonstrated that respondents were generally supportive of the PID Act's objects. However, respondents identified a broad range of issues with the operation of the PID Act. Public sector entities particularly raised concerns about the:

- need for greater clarity about applying key definitions and provisions of the PID Act
- complex drafting of some sections of the PID Act
- requirements for assessing and investigating PIDs
- implications of the confidentiality provisions at s.65
- lack of focus on subject officers.

Disclosers/advocacy groups highlighted concerns about:

- effectiveness of PID Act protections
- lack of clarity when a matter involves more than one public sector entity
- lack of accountability, particularly in relation to timeliness.

Research undertaken during the course of the review included analysis of data on PIDs reported to the oversight agency since the commencement of the PID Act, a comparative analysis of PID legislation in other states and the Commonwealth, and the preparation of internal discussion papers on key issues raised in the review. Consultation was undertaken with key stakeholders in relation to the proposed findings and recommendations.

² Refer to <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/review-of-the-public-interest-disclosure-act>.

Findings

The PID Act is a key element of the public sector integrity framework in Queensland. It supports ethical conduct in the public sector by encouraging a pro-disclosure culture. It also supports Australia's commitment to its international obligations in accordance with the United Nations Convention Against Corruption, and OECD and G20 protocols.

Although I have highlighted in my report a number of technical, operational and implementation issues with respect to the PID Act, I am satisfied that the objects of the Act are valid and appropriate.

I consider that there are a number of changes that should be made to the PID Act to:

- focus the 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.

It is timely that the PID Act be amended to ensure that it effectively achieves its objects, reflects current best practice in legislative drafting and contributes to the integrity and transparency of the Queensland public service.

Recommendations

As a result of my review of the PID Act, I make the following recommendations:

Recommendation 1

The objects of the PID Act remain valid and do not require amendment.

Recommendation 2

The title of the PID Act should be amended to incorporate both the terms 'whistleblower' and 'public interest disclosure'.

Recommendation 3

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

Recommendation 4

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

Recommendation 5

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

Recommendation 6

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

Recommendation 7

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

Recommendation 8

The PID Act should be amended to expressly state that a disclosure by a public officer includes a disclosure of information falling within the definition of a PID that is made by the officer in the ordinary course of the officer's performance of their duties.

Recommendation 9

The definition of 'public officer' at s.7 of the PID Act should be amended to encompass all persons performing duties in and for public sector entities, whether paid or unpaid, so as to include volunteers, contractors (including the employees of organisations engaged under contracts for service), trainees, students and others in employment-like arrangements in the public sector.

Recommendation 10

The PID Act should be amended to provide that the Act continues to apply to a 'public officer' for up to 12 months after separation from employment (or termination of their appointment as a contractor, or the end of their engagement as a volunteer, student or similar), for the purpose of making a PID and receiving the protections under the PID Act.

Recommendation 11

The PID Act should continue to provide multiple pathways for a PID to be made and allow disclosers to choose to whom they make their disclosure.

Recommendation 12

Section 28(1) of the PID Act should be amended to require that chief executive officers of public sector entities ensure that public officers are provided with information about their rights and responsibilities under the PID Act.

Recommendation 13

Section 28(1) of the PID Act should be amended to require that chief executive officers of public sector entities ensure that supervisors, managers and other officers with responsibility for receiving and assessing disclosures are provided with appropriate training to fulfil their responsibilities.

Recommendation 14

Section 19(2) of the PID Act should be amended to allow an employee of a GOC or rail government entity to make a disclosure to the Auditor-General, in addition to the GOC, rail government entity and the Crime and Corruption Commission.

Recommendation 15

The PID Act should be amended to provide specific authority for chief executive officers of public sector entities to take reasonable steps to assess disclosures before determining whether the disclosure is a PID, whether the entity should decide no action is required in accordance with s.30 or whether referral of the disclosure is required in accordance with s.31. This should include consultation with the discloser (where practicable), and other public sector entities.

Recommendation 16

Section 65(3) of the PID Act should be amended to clarify that making a record of confidential information or disclosing it to someone else is permitted for the purpose of taking reasonable steps to assess disclosures, including consultation with other public sector entities.

Recommendation 17

The PID Act should be amended to provide that chief executive officers of public sector entities may assess a disclosure and determine whether the disclosure is a PID in accordance with the PID Act.

Recommendation 18

The PID Act should be amended to require a chief executive officer, who has assessed a disclosure, to provide the discloser with a written decision informing them whether the disclosure has been assessed as a PID in accordance with the PID Act, including reasons for the decision and information about the discloser's review rights.

Recommendation 19

The PID Act should be amended to require the chief executive officer of a public sector entity to complete the assessment of a disclosure, and communicate in writing the outcome of that assessment to the discloser, within one month of receipt of the disclosure.

Recommendation 20

The PID Act should be amended to require the chief executive officer of a public sector entity to provide a status report on the management of a PID to the discloser every two months, commencing from the date the discloser was informed that the disclosure had been assessed as a PID, until the PID has been resolved/closed or action finalised.

Recommendation 21

The PID Act should be amended to provide that a discloser may apply to the oversight agency for review of a PID investigation if the discloser has not been advised by the public sector entity managing the PID that the PID has been finalised within six months from the date the disclosure was assessed as a PID.

Recommendation 22

Section 29(1) and (2) of the PID Act should be amended to require the chief executive officer of a public sector entity to which a disclosure is made or to which a disclosure is referred (under s.31 or s.34) to include key dates as part of the proper record of the disclosure, including the date the disclosure is received, the date the assessment of the disclosure is completed, the dates when any investigation is commenced and completed, and the date when the PID is resolved/closed or action finalised.

Recommendation 23

The PID Act should be amended to clarify that a public officer may make a disclosure of information about any public sector entity, not limited to the public sector entity within which they are employed or engaged.

Recommendation 24

The PID Act should be amended to provide that the chief executive officer of a public sector entity managing or investigating a PID must consult the discloser (where practicable), before contacting the discloser's public sector employer or other stakeholders for the purpose of undertaking a risk assessment regarding the risk of reprisal to the discloser.

Recommendation 25

The PID Act should be amended to provide that the chief executive officer of a public sector entity must give reasonable help to another public sector entity that is managing or investigating a PID for the purpose of completing a risk assessment regarding the risk of reprisal to the discloser or others associated with the disclosure.

Recommendation 26

Section 28 of the PID Act should be amended to include a requirement that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that the interests of subject officers are taken account of in the assessment and investigation of PIDs.

Recommendation 27

Section 28 of the PID Act should be amended to include a requirement that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that procedural fairness is accorded to all parties (including the discloser, subject officer and witnesses) in the conduct of assessment and investigation of PIDs.

Recommendation 28

The PID Act should be amended to include a requirement that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that an employee of the entity who has been the subject of a PID that has not been substantiated is offered protection from detriment by the entity or other public officers of the entity.

Recommendation 29

The PID Act should be amended to include a requirement that the chief executive officer of a public sector entity that has investigated a PID must provide reasonable information in writing to the person who is the subject of the PID (the subject officer); including that the PID has been investigated, the finding at the conclusion of the investigation, obligations of the subject officer in relation to confidentiality, the support available to the subject officer, and if the matter was not substantiated that they are afforded protection from detriment.

Recommendation 30

All public sector entities, as defined at s.6 of the PID Act, should continue to be bound by the Act without exception.

Recommendation 31

Section 28 of the PID Act should be amended to make explicit that all parties to a PID (including the discloser, subject officer and witnesses) must not intentionally or recklessly disclose confidential information to anyone, except as required to cooperate with the assessment or investigation of a PID by a public sector entity, or as reasonably necessary to consult a representative, support person or health service provider.

Recommendation 32

The PID Act should be amended to make explicit whether and to what extent the chief executive officer of a public sector entity may withhold confidential information, as defined in s.65, from disclosure in response to an information request made under the *Workers Compensation and Rehabilitation Act 2003*.

Recommendation 33

The PID Act should be amended to provide for an administrative redress scheme for disclosers, witnesses and other parties who have experienced detriment as a result of their involvement in the making, assessment or investigation of a PID.

Recommendation 34

Section 40 of the PID Act should be amended to clarify who is protected from reprisal, and to include examples to assist in the interpretation and application of the Act.

Recommendation 35

The PID Act should be amended to make explicit the internal and external review rights available for each administrative decision made under the Act.

Recommendation 36

The PID Act should be amended to provide a right of external review to the oversight agency where a discloser is dissatisfied with the outcome of a public sector entity's assessment and determination about whether a disclosure is a PID (as recommended at Recommendation 17).

Recommendation 37

The PID Act should be amended to provide a right of external review to the oversight agency where a discloser, witness or other party who has experienced detriment as a result of their involvement in a PID, is dissatisfied with the outcome of a public sector entity's assessment and determination of an application under the administrative redress scheme (as recommended at Recommendation 33).

Recommendation 38

The PID Act should be amended to make explicit the oversight agency has authority to audit public sector entities' compliance with the Act, and to request information and receive cooperation from public sector entities in undertaking audits and other compliance activities.

Recommendation 39

Section 29(1) and (2) of the PID Act should be amended to require the chief executive officer of a public sector entity to keep a proper record for each disclosure of the support provided to a discloser as required by s.28(1)(a); if no action was taken under s.30, the grounds under s.30(1); whether a review was requested as permitted under s.30(3), and if so, on what grounds and details of the outcome.

Recommendation 40

Section 33 of the PID Act should be amended to make explicit that the chief executive officer of a public sector entity must give to the oversight agency any or all information mentioned in s.29 for each disclosure within 30 working days of each disclosure being resolved/finalised.

Chapter 1: Terms of reference and review process

1.1 Terms of reference

Section 62 of the *Public Interest Disclosure Act 2010* (PID Act) requires that the oversight agency (the Office of the Queensland Ombudsman), carry out a review of the operation of the Act. The review must commence within five years after the commencement of s.62. That section commenced on 1 January 2011.

Section 62 sets out the objects of the review, including:

- deciding whether the main objects of the Act remain valid; and
- deciding whether the Act is achieving its main objects; and
- deciding whether provisions of the Act are appropriate for achieving its main objects.

Guided by the requirements of the PID Act, I developed terms of reference for the review. On 2 November 2015, I approved the following terms of reference for the review:

The purpose of the *Public Interest Disclosure Act 2010* (PID Act) is to 'facilitate disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures'.

The objects of the PID Act are to:

- promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector
- ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with
- ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure
- provide protection from reprisals to persons making public interest disclosures.

Section 62 of the PID Act requires that the oversight agency must carry out a review of the operation of the Act and that review must commence within five years after the commencement of that section.

The Office of the Queensland Ombudsman (the Office) is the oversight agency for the PID Act. As the PID Act commenced on 1 January 2011, the review must commence prior to 1 January 2016.

Scope

This review will consider the operation of the PID Act. In accordance with s.62(3) of the Act, the objects of the review will include:

1. deciding whether the main objects of the PID Act remain valid
2. deciding whether the PID Act is achieving its main objects
3. deciding whether the provisions of the PID Act are appropriate for achieving its main objects.

Out of scope

For the purpose of this review, the following issues are out of scope:

- the definition of corrupt conduct (under s.15 of the *Crime and Corruption Act 2001*)
- complaints about how a specific PID is currently being managed by a public sector entity.

Methodology

The Office will publish an issues paper to:

- inform stakeholders about the operations of the PID Act
- provide information about known issues with the operations of the Act
- pose questions to prompt feedback and comments from stakeholders for further consideration.

Stakeholders are invited to make written submissions in response to the issues paper. Submissions may address the issues identified in the issues paper or other matters related the operation of the PID Act.

Data, feedback and ideas generated from this consultation process will inform the review and the Ombudsman will then consider how to proceed. Further processes may include additional research and consultation.

A final report on the outcome of the review of the PID Act will be prepared by the Ombudsman. Material from stakeholder submissions may be incorporated in the Ombudsman's final report on this review.

Reporting timetable

The Ombudsman is required to give the Attorney-General and the Speaker of the Parliament a report about the outcome of the review. The Attorney-General must, as soon as practicable after receiving the report, table the report in the Legislative Assembly.

The final report will be provided to the Attorney-General and Speaker by 31 December 2016.

1.2 Review process

1.2.1 Issues paper

Following a period of research, informal consultation with PID Coordinators and analysis of PID data reported to the oversight agency over the period 2011 to 2015, the Office produced an issues paper in November 2015 (refer to Appendix A). The issues paper was published on the Office's website³ and was circulated to chief executive officers of public sector agencies, PID Coordinators and the public.

Twenty six submissions were received in response to the issues paper, of which 23 were published on the Office's website (refer to Appendix B).⁴ Two submitters requested that their submissions not be published. The Ombudsman decided not to publish one further submission on the basis that it promoted commercial interests and may infringe intellectual property rights. Published submissions were redacted to remove content which:

- may have identified a complainant or the person the subject of a complaint
- may be defamatory
- may have related to a matter before a court or tribunal.

When making decisions about the publication of submissions, the Ombudsman considered the policies and practice of Australian law reform bodies, particularly the Australian Law Reform Commission (ALRC).⁵

1.2.2 Research and consultation

Submissions were received in response to the issues paper from:

- 1 officer of the Queensland Parliament
- 11 State Government departments (including one submission made jointly by two departments)
- 3 statutory authorities
- 2 independent complaints investigation bodies
- 2 local governments
- 2 public universities
- 2 advocacy organisations
- 2 private individuals
- 1 private business.

³ Refer to <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/review-of-the-public-interest-disclosure-act>.

⁴ Refer to table of submitters at <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/review-of-the-public-interest-disclosure-act>.

⁵ <http://www.alrc.gov.au/about/policies/access-submissions-and-inquiry-material>.

Most respondents commented selectively on those issues and questions of relevance and significance to them. Some public sector entities responded comprehensively, providing opinion and suggestions about the majority of sections of the PID Act and questions referred to in the issues paper. There was little uniformity of views across sectors, with submissions demonstrating a diversity of perspectives on those areas of the PID Act that should be improved, and the amendments that would achieve those improvements.

The independent complaints investigation bodies and the officer of parliament had specific issues to highlight which arose from their particular operations and responsibilities under the PID Act.

Two advocacy organisations, representing groups with an interest in the operation of the PID Act, provided submissions on behalf of their members. One proposed the expansion of the coverage of the PID Act which would benefit its members. The other highlighted concerns about the protection of disclosers and suggested the creation of a new statutory authority with specific responsibility for ensuring fair treatment of disclosers, independent of the assessment and investigation of PIDs.

Two individuals who had made disclosures wrote of their experiences and made suggestions about amendments to the PID Act which would address challenges they faced.

They raised concerns about the:

- effectiveness of PID Act protections
- lack of clarity when a matter involves more than one public sector entity
- lack of accountability, particularly in relation to timeliness.

Public sector entity respondents were generally supportive of the objects and value of the PID Act. Most comments were about operational issues and concerns associated with interpretation and implementation of the PID Act.

In summary, public sector entities expressed concerns about the:

- need for greater clarity about applying key definitions and provisions of the PID Act
- complex drafting of some sections of the PID Act
- requirements for assessing and investigating PIDs
- implications of the confidentiality provisions at s.65
- lack of focus on subject officers.

A number of discussion papers were prepared on key issues addressed in the issues paper, which encompassed comparative analysis of legislation in other Australian jurisdictions, as well as research on options for addressing concerns identified by stakeholders.

In the latter stages of the review a paper was prepared exploring opportunities for changes to the PID Act to respond to issues identified by stakeholders and independent research. This paper also presented proposed findings and recommendations. Consultation was undertaken with key parties and agencies to seek their views on the proposed findings and recommendations, including:

- Professor A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University
- Department of Justice and Attorney-General
- Public Service Commission
- CCC.

The Commissioner, Queensland Fire and Emergency Services was consulted about the proposal to amend the definition of 'public officer'⁶ to include volunteers in view of the large number of volunteers engaged with that entity.

Feedback on the proposed findings and recommendations was also sought from PID Coordinators at a meeting and a teleconference held in October 2016.

⁶ Refer to section 4.1.6 below.

Chapter 2: Overview and context for the review

2.1 Integrity landscape

The PID Act forms part of the integrity framework within Queensland, and is related to broader Australian and international obligations concerning the prevention of corruption and protection of persons making disclosures ('whistleblowers').

Australia is a signatory to the United Nations Convention Against Corruption (UNCAC), which is a universal, legally binding instrument that provides a comprehensive framework to prevent and combat corruption.⁷

The purpose and objects of the PID Act are consistent with the purposes of UNCAC,⁸ in particular:

Article 1. Statement of Purpose

The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

...

(c) To promote integrity, accountability and proper management of public affairs and public property.

...

Article 8. Codes of conduct of public officials

...

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

...

Article 33. Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

Australia is one of 35 member countries of the Organisation for Economic Co-operation and Development (OECD). The OECD Principles for Managing Ethics in the Public Service are:

... designed to help countries review the institutions, systems and mechanisms they have for promoting public service ethics. They identify the functions of guidance, management or control against which public ethics management systems may be checked. These principles distil the experience of OECD countries, and reflect shared views of sound ethics management.⁹

The objects of the PID Act are consistent with Principles 2 and 4:

⁷ *United Nations Convention Against Corruption Resource on Good Practices in the Protection of Reporting Persons*, United Nations, New York, 2015 http://www.unodc.org/documents/corruption/Publications/2015/15-04741_Person_Guide_eBook.pdf.

⁸ https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

⁹ *Trust in Government – Ethics Measures in OECD Countries*, OECD, 2000, p. 75 <http://www.oecd.org/corruption/oecdprinciplesformanagingethicsinthepublicservice.htm>.

2. Ethical standards should be reflected in the legal framework

The legal framework is the basis for communicating the minimum obligatory standards and principles of behaviour for every public servant. Laws and regulations could state the fundamental values of public service and should provide the framework for guidance, investigation, disciplinary action and prosecution.

...

4. Public servants should know their rights and obligations when exposing wrongdoing

Public servants need to know what their rights and obligations are in terms of exposing actual or suspected wrongdoing within the public service. These should include clear rules and procedures for officials to follow, and a formal chain of responsibility. Public servants also need to know what protection will be available to them in cases of exposing wrongdoing.

The G20, of which Australia is a member, first established an Anti-Corruption Working Group in 2010. Following its September 2016 meeting, G20 published its Anti-Corruption Action Plan 2017-2018:¹⁰

Public sector integrity and transparency: ... The G20 will promote greater transparency in the public sector ... We will promote a culture of integrity and accountability in our institutions ... G20 priorities will include organising against corruption (i.e. structuring the public administration to detect and minimise corruption risks), encouraging public institutions to implement anti-corruption initiatives ... Encouraging the reporting of suspected actions of corruption is critical to deterring and detecting it. We will promote this goal, including reviewing our progress in implementing legislative and institutional protections for whistle-blowers.

The PID Act objects support Australia's international obligations and commitments to providing mechanisms for facilitating the disclosure of corruption and other forms of wrongdoing in the public sector, and protecting whistleblowers.

2.2 *Australian context*

The Commonwealth and all other Australian states and territories have legislation making provision for PIDs and protection for disclosers. They reflect broadly similar purposes and objects to the PID Act.

Australian research in the field of whistleblower protection has contributed significantly to the development of public policy and legislative frameworks. The Whistling While They Work: Enhancing the theory and practice of internal witness management in public sector organisations project, led by Griffith University, was conducted between 2005 and 2009. Supported by Ombudsman offices and integrity agencies across Australia, the research led to the identification of 'best practice' systems for whistleblowing policies and procedures in the Australian public sector.¹¹ The research outcomes influenced the development of the *Public Interest Disclosure Act 2013* (Cth), as well as the PID Act and amendments to the PID legislation in New South Wales in 2010 and in the Australian Capital Territory in 2012.

Recent reviews of the South Australian and Commonwealth acts have emphasised the ongoing value of PID legislation and have focused on enhancements which sharpen the focus and improve the operations of the legislation.¹² Reviews of the mechanisms for dealing with disclosures and protection of whistleblowers are underway in Victoria and the Northern Territory.¹³

¹⁰ G20 Anti-Corruption Action Plan 2017-2018, 27 September 2016 http://g20.org/English/Documents/Current/201609/t20160927_3508.html.

¹¹ http://www.whistlingwhiletheywork.edu.au/?page_id=13.

¹² For example: *A review of the Whistleblowers Protection Act 1993* (SA), The Hon. Bruce Lander QC, September 2014 <https://www.icac.sa.gov.au/content/legislative-reviews-0> and *Review of the Public Interest Disclosure Act 2013*, Mr Phillip Moss AM, 15 July 2016 <https://www.dpmc.gov.au/resource-centre/government/review-public-interest-disclosure-act-2013>.

¹³ Following legislative amendment which came into effect in May 2016, further review is underway in Victoria (see <http://www.dpc.vic.gov.au/index.php/news-publications/ibac-discussion-paper>) and a review has been underway in the Northern Territory <http://www.timebase.com.au/news/2015/AT318-article.html>.

In December 2016 the Commonwealth Government finalised the first *Open Government National Action Plan*, which promotes open government and seeks to contribute to Australia becoming 'more open, transparent and accountable'.¹⁴ The first commitment in the *Open Government National Action Plan* is:

We will ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. We will do this by improving whistle-blower protections for people who disclose information about tax misconduct to the Australian Taxation Office. We will also pursue reports to whistle-blower protections in the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector.¹⁵

On 20 November 2016, the Commonwealth Senate referred an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors to the Parliamentary Joint Committee on Corporations and Financial Services for report by 30 June 2017.¹⁶ The outcome of this inquiry may also influence the Commonwealth Government's response to the review of the Commonwealth PID Act.

2.3 *Queensland context*

In conjunction with the *Anti-Discrimination Act 1991*, *Crime and Corruption Act 2001*, *Ombudsman Act 2001*, *Public Sector Ethics Act 1994* and *Public Service Act 2008*, the PID Act is a key element of the integrity framework in the public sector in Queensland. The PID Act plays an important role in fostering a strong ethical culture in public sector entities.

The PID Act commenced on 1 January 2011 and repealed the *Whistleblowers Protection Act 1994*.

¹⁴ Department of Prime Minister and Cabinet, *Australia's First Open Government National Action Plan 2016-18* <http://ogpau.pmc.gov.au/sites/default/files/posts/2016/12/Australia%27s%20first%20Open%20Government%20National%20Action%20Plan%20-%20FINAL.pdf> p. 5.

¹⁵ Ibid. p.12.

¹⁶ For further information refer to http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services.

Chapter 3: The PID Act

3.1 Purpose of the PID Act

The purpose of the PID Act is to ‘facilitate disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures’.

The main objects of the PID Act as set out at s.3 are to:

- (a) promote the public interest by facilitating PIDs of wrongdoing in the public sector
- (b) ensure that PIDs are properly assessed and, when appropriate, properly investigated and dealt with
- (c) ensure that appropriate consideration is given to the interests of persons who are the subject of a PID
- (d) provide protection from reprisals to persons making PIDs.

This purpose of this review is to consider the operation of the PID Act and decide whether:

- the main objects of the PID Act remain valid
- the PID Act is achieving its main objects
- the provisions of the PID Act are appropriate for achieving its main objects.

3.2 Use of the PID Act

3.2.1 PID data

Under the PID Standard, public sector entities must report statistical information about PIDs received to the oversight agency. The oversight agency must then prepare an annual report about the operation of the PID Act, including statistical information about PIDs.

In 2015-16, 585 PIDs were reported to the oversight agency¹⁷ and this is a 9% increase on the previous year’s total of 535.

¹⁷ Refer to Queensland Ombudsman 2015-16 Annual Report, pp. 65-70
http://www.ombudsman.qld.gov.au/Portals/0/docs/Publications/Annual_Reports/Annual_Report_2015-16.pdf.

Table 1: PIDs reported by disclosure type

Disclosure type	Notes	2011-12		2012-13		2013-14		2014-15		2015-16	
s.13 disclosures		#	%	#	%	#	%	#	%	#	%
Official misconduct	1	1062	89.8	1036	90.9	658	90.8	26	4.9	-	-
Corrupt conduct	2	-	-	-	-	-	-	415	77.6	514	87.9
Maladministration		34	2.9	15	1.3	16	2.2	40	7.5	15	2.6
Misuse of public resources		31	2.6	33	2.9	20	2.8	15	2.8	17	2.9
Public health & safety		7	0.6	4	0.4	7	1.0	5	0.9	5	0.9
Environment		0	0.0	0	0.0	2	0.3	1	0.2	5	0.9
subtotal		1134		1088		703		502		556	
s.12 disclosures		#	%	#	%	#	%	#	%	#	%
Disability		26	2.2	41	3.6	14	1.9	20	3.7	23	3.9
Environment		2	0.2	0	0.0	3	0.4	4	0.7	1	0.2
Reprisal		21	1.8	11	1.0	5	0.7	9	1.7	5	0.9
subtotal		49		52		22		33		29	
TOTAL	3	1183		1140		725		535		585	

Notes:

1. Official misconduct ceased to be a type of PID on 30 June 2014. However, 26 PIDs about official misconduct made in 2013-14 were reported to the oversight agency in 2014-15.

2. Corrupt conduct became a type of PID on 1 July 2014.

3. A PID may include more than one type of disclosure (for example, corrupt conduct and maladministration); therefore, the number of PIDs by disclosure type may exceed the number of PIDs reported by agency type.

Table 2: PIDs reported by agency type

Agency type	Notes	2011-12		2012-13		2013-14		2014-15		2015-16	
		#	%	#	%	#	%	#	%	#	%
Department		961	83.3	626	56.1	436	62.5	292	59.3	332	58.8
Local council		119	10.3	96	8.6	83	11.9	68	13.8	59	10.4
Statutory authority		3	0.3	220	19.7	111	15.9	103	20.9	130	23.0
Public service office		8	0.7	6	0.5	6	0.9	6	1.2	5	0.9
GOC		54	4.7	136	12.2	39	5.6	12	2.4	34	6.0
University		9	0.8	32	2.9	23	3.3	11	2.2	5	0.9
TOTAL	1	1154		1116		698		492		565	

Note:

1. A PID may include more than one type of disclosure (for example, corrupt conduct and maladministration); therefore, the number of PIDs by disclosure type may exceed the number of PIDs reported by agency type.

Table 3: PIDs reported by discloser type

Discloser type	Notes	2011-12		2012-13		2013-14		2014-15		2015-16	
		#	%	#	%	#	%	#	%	#	%
Employee of agency		1117	93.4	919	82.3	632	90.5	424	86.2	499	88.3
Employee of another public sector agency		10	0.8	27	2.4	9	1.3	16	3.3	16	2.8
Manager/supervisor		3	0.3	51	4.6	13	1.9	10	2.0	8	1.4

Discloser type	Notes	2011-12		2012-13		2013-14		2014-15		2015-16	
		#	%	#	%	#	%	#	%	#	%
Auditor		0	0.0	20	1.8	3	0.4	0	0	2	0.4
Anonymous		43	3.6	67	6.0	29	4.2	20	4.1	16	2.8
Member of public		23	1.9	30	2.7	12	1.7	22	4.5	13	2.3
Other	1	0	0.0	2	0.2	0	0.0	0	0.0	11	1.9
TOTAL	2	1196		1116		698		492		565	

Note:

1. 'Other' includes 'unknown' discloser status and incomplete data

2. A PID may include more than one type of disclosure (for example, corrupt conduct and maladministration); therefore, the number of PIDs by disclosure type may exceed the number of PIDs reported by discloser type.

Table 4: PIDs reported by outcome

Outcome type	Notes	2011-12		2012-13		2013-14		2014-15		2015-16	
		#	%	#	%	#	%	#	%	#	%
Substantiated		249	51.8	290	43.2	317	47.3	217	50.5	157	46.6
Partly substantiated		31	6.4	35	5.2	68	10.1	43	10.0	35	10.4
Not substantiated		201	41.8	326	48.5	256	38.2	136	31.6	110	32.6
Other	1	0	0.0	21	3.1	29	4.3	34	7.9	35	10.4
TOTAL	2	481		672		670		430		337	

Note:

1. 'Other' outcome includes that the investigation was discontinued, for example, because the subject officer has resigned or the matter was dealt with through another appropriate process.

2. This table reports on the PID matters closed in a financial year. This will vary from the number of PIDs reported in the same year.

Analysis of the data reported to the oversight agency over the last five years shows that:

- Most PIDs (on average 89%) were about 'corrupt conduct' (or previously 'official misconduct').
- Between 2-3% of PIDS were about maladministration.
- Less than 2% of PIDs were about reprisal action.
- Most PIDs (an average of 91%) were reported by employees of a public agency.
- Approximately 2.5% of PIDs were reported by members of the public.
- State Government departments accounted for the largest percentage of reported PIDs (on average 65% each year).
- A finding of 'substantiated' was reported in 47.5% of PID investigations finalised on average across the five year period, with on average a further 8% partly substantiated.

The passage of the *Crime and Misconduct and Other Legislation Amendment Act 2014* resulted in a changed focus for the CCC (formerly Crime and Misconduct Commission), from improving the integrity and reducing the incidence of misconduct in the public sector¹⁸ to reducing 'corruption' in the public sector.¹⁹ The amendment of the *Crime and Corruption Act 2001*, to remove 'official misconduct' and replace it with 'corruption' required a consequential amendment of s.13 of the PID Act. The change from the PID category of 'official misconduct' to 'corrupt conduct' took effect from 1 July 2014.

The change in the type of information a public officer can disclose has had an impact on the number of PIDs reported to the oversight agency since then. A smaller number of PIDs in the

¹⁸ Refer to s.4 *Crime and Misconduct Act 2001* current as at 27 November 2013
https://www.legislation.qld.gov.au/LEGISLTN/SUPERSED/C/CrimeandMisA01_131127.pdf.

¹⁹ Refer to s.4 *Crime and Corruption Act 2001*
<https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/C/CrimeandCorruptionA01.pdf>.

new category of 'corrupt conduct' were reported in 2014-15 compared to the number of 'official misconduct' PIDs reported in 2013-14 (415 compared to 658).

In 2015-16, there were 514 'corrupt conduct' PIDs reported, representing an increase of 23.8% on the number reported in the preceding year. This may reflect a growing familiarity and confidence in assessing matters using the new provision in the PID Act.

It is notable that there was very limited use of the PID Act by members of the public. The data shows that in the five years of operation of the PID Act there were only 124 PIDs under s.12(1)(a), disclosing information about a substantial and specific danger to the health or safety of a person with a disability. Of these, in only 53 cases (an average of just over 10 a year) was the discloser a member of the public or anonymous. In the balance of cases the discloser was an employee of the public sector entity reporting the PID, or another public sector entity. Therefore, if their disclosure related to the conduct of a public officer or a public sector entity, those disclosers could have made a disclosure under one of the elements of s.13 in many cases.

In 28 of the 124 PIDs (or 22% of the total PIDs made under s.12(1)(a) over the past five years), the 'subject officer' or the person allegedly responsible for the harm to a person with a disability, was not an employee. While the data on the nature of the allegations is incomplete, analysis indicates that such PIDs were typically lodged with the Department of Communities, Child Safety and Disability Services, and concerned harm to a person in care provided by a non-government service provider. As is discussed later in this report, there are other complaints mechanisms in place to address such matters.

The number of PIDs under s.12(1)(b) and (c) regarding substantial and specific danger to the environment has been very small, with only 10 PIDs reported in five years.

3.2.2 Reprisal complaints

Very few PIDs of reprisal are reported to the oversight agency. Across the five years since the PID Act came into effect, 51 PIDs of reprisal have been reported, but of these, 64% were lodged during the first two years of the Act's operation. In the last three years between five and nine PIDs of reprisal have been reported each year.

The nature of the data reported to the oversight agency does not allow detailed comparison of the types of reprisal which have been the subject of a PID. However, analysis indicates that some 45% of the reprisal PIDs involved allegations of some form of bullying, harassment or inappropriate behaviour (including verbal abuse and comments posted in signage, mail or online). Of the balance, some 10% involved concerns about employment, including disciplinary action or termination of employment, or threats to subject the discloser to a detriment such as to damage their professional reputation. A small number of matters related to the management of previous complaints or investigations. There were also isolated examples of alleged assault and property damage.

Of the reprisal PIDs reported, 17% were substantiated, with a further 3% partly substantiated. In a significant majority of matters, over 55%, the PID was not substantiated. Unfortunately, in 23% of cases the data about outcomes is incomplete and therefore more detailed analysis is problematic.

There could be a number of explanations for the declining level of allegations of reprisal by disclosers. It may be attributable to:

- few instances of reprisal occurring
- entities having effective policies and procedures for responding to and remedying instances of reprisal when they arise
- disclosers being unaware of how to raise concerns of reprisal when they experience it, and/or

- disclosers lacking confidence in the processes in place to address reprisal or the value of making a PID of reprisal.

The submission from the Anti-Discrimination Commission Queensland (the ADCQ), in response to the issues paper²⁰ reports that in the period from 1 January 2011 to 31 December 2015, the ADCQ received 38 complaints which included the ground of reprisal, of which 23 were accepted. The ADCQ noted that of those 23 accepted reprisal complaints, eight had been made by two people (that is, two people had made four complaints each). Therefore, it would appear that there have been only 17 individuals successful in lodging complaints of reprisal with the ADCQ in five years.

Of the 18 complaints that had been finalised at the date of the ADCQ's submission, 11% had been conciliated and 72% had been referred to the Queensland Civil and Administrative Tribunal (QCAT). To date, the Office is aware of only one published decision of QCAT²¹ dealing with an allegation of reprisal under the PID Act. These results raise concerns about the utility of the mechanisms in place to resolve complaints of reprisal, which are discussed below.

3.3 *Objects of the PID Act*

The main objects of the PID Act as set out at s.3 are to:

- promote the public interest by facilitating PIDs of wrongdoing in the public sector
- ensure that PIDs are properly assessed and, when appropriate, properly investigated and dealt with
- ensure that appropriate consideration is given to the interests of persons who are the subject of a PID
- provide protection from reprisals to persons making PIDs.

Submissions

Where respondents commented specifically on the objects of the PID Act in response to the issues paper they were generally positive about the value of the Act and the validity of the Act's objects:

The objects are important in establishing a system that facilitates the reporting of wrongdoing and providing legislative protection against reprisal for disclosers. This is a key public interest matter that supports integrity in the public sector.

Department of Infrastructure, Local Government and Planning²²
Department of State Development and Co-ordinator-General²³

The department/s consider the main objectives of the PID Act are valid ... It is considered that the PID Act is a key component to underpinning the integrity and accountability of the Queensland Government, for the identified areas of complaints.

Department of Natural Resources and Mines and
Department of Energy and Water Supply²⁴

The main objects of the PID Act still remain valid ... the QPS acknowledges that disclosures about wrongdoing are an important public sector accountability mechanism and believes that the PID Act has been effective in promoting public interest disclosures.

Queensland Police Service²⁵

²⁰ Submission 11.

²¹ *Flori v State of Queensland & Ors* [2016] QCAT 80.

²² Submission 1.

²³ Submission 2.

²⁴ Submission 24.

²⁵ Submission 3.

Council strongly supports a statutory scheme that provides appropriate protections for public sector workers who make disclosures about issues of public interest. Council supports such a scheme not only because it is in the interest of public sector workers, but also because the legislation promotes a more open and transparent government and in doing so enhances public confidence in government administration.

Council of the City of Gold Coast²⁶

The University believes the objectives of the Act remain valid.

University of Queensland²⁷

Overall, EHP's experience with the PID Act indicates that the legislation has achieved its objectives of promoting disclosures in the public interest and protecting disclosers. Consequently, the comments provided are directed towards improving the current arrangements rather than proposing significant changes.

Department of Environment and Heritage Protection²⁸

The Department strongly supports the purpose of the Act, specifically to 'facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures'. In the Department's submission we have made some observations and recommendations in relation to the operations of the Act which we consider may assist departments in discharging their legislative responsibilities.

Department of Education and Training²⁹

Some submitters identified areas where the objects could be enhanced, or the connection between the objects and the provisions of the PID Act is not sufficiently clear:

Item (d) should include – 'and natural justice to persons that are the subject of a PID'.

Logan City Council³⁰

If it is the QO's stance that the Act does not require the person with a disability to be in the direct care of the Department for the disclosure to amount to a PID, i.e. the person with a disability may be a client of a FNGSP then the main objects of the PID Act require clarification and or revision.

Department of Communities, Child Safety and Disability Services³¹

An objective of the PID Act is to ensure that public interest disclosures are properly assessed, and where necessary, properly investigated and actioned ...

The system is largely an internal complaint management process for wrong doing by its officers that is in the public interest. Historically the public has not had confidence in a body dealing with complaints about the conduct of its members, and example of which is the Queensland Law Society, which previously dealt with complaints about its members.

A system for dealing with complaints has to be, and be seen to be, impartial.

Anti-Discrimination Commission Queensland³²

Of the submitters who specifically responded to the section of the issues paper dealing with the objects of the PID Act, 10 commented positively about the ongoing validity and appropriateness of the objects of the PID Act. Five submissions identified general or specific concerns about the

²⁶ Submission 4.

²⁷ Submission 26.

²⁸ Submission 8.

²⁹ Submission 2.

³⁰ Submission 9.

³¹ Submission 10.

³² Submission 11.

objects or the purpose of the PID Act. The remaining submitters did not make comments about the purpose or objects of the PID Act.

Findings

Based on the PID data reported by agencies, there is evidence that the objects of the PID Act are being achieved. Disclosers are exercising their rights under the PID Act to bring to light allegations about wrongdoing and thereby attract the protections available under the Act. While some complaints are received from disclosers by this Office, under the *Ombudsman Act 2001*, about the assessment or investigation of PIDs by public sector entities, the numbers are small by comparison with the total PIDs reported in the database.

Agencies, particularly State Government departments and statutory authorities are, overall, demonstrating through the entry of data into the PID database that PIDs are being identified, assessed, investigated and actioned. The number of PIDs reported by local governments raises concerns about potential under-reporting. Public sector entities also demonstrate their commitment to effectively managing PIDs through their engagement with the Office, including attendance at PID Coordinator network meetings and participation in training workshops. The Office receives a small but wide range of enquiries from PID Coordinators and managers within public sector entities seeking guidance about correct interpretation and application of the PID Act.

The submissions received in response to the issues paper indicate that agencies charged with implementing the PID Act consider it achieves its objects. There is indirect commentary in some submissions in response to the issues paper that individual entities take pains to fulfil the obligations in the PID Act and PID Standard issued by the Office.

The responses to the issues paper do raise a variety of concerns about the implementation of the PID Act, and highlight an array of changes which could improve the operation of the Act. However, notwithstanding the particular technical, operational and implementation issues that arise in respect of the objects of the PID Act, I am satisfied that the objects remain valid and appropriate.

PIDs are a proven source of information about wrongdoing. There remains an ongoing need to build and maintain a 'pro disclosure' culture where organisations are open to receiving reports of wrongdoing and build confidence by acting quickly and appropriately on such information.

Recommendation 1

The objects of the PID Act remain valid and do not require amendment.

3.4 Title of the PID Act

Feedback from PID Coordinators and others consulted during the latter stages of the review raised concern about the title of the PID Act. The previous legislation was titled *Whistleblowers Protection Act 1994*. The term 'whistleblower' was removed when the PID Act commenced.

Submissions

Feedback was provided to the review that:

There appears to be confusion around the terminology regarding "Public Interest Disclosure". The previous term "whistle-blower" appears to be better received by the people who generally make

such complaints ... Is there any scope to revisit the previous terminology “whistle-blower”?

Council of the City of Gold Coast³³

The title of the legislation is confusing and the Act is too complex to be readily understood by everyday members of the public and most public sector employees.

Department of Infrastructure, Local Government and Planning³⁴
Department of State Development³⁵

... the term ‘whistleblower’ is still reference from time to time, which may be due to its long term historical use and that it may provide more understanding and meaning for some, due to its broad national/international use.

Department of Natural Resources and Mines and
Department of Energy and Water Supply³⁶

The term ‘whistleblower’ was first used in the 1960’s³⁷ in the context of reporting wrongdoing, and was popularised in the 1970’s by US civic activist Ralph Nader.³⁸ The term is now in common use internationally. In the Secretary-General of the United Nations Bulletin on protection against retaliation for United Nations staff who report misconduct it states that this ‘is commonly known as “whistleblower protection”’.³⁹

Feedback from PID Coordinators to the review was that the term ‘whistleblower’, while it had some negative connotations, was more meaningful for the broader community. It is a term widely used in the media and continues to be used in some legislation in Australia. Reintroducing the term ‘whistleblower’ into the title of the legislation would assist in building community understanding of the purpose of the legislation.

Findings

The word ‘whistleblower’ continues to register more significantly with the community than the term ‘public interest disclosure’. Therefore, it would be appropriate to amend the title of the Act to include a combination of these terms. This could be achieved, for example, by amending the title to the *Public Interest Disclosure (Whistleblower Protection) Act* or similar.

Recommendation 2

The title of the PID Act should be amended to incorporate both the terms ‘whistleblower’ and ‘public interest disclosure’.

³³ Submission 4.

³⁴ Submission 1.

³⁵ Submission 2.

³⁶ Submission 24.

³⁷ See www.phrases.org.uk/meanings/whistle-blower.html for origins of the use of the term.

³⁸ See <https://en.wikipedia.org/wiki/Whistleblower>.

³⁹ United Nations Ethics Office ‘Protection Against Retaliation: Protecting the Whistleblower’ at <http://www.un.org/en/ethics/protection.shtml>.

Chapter 4: Provisions of the PID Act

The issues paper highlighted a number of areas for consideration in the review of the operation of the PID Act. These issues are discussed in this chapter, along with an analysis of the submissions and views presented during consultation, the review findings and, where appropriate, recommendations.

4.1 Who can make a PID

4.1.1 Two different types of disclosers

The PID Act creates two classes of discloser: ‘any person’ and ‘public officer’ (which is defined at s.7 of the Act).

The most commonly and widely accepted definition of ‘whistleblowing’ (or the making of public interest disclosures) is:

... the ‘disclosure by organisation members (former and current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organisations that may be able to effect action.’⁴⁰

Brown and Donkin note that:

... few individuals are better placed to observe or suspect wrongdoing within an organisation than its very own officers and employees.

...

While simple in theory, the definition of whistleblowing is complex in practice. First and foremost, whistleblowers are understood to be ‘organisation members’ (for example, employees, volunteer workers or contractors) ... At times, however, any person who claims to have revealed wrongdoing might also seek to claim this title, even when they are outside the organisation concerned – for example when they are an aggrieved consumer, client or citizen complainant. The fact that legislation in five Australian jurisdictions currently supports this second concept of a whistleblower – **confusing the purpose of whistleblower protection** – is a basic issue for reform...⁴¹

(emphasis added)

The provision for ‘any person’ to make a PID is inconsistent with the concept of a PID scheme as a mechanism for facilitating internal disclosures and providing protection from reprisal for employees and others within an agency who make PIDs about wrongdoing inside an agency.

Since Brown and Donkin highlighted concerns about legislative confusion in 2008, state legislation has been generally amended so that it is almost exclusively focused on providing for internal rather than external disclosures. The primary exceptions are the Northern Territory and Tasmanian legislation which allow for any person to make a disclosure in certain limited circumstances.

The Commonwealth PID Act does make provision at s.70 for an authorised officer to determine that an individual is taken to be a ‘public official’ for the purposes of making a disclosure. However, the individual must first have information about ‘disclosable conduct’ for that section to be invoked.

The purpose and objects of the PID Act focus on ‘public sector wrongdoing’ yet s.12 is framed in terms which do not limit its application to disclosures about the public sector. Under s.12, PIDs

⁴⁰ AJ Brown and Marika Donkin, Introduction, *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, Editor AJ Brown, ANU E Press, 2008, p 8.

⁴¹ Ibid pp.9-10.

can be made about conduct outside the public sector for which a public sector entity may be a regulator, or conduct which is entirely outside the control of a public sector entity.

As discussed above, in 22% of the total PIDs made under s.12(1)(a) over the past five years, the subject officer or the person allegedly responsible for the harm to a person with a disability, was not an employee. In such cases, there may be little a public sector entity can do apart from referring the disclosure (or the discloser) to another process which can deal with conduct in the private sector, for example, the Queensland Police Service or Anti-Discrimination Commission Queensland.

The inclusion in the PID Act of provision for 'any person' to make disclosures presents a number of challenges for agencies responsible for implementing the PID Act, including:

- The low number of PIDs made under s.12(1)(a), (b) and (c) across the public sector means agency officers responsible for assessing and managing PIDs only infrequently deal with such disclosures and therefore do not build expertise in interpreting and applying these provisions.
- It will be more difficult for a public sector entity to investigate a PID about conduct outside the public sector unless the particular circumstances fall within the regulatory functions of the entity.

The public sector entity receiving or investigating a PID will face significant practical impediments to assessing the risk of reprisal to the discloser, or taking steps to prevent reprisal against a discloser who is not a public officer.

Submissions

The submissions in response to the issues paper present a number of different perspectives, and reflect some confusion about the purpose of providing for two classes of disclosers under the PID Act:

The effect of including two categories of disclosers is positive and helps encourage reporting of alleged wrongdoing. However, as with comments made above about the main objects of the PID Act, some revision may be necessary to section 12 of the Act regarding *certain PIDs may be made by 'any person'*. *This includes disclosures about a substantial and specific danger to the health and safety of a person with a disability ...* some additional clarity is required here regarding disclosures about a substantial and specific danger to the health and safety of a person with a disability even if the person with a disability is not in the direct care of the public sector entity ... The provisions as they currently stand do not offer sufficient clarity around the receipt of disclosures from members of the public concerning persons with a disability who are not in the direct care of the department, instead through the function of a funded agreement, the department's client is receiving supports/services through a FNGSP.

Department of Communities, Child Safety and Disability Services⁴²

The inclusion of two categories of disclosers presupposes that only people within those categories are privy to the types of information in question. However, that is not necessarily the case. For example, a member of the public with information relevant to possible corrupt conduct or maladministration receives no protection from the Act. As the Act is intended to encourage disclosures and protect disclosers, this distinction potentially runs contrary to the broad objectives of the legislation.

Conversely, withdrawing the distinction could have resource implications because it raises the possibility that agencies could experience a significant increase in the number of disclosures. And while only 5% of the additional might qualify for protection under the Act, 100% of the allegations will require assessment.

Department of Environment and Heritage Protection⁴³
Department of National Parks, Sport and Racing⁴⁴

⁴² Submission 10.

⁴³ Submission 8.

The effect of including two categories of disclosers ('any person' and 'public officer') has not adversely impacted on the QPS and appears appropriate.

Queensland Police Service⁴⁵

There are generally speaking significant differences between the two types of disclosers so I do not believe it makes sense to treat them the same.

Darling Downs Hospital and Health Service⁴⁶

The separate category and extended provisions for 'public officer' disclosures provide a public officer with protections for reporting maladministration, corrupt conduct and so forth, which often are reported due to allegations within the department or workplace they occupy, therefore these protections and support are important to promote the reporting of wrong doing. It also assists to highlight public officer obligations and seriousness with regard to Corrupt Conduct and supports the responsibilities under the Code of Conduct to report wrong doing, including substantial misuse of public resources and maladministration. Concerns would also arise with regard to protecting 'any person' for types of disclosers specific to 'public officers'.

The position of the CCC as to whether or not corrupt conduct disclosed by members of the public is suitable for inclusion in s12 may warrant consideration, however as per above the practicality of providing protections, the implication of private and political interests, and referring back to the objectives of the PID Act and those areas identified may deem this inappropriate.

Department of Natural Resources and Mines and
Department of Energy and Water Supply⁴⁷

Some submitters argued that there are benefits to providing for disclosures by members of the public ('any person') under the umbrella of the PID Act, while acknowledging that there is a lack of clarity currently in the Act. Maintaining the existing approach does not address this lack of clarity or the challenges identified above. During consultation in the latter stages of the review there was universal agreement that the focus of the PID Act should be on internal disclosures of wrongdoing within the public sector by public officers.

Professor A J Brown, cited above, reiterated his view that 'best practice' PID legislation is focused on facilitating the disclosure of wrongdoing within organisations by members of organisations, as they are at the greatest risk of reprisal and therefore have the greatest need of protection. Representatives of the CCC, Public Service Commission and Department of Justice and Attorney-General raised no concerns with the proposal to refocus the PID Act on internal disclosures. PID Coordinators consulted during PID Network meetings in October 2016 also responded positively to this proposal.

Findings

The current legislative scheme, which distinguishes between two classes of discloser in terms of the types of disclosures they can raise, is inherently problematic. It may cause confusion in the community in terms of understanding individual rights and protections. It creates challenges for agencies responsible for implementing the legislation. The benefits of 'any person' making disclosures have been limited, based on the data reported by agencies to the oversight agency. As discussed below, there are other complaints mechanisms already in place which provide members of the public with options to raise information concerning danger to the health or safety or a person with a disability, or danger to the environment, while still providing protections.

Amending the PID Act to remove the capacity for 'any person' to make a disclosure would focus the legislation on public sector integrity, by encouraging public sector officers and those

⁴⁴ Submission 16.

⁴⁵ Submission 3.

⁴⁶ Submission 21.

⁴⁷ Submission 24.

engaged to perform public services to disclose wrongdoing. It would also ensure the PID Act is in step with current best practice in PID legislation.

This change to the PID Act should only be introduced, as discussed below, if accompanied by:

- considerably broadening the reach of the PID Act by extending the definition of ‘public officer’
- clarifying that the entitlement to make a complaint of reprisal extends not only to any person who makes or is believed to have made a PID, but also to their family, colleagues and associates who are subjected to detriment because of their relationship to the person who has or is believed to have made a PID.

Recommendation 3

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

4.1.2 PIDs about behaviour outside the public sector

PIDs which may be made by ‘any person’ under s.12 include disclosures about a substantial and specific danger to the health and safety of a person with a disability (s.12(1)(a)), substantial and specific danger to the environment (s.12(1)(b) and (c)) and reprisal (s.12(1)(d)).

PID data reveals the low level of use made by members of the public of the right to make a PID.⁴⁸ Over the past five years members of the public have been reported as making between 1.9% and 4.5% of total PIDs reported.

Analysis of PIDs made under s.12(1)(a) over the five years since the PID Act commenced reveals that only 54 PIDs (an average of 10 PIDs each year), have been made by a discloser who is not a public officer. PIDs concerning danger to the environment made under s.12(1)(b) or (c) are even less frequent with only 10 recorded over the same period.

The low number of PIDs by persons other than public officers may be due to a lack of public awareness of the PID Act and the protections it provides for disclosure, the lack of demand for such protections, and/or the lack of awareness of officers within agencies assessing complaints which might fall within the terms of the PID Act.

There are a range of alternative legislative and administrative schemes in place in Queensland which permit members of the public to raise concerns, and receive protections when they make a report, about the health and safety of persons with a disability and danger to the environment.

For example, with regard to a report about danger to the health or safety of a person with a disability, depending upon the specific nature of the concerns, matters could be raised with:

- Department of Communities, Child Safety and Disability Services complaints scheme
- Hospital and Health Service complaints schemes
- Office of the Health Ombudsman
- Office of the Public Guardian
- Office of the Public Advocate
- Anti-Discrimination Commission Queensland
- Queensland Police Service
- Queensland Ombudsman
- CCC.

⁴⁸ Refer to section 3.2.1 of this report.

In relation to concerns about danger to the environment, again depending upon the particular circumstances and the nature of the environmental harm, matters could potentially be raised with:

- The local government with responsibility for the location at which the harm is occurring
- Department of Environment and Heritage Protection
- Department of Natural Resources and Mines
- Department of Agriculture and Fisheries (Biosecurity Queensland)
- Department of National Parks, Sport and Racing
- Department of Energy and Water Supply
- Queensland Ombudsman
- Great Barrier Reef Marine Park Authority
- Commonwealth Department of the Environment and Energy.

A person making a complaint to the Queensland Ombudsman or the CCC would attract protection from detriment similar to the protection from reprisal afforded under the PID Act. There are also protections in other complaints mechanisms, for example, for complaints under the *Health Ombudsman Act 2013* and the *Anti-Discrimination Act 1991*.

Submissions

While some submitters considered there was value in retaining the capacity for 'any person' to make a PID under s.12(1)(a), (b) and (c), the majority raised questions about the ongoing utility of these provisions:

Including disclosures regarding the health and safety of a person with a disability is of significant value as it is a further mechanism that can offer a safeguard to some of the most vulnerable members of the community and ensuring that the department is engaging with service providers that provide safe and quality services to its clients.

Department of Communities, Child Safety and Disability Services⁴⁹

Despite the legislative intent to protect disclosers against reprisal, there are limits on what protection and support can be provided to 'any person' who is not a public officer. For this reason, and given minimal reporting by members of the public, the Department questions whether treating these matters as PIDs does in fact help to achieve the stated purpose and objects of the Act.

That said, the Department believes that continuing with 'any person' being able to make a disclosure of reprisal has merit given allegations of reprisal are sometimes made against people who are not public officers (including relatives and associates of the discloser).

Department of Education and Training⁵⁰

Agencies, other than a law enforcement agency, have very limited capacity to provide protection to a person who is not an employee. It may be beneficial to consider under what circumstances a person would require protection if they were to make a disclosure, then assess the risks against what it is that has been alleged. For example if the matter could be a criminal offence, then protection would be available to them as a witness to criminal proceedings by the Qld Police Services or the Crime and Corruption Commission.

Consideration should be given to amending who can make a PID to ensure that a discloser receives protection from the agency that has capacity to provide it. Apart from protecting their identity, public sector agencies have very limited further capacity to protect a non-employee from reprisal.

University of Queensland⁵¹

⁴⁹ Submission 10.

⁵⁰ Submission 22.

⁵¹ Submission 26.

Given the importance of health service complaints, and the sensitive nature of the information and relationships involved in health service delivery the [Health Ombudsman Act 2013] contains a number of protections for notifiers, complainants and people who assist the Health Ombudsman by providing information ... the protections and requirements for managing a complaint provided in the [Health Ombudsman] Act also appear to be contained in the [PID Act], providing a level of duplication.

Office of the Health Ombudsman⁵²

Findings

Given the low numbers of disclosures by members of the public and the alternative complaints schemes available, there would be limited impact from removing the capacity for any person to make a PID in accordance with s.12(1)(a), (b) and (c) of the Act.

The ability for any person to make a PID about reprisal under s.12(1)(d) is considered a core feature of the PID Act and should be maintained.

Recommendation 4

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

4.1.3 Meaning of 'substantial and specific'

Section 13 of the PID Act uses the words 'substantial and specific' when describing some types of public interest information. For example, s.13(1)(c) refers to 'substantial and specific danger to public health and safety' and s.13(1)(d) refers to 'substantial and specific danger to the environment'.

The PID Act provides no further guidance on the meaning or application of the phrase 'substantial and specific'. The *Acts Interpretation Act 1954*⁵³ does not provide any definition of the phrase or the individual words.

There was general support from stakeholders that there should be a threshold of seriousness for disclosures to be assessed as a PID.

Submissions

Feedback from stakeholders reported practical difficulties in using the term 'substantial and specific'. Several agencies indicated further guidance and examples in the legislation would be useful. Agency feedback is outlined below.

Complaint managers report that ambiguity in the PID Act causes a great deal of uncertainty both before and after a complaint is made of reprisal to the Commission. It is suggested that more guidance and examples of terms such as 'substantial and specific', 'confidentiality', 'maladministration', 'detriment' and 'reasonable management action' would provide more certainty. In conciliation, greater certainty would help parties to better analyse and assess the issues, strengths and risks.

Without any guidance in the legislation or case law, parties become entrenched in their own interpretations, making resolution through conciliation more difficult. This then derogates from the

⁵² Submission 23.

⁵³ <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/A/ActsInterpA54.pdf>.

objective of section 44 of the PID Act in providing a low cost remedy for a person who has suffered a reprisal.

...

'Substantial and specific' is a requirement for most of the information that can be the subject of a PID, but there is no guidance or examples of its meaning. Without guidance or examples, the average person may view 'substantial and specific' in a subjective way.

Anti-Discrimination Commission Queensland⁵⁴

Both terms are open to wide subjective interpretations. All other synonyms for substantial and specific would suffer the same difficulty with subjectivity. An objective test should replace the subjective one.

Department of Infrastructure, Local Government and Planning⁵⁵
Department of State Development and Co-ordinator-General⁵⁶

The Department believes that because this term is undefined it is open to interpretation. It is our view the Act should provide more guidance on the meaning of 'substantial and specific' or alternatively reword the definition to ensure greater clarity.

Department of Education and Training⁵⁷

... perhaps consideration could be given to the inclusion of examples that would provide more guidance ... on the meaning of 'substantial and specific' as it relates to Sections 12 and 13 of the PID Act.

Queensland Police Service⁵⁸

More examples of 'substantial' and 'specific', would be beneficial.

Central Queensland Hospital and Health Service⁵⁹

While guidance and examples may assist, this would be appropriate in supporting tools or training rather than the PID Act. The usual meaning should continue to be applied, as is the case with other terms within related ethical-based legislation – should it become too specific it may restrict, and therefore impact, the application of the PID Act.

Department of Natural Resources and Mines and
Department of Energy and Water Supply⁶⁰

Findings

The terms, 'substantial' and 'specific' are difficult to apply consistently when assessing purported PIDs to determine whether they comply with the provisions of the PID Act. The evidence from the submissions indicates that agencies experience difficulty in interpreting and applying those sections of the PID Act which use these terms. This would suggest that different agencies and different decision-makers may assess purported PIDs differently, potentially resulting in considerable inconsistency in the application of the PID Act.

However, there is also a danger that the PID Act be written so narrowly that it becomes excessively prescriptive and cannot be applied to the broad range of possible circumstances in which PIDs may occur and require assessment.

⁵⁴ Submission 11.

⁵⁵ Submission 1.

⁵⁶ Submission 2.

⁵⁷ Submission 22.

⁵⁸ Submission 3.

⁵⁹ Submission 12.

⁶⁰ Submission 24.

It would be beneficial to incorporate within the PID Act descriptions of the information that may be disclosed (Part 2, Division 1) that are more objective and less open to individual interpretation. In addition, or alternatively, examples could be cited that will assist agency officers responsible for interpreting and applying the PID Act.

As a minimum, definitions of key terms not currently referenced in the dictionary to the PID Act (Schedule 4), in particular 'substantial' and 'specific', should be included. This would promote more consistent assessment of matters and simplify application of the PID Act.

Recommendation 5

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

Recommendation 6

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

4.1.4 Dealing with public officer complaints about matters that are substantially workplace complaints or grievances

Under s.13(1)(a)(ii) of the PID Act, a public officer may make a PID about 'maladministration that adversely affects a person's interests in a substantial and specific way'. Experience has shown that this provision is regularly used to make PIDs concerning matters that are substantially individual workplace complaints or grievances. This presents a number of challenges, including:

- balancing matters of fundamentally personal or private interest with the objective of the PID Act which is to facilitate disclosures of wrongdoing in the public interest
- assessing matters where there is overlap with other processes, for example, grievance procedures, discrimination complaints, workers' compensation claims and Queensland Industrial Relations Commission proceedings
- delays in formally investigating matters which are often suited to immediate informal resolution.

The Review of the Commonwealth PID Act has identified a similar challenge whereby, due to the framing of that Act, a significant number of PIDs 'concerned issues like workplace bullying, harassment, forms of disrespect from colleagues or managers, or minor allegations of wrongdoing'.⁶¹ Other state's PID legislation, including NT and NSW, do not allow PIDs from public officers about matters that are substantially workplace grievance matters.

Submissions

The issues paper invited respondents to consider whether a public interest test should be applied to disclosures by public officers that are substantially workplace grievances. There was support for the view that workplace complaints should not be PIDs unless there is some additional feature of systemic maladministration or public interest.

⁶¹ Review of the Public Interest Disclosure Act 2013, Mr Phillip Moss AM, 15 July 2016
<https://www.dpmc.gov.au/resource-centre/government/review-public-interest-disclosure-act-2013>, p.30.

The term ‘maladministration’, although defined in the Act, is broad and allows for the inclusion of matters that may be solely in the personal interest of the discloser and not the department or public service generally. For this reason, the Department concurs with the idea raised in the issues paper that consideration be given to adding a ‘public interest’ test for disclosures by public sector officers that are substantially workplace complaints. However, should such a term be introduced, it would require definition to facilitate unambiguous assessment.

Department of Education and Training⁶²

Complainants sometimes seek to lodge a PID about circumstances which affect them personally – i.e. substantially workplace complaints concerning themselves, but not others; however, an individual’s dissatisfaction with their own workplace circumstances is unlikely to be a matter in the public interest (i.e. unlikely to be a PID).

Queensland University of Technology⁶³

... one of the concerns with this legislation is that it may be used by disgruntled staff to target specific managers or the organisation generally. In this regard one is not dealing with those who act in bad faith. There are also employees who ‘crusade’ often in relation to historical grievances and who fervently believe in the righteousness of their actions. Having a public interest test as part of the assessment would assist in being able to exclude these types of personal vendettas from the ambit of the PID.

Darling Downs Hospital and Health Service⁶⁴

There was general support that a ‘public interest test’ should be applied to s.13(1)(a)(ii) of the PID Act:

Yes, the inclusion of a public interest test for maladministration could be beneficial as the definition is too broad and captures issues not intended by legislation.

University of Queensland⁶⁵

Yes. Failure to undertake this process results in a protracted period of investigation into what should have been dealt with through internal processes.

Logan City Council⁶⁶

There was also concern that any public interest should still permit discretion on the part of an agency to assess a matter as a PID where there were grounds to do so:

An agency should not be limited in its ability to afford PID status to a person who makes a disclosure that does not meet the current criteria in sections 12 and/or 13 of the PID Act, but that warrants protection because of the significance of the disclosure (such as an allegation of severe sexual harassment) and the associated circumstances indicate there is a reasonable likelihood that the discloser could be subject to a substantial and specific detriment.

Department of Environment and Heritage Protection⁶⁷
Department of National Parks, Sport and Racing⁶⁸

Findings

The objects of the PID Act are focused on facilitating PIDs of wrongdoing in the public interest. Workplace complaints and grievances, by their very nature, frequently concern the private or personal interests of a single individual. There are other mechanisms, both administrative and statutory, that public sector officers can utilise to address workplace complaints and grievances.

⁶² Submission 22.

⁶³ Submission 5.

⁶⁴ Submission 21.

⁶⁵ Submission 26.

⁶⁶ Submission 9.

⁶⁷ Submission 8.

⁶⁸ Submission 16.

Depending upon the particular nature of the concern, these could include raising the matter through:

- their public sector employer's employee complaints management process
- complaint to the Ombudsman under the *Ombudsman Act 2001*
- complaint to the ADCQ under the *Anti-Discrimination Act 1991*
- appeal to the Queensland Industrial Relations Commission under the *Public Service Act 2008*.

However, as noted in the Review of the Commonwealth PID Act:

Occasionally, a personal employment-related grievance can be symptomatic of a larger, systemic concern such as discriminatory employment practices or nepotism. Such concerns should attract the protection of the PID Act.⁶⁹

There are a number of options available to address the challenge of focusing legislation on disclosures of wrongdoing that are in the public interest rather than purely private interest. As discussed in the NSW Ombudsman Factsheet on 'Public Interest',⁷⁰ 'what is in the 'public interest' is incapable of precise definition as there is no single and immutable public interest'. A 'public interest test' which purely seeks to exclude workplace complaints or grievances on the basis that there is no or limited 'public interest' in the matter raised has the potential to exclude disclosures that could in fact lead to identification of broader systemic concerns.

Limiting the use of the PID Act as an alternative vehicle for raising individual concerns needs to be balanced with the objective of ensuring that matters where there is a broader public interest in the disclosure are identified.

This balance may be achieved by amending s.13(1)(ii) of the Act to:

- exclude matters that solely concern personal workplace grievances, and
- permit the exercise of discretion on the part of a proper authority to accept a disclosure that solely concerns a personal workplace grievance if in the circumstances it is reasonable to do so.

This will allow for circumstances where a disclosure of a personal workplace grievance is indicative of a wider systemic issue, or where there are grounds to afford the discloser the protections available under the PID Act due to the particular circumstances of the matter.

Recommendation 7

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

4.1.5 Public officers reporting role-related PIDs

Section 13 of the PID Act provides that PIDs may be made by public officers. However, the PID Act does not explicitly provide for disclosures which arise in the context of an officer's employment ('role-related' PIDs). These can arise where officers have a higher likelihood of identifying 'public interest information' in the performance of their ordinary duties (for example, an auditor making a disclosure of corrupt conduct based on information they have identified

⁶⁹ Review of the Public Interest Disclosure Act 2013, Mr Phillip Moss AM, 15 July 2016

<https://www.dpmc.gov.au/resource-centre/government/review-public-interest-disclosure-act-2013>, p.32.

⁷⁰ NSW Ombudsman Fact Sheet 16: Public Interest published March 2012 <http://www.ombo.nsw.gov.au/news-and-publications/publications/fact-sheets/state-and-local-government/public-interest> .

during an audit or an investigator making a disclosure of maladministration based on information they identified during the conduct of a complaint investigation).

Submissions

Some submitters considered that it would be useful to make it clearer in the PID Act that a disclosure to a proper authority of information obtained in the normal course of an officer's duties is a PID and should be recognised and treated accordingly.

Sections 12 and 13 of the Act provide that PIDs may be made by public officers but do not specifically provide for disclosures in the normal course of employment. The Department has encountered queries and in some cases resistance from staff members who 'reported' PIDs as part of their normal role (including auditors, Principals mandatorily reporting student harm, internal investigators who themselves uncover further alleged wrongdoing). The Department believes the Act would benefit from specific mention that a PID includes a disclosure by a person as part of their normal course of employment.

Department of Education and Training⁷¹

If the circumstances indicate that a discloser could be subject to a substantial and specific detriment, even if they do so in the course of performing their duties, the option of PID protection should extend to them as well.

Department of Environment and Heritage Protection⁷²
Department of National Parks, Sport and Racing⁷³

Some submitters, while supportive of specifically recognising role-related PIDs in the PID Act, considered they should be dealt with differently to other PIDs:

... the University would support the Act being more explicit about disclosures that are made in the normal course of a public officer's job. For example if a matter is brought to the attention of the agency through an audit and subsequently assessed as a PID the tasks of assessing, protecting and providing updates to the auditor appears unnecessary. However, if there is a risk of reprisal then the matter should be dealt with in accordance with the PID policy and procedures of the agency.

University of Queensland⁷⁴

That would clear up any doubt for officers whose duty it is to report such matters as part of their normal duties ... There should be acknowledgment that such matters will follow a different path in both the Act and the PID Standard.

Department of Infrastructure, Local Government and Planning⁷⁵
Department of State Development and Co-ordinator-General⁷⁶

Role related disclosures made by a person in the normal course of employment (such as disclosures by Governance and HR officers arising from information they obtain in performance of their roles) could potentially have a reduced administrative process applied in the treatment of those officers as disclosers. This may include simplifying the process of notification of protections to those disclosers and the case closure processes.

Queensland Rail⁷⁷

The PID Act should be more specific in the requirements around a Department's management of disclosures that occur within the normal course of a public officer's duties ... Consideration should

⁷¹ Submission 22.

⁷² Submission 8.

⁷³ Submission 16.

⁷⁴ Submission 26.

⁷⁵ Submission 1.

⁷⁶ Submission 2.

⁷⁷ Submission 18.

be given to, where reprisal is unlikely and the disclosure is made in the normal course of duties, what PID administrative requirements are required, if any.

Queensland Health⁷⁸

Others considered that the intention of the PID Act was already sufficiently clear:

It is already clear that any public officer can make a public interest disclosure to a proper authority. The fact that concerns arise through a public officer's normal course of employment is to be expected. PIDs are often made because a public officer becomes concerned about something which arises through the course of their employment.

Queensland University of Technology⁷⁹

This has been an area of uncertainty over the years, particularly in early implementation of the PID Act, however it is considered that the provisions surrounding disclosures in the normal course of a public officer's duty are now well understood. For the purposes of clarity providing more guidance in the PID Act may assist for future PIDs and assessors.

...

It is considered that the current provisions are appropriate, whereby risk assessment for reprisal is applied accordingly, and therefore allows for a proportionate and appropriate management and response. The appropriate management is considered a matter for the PID Coordinator, or contact officer, to consult with the disclosure [sic], consider the context and particulars, and manage this appropriately. Restricting or change provisions specific for role-related PIDs may limit protections that were otherwise appropriate or required for that particular case, and rather maintaining the provisions allows for flexible and appropriate management.

Department of Natural Resources and Mines and
Department of Energy and Water Supply⁸⁰

One submitter questioned the application of the PID Act where there is a 'management responsibility' to report or a disclosure is made arising from the performance of the officer's duties:

It is Council's view that any employee with managerial/supervisory responsibilities should not be able to rely on the application of the PID Act because they are raising allegations of corrupt conduct about employees they manage. In Council's view this is an inherent part of a manager's or supervisor's role and the responsibility for reporting corrupt conduct should be exercised as required and without the protection of the Act.

...

It is Council's view that the Act needs to be more specific on the topic of how role-related PIDs should be managed. For example: If a Manager conducts an audit and uncovers corrupt conduct by their Director, should the auditor (Manager) be afforded PID protection?

City of Gold Coast Council⁸¹

Findings

There is broad support for clarifying the PID Act to include circumstances where a public officer makes a disclosure of information falling within the definition of a PID, where that information came to their knowledge through the ordinary course of the performance of their duties. This would resolve an area of apparent confusion and provide clarity both for public sector officers and those responsible for administering the PID Act.

⁷⁸ Submission 19.

⁷⁹ Submission 5.

⁸⁰ Submission 24.

⁸¹ Submission 4.

Notwithstanding the views of some agencies that role-related PIDs comprise a separate class of PIDs that should be treated differently from other PIDs, I see no strong case for public sector entities not following the same approach required for managing other disclosures. Further, the discloser should be afforded the same protection from reprisal afforded by Chapter 4 of the PID Act.

The PID Act does not constrain agencies as to how a disclosure is assessed or investigated, other than that it be 'properly assessed and, when appropriate, properly investigated and dealt with'.⁸² Therefore, agencies retain the discretion to manage the content of the disclosure as appropriate to each circumstance.

While it may be that disclosers of role-related PIDs are not at the same risk of reprisal as others, this will, unfortunately, not always be the case. Taking into account the broad definition of detriment in the PID Act,⁸³ supervisors and managers, internal auditors and others who are more likely to be in a position to make role-related PIDs are potentially as much at risk of reprisal as any other discloser. Risk of reprisal for a particular discloser, and the actions required to manage that risk, are matters that should be considered on a case-by-case basis by an agency as required under s.6.6 of the PID Standard.

The intent of the PID Act is to provide broad protection from reprisal for all disclosers.

Recommendation 8

The PID Act should be amended to expressly state that a disclosure by a public officer includes a disclosure of information falling within the definition of a PID that is made by the officer in the ordinary course of the officer's performance of their duties.

4.1.6 Employment arrangements for public officers

Section 7(1) of the PID Act provides that 'a public officer, of a public sector entity, is an employee, member or officer of the entity'. This has been interpreted as including officers employed on a permanent, temporary or casual basis but not including volunteers and contractors.⁸⁴

The definition of 'public officer' in the PID Act is effectively the same definition used in the repealed *Whistleblowers Protection Act 1994*, and does not reflect the current reality that public sector functions may be performed by contractors and employees of contracted agencies, often side-by-side with public sector officers and employees. It also does not acknowledge the role of volunteers, trainees, interns, work-experience students and others who undertake duties within public sector workplaces without remuneration or as part of their professional development or training.

If a public officer makes a disclosure of information that is encompassed by s.13, the PID Act applies. However, if a contractor discloses the same information, the PID protection does not apply (although in some circumstances other protections may take effect). This creates a disincentive to disclose wrongdoing and inequity with respect to available protections between persons potentially working side by side as colleagues.

A similar issue arises when students and volunteers are in employment-like arrangements. For example, a student doctor or nurse working in a hospital (while on a university placement), will not have the protection under the PID Act that an employed doctor or nurse has. A student

⁸² Refer to s.28(1)(b).

⁸³ Refer to the definition at Schedule 4.

⁸⁴ Crime and Misconduct Commission, Queensland Ombudsman and Public Service Commission, *Managing a public interest disclosure program: a guide for public sector organisations*, p.48.

health practitioner is potentially likely to have access to information about wrongdoing or risk to the health and safety of patients, but may perceive themselves at greater risk of reprisal given their junior status and supervision arrangements. Likewise, a volunteer providing emergency services is currently not afforded protection under the PID Act if they make a disclosure of information about wrongdoing, while the paid colleague they work alongside is.

Brown et al⁸⁵ focus on the key principles which should be present in best-practice legislation. As context for their discussion of principles they comment:

... the focus of whistleblowing legislation is to detail the special measures required for protecting and managing people internal to an organisation who possess crucial information about internal wrongdoing, but who face great incentives against revealing it ... The principles are designed to apply to any employee, contractor or other person working in a public sector agency.

Transparency International, an international anti-corruption advocacy agency, in its publication 'International Principles for Whistleblower Legislation',⁸⁶ considers that best practice whistleblower protection legislation should encompass a broad definition of 'whistleblower':

4. *Broad definition of whistleblower* – a whistleblower is any public- or private sector employee or worker who discloses information ... and who is at risk of retribution. This includes individuals who are outside the traditional employee-employer relationship, such as consultants, contractors, trainees/interns, volunteers, student workers, temporary workers and former employees.

A diversity of approaches is employed within PID legislation across the Commonwealth and other state and territory jurisdictions. The Commonwealth PID Act⁸⁷ explicitly covers any individual who is a contracted service provider and employees of contracted service providers, or a person who provides direct or indirect services for a Commonwealth contract. Uniquely, the Commonwealth PID Act permits an authorised officer to determine that a person who does not otherwise meet the definition of 'public officer' be treated as a public officer for the purposes of making a disclosure.⁸⁸

The NSW PID Act⁸⁹ defines 'public official' broadly as 'an individual who is an employee of or otherwise in the service of a public authority', with a number of specific inclusions, as well as individuals engaged under a contract of service with a public authority, contracted organisations and their employees. The NSW PID Act explicitly states that it includes volunteers engaged in activities in the public interest (officers and members of rural fire brigades and SES units), private sector employees fulfilling legislative functions (e.g. RSPCA inspectors), and employees of private sector entities contracted to the public sector (e.g. employees of a company managing a correctional centre).

The ACT PID Act⁹⁰ uses a simple but comprehensive definition which encompasses all persons internal to a public agency. It concisely captures employees, contractors, employees of contractors and volunteers 'exercising a function of the public sector entity'.

Submissions

Stakeholder feedback was generally supportive of widening the definition of 'public officer' to include volunteers, contractors and those working with 'public officers' under employment-like arrangements.

The following comments demonstrate the arguments in support:

⁸⁵ AJ Brown, Paul Latimer, John McMillan and Chris Wheeler, Best-practice whistleblowing legislation for the public sector: the key principles, *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations*, Editor AJ Brown, ANU E Press, 2008, pp.266-267.

⁸⁶ http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation.

⁸⁷ *Public Interest Disclosure Act 2013*.

⁸⁸ Refer to s.70 *Public Interest Disclosure Act 2013*.

⁸⁹ *Public Interest Disclosure Act 1994* (NSW).

⁹⁰ *Public Interest Disclosure Act 2012* (ACT).

... volunteers and contractors are exposed to the same working conditions as employees on the payroll system and thus should be protected in the same manner. Further a widening of the Act to include volunteers and contractors will align with the Crime and Corruption Act.

Council of the City of Gold Coast⁹¹

While contractors and volunteers are not employed by an agency, they often work in agency locations and with agency employees. Consequently they are often well-placed to become privy to information and/or behaviour that may be reflective of corrupt conduct and/or maladministration. In those circumstances, a contractor or volunteer is as likely to experience a reprisal as a public officer.

Department of Environment and Heritage Protection⁹²
Department of National Parks, Sport and Racing⁹³

The *PID Act* should be widened to include volunteers and contractors which would then align the PID and the Hospital and Health Boards Act where a “designated person” includes volunteers and contractors.

Central Queensland Hospital and Health Service⁹⁴

A small number of submitters raised concerns about broadening the definition of ‘public officer’:

Public sector entities are able to provide protections to their own officers because they have direct influence over the workplace circumstances of those people. Accordingly, entities have jurisdiction to relocate those individuals if appropriate, approve leave or other special arrangements and keep the identity of the person (and the reasons for any changes to their workplace circumstances) confidential; therefore the protections which an entity can offer to persons who are not their officers may be limited. Further, consultation about protections may be required with parties outside of the organisation (e.g. the discloser’s external line management, in the case of contractors), reducing the ability of the organisation to keep the discloser’s identity confidential. If, however, the definition was widened, the Act should be clear that any protections put in place by an entity only concern those matters which are logically within the entity’s jurisdiction and that there would be no liability to put arrangements in place elsewhere.

Queensland University of Technology⁹⁵

The University does not support the Act being widened to include volunteers. Whilst every person that has a relationship with a public sector agency should be protected from inappropriate behaviour, extending the PID definition to include volunteers may result in:

- Distortion of annual PID statistics.
- Increased obligations on agencies to manage additional PIDs.
- Incur additional costs of managing and investigating PIDs.
- Create unrealistic challenges to manage PIDs in complex scenarios.

Consideration should be given to broadening the definition to include contractors who provide services to the agency.

The University of Queensland⁹⁶

The views of entities with significant volunteer engagement were obtained during the course of the review. The Director-General of the Department of Education and Training stated in his response to the issues paper:

⁹¹ Submission 4.

⁹² Submission 8.

⁹³ Submission 16.

⁹⁴ Submission 12.

⁹⁵ Submission 5.

⁹⁶ Submission 26.

Section 7(1) of the Act provides that 'a public officer, of a public entity, is an employee, member or officer of an entity'. This has been interpreted as including officers employed on a permanent, temporary or casual basis, but not including volunteers and contractors. From the Department's perspective, volunteers play an important and active role in our schools by assisting staff in a range of areas and by helping foster a partnership between home, school and the community. For this reason, the Department supports the view that the definition of 'public officer' in the Act be widened to include volunteers.⁹⁷

In response to the issues paper, Queensland Health stated:

The department agrees the definition of public officer, as it relates to the provisions of the PID Act, should be extended to include contractors, volunteers and students working with 'public officers' under employment-like arrangements (similar to NSW PID legislation).

This would assist those students and volunteers providing health care whilst working within hospitals, Ambulance services and other health care placements to disclose wrongdoing within the workplace.⁹⁸

Queensland Fire and Emergency Services has a large volunteer workforce with 'approximately 42,000 dedicated volunteers across the state in the SES, RFS, research and Scientific Branch network and Technical Rescue Unit'.⁹⁹ In response to an invitation to comment on the implications of the broadening of the definition of 'public officer', the then Acting Commissioner wrote:

Queensland Fire and Emergency Services (QFES) has a significant volunteer workforce that performs 'employment-like' duties in both the Rural Fire Service and the State Emergency Service.

Despite the additional QFES resources required to assess and manage the increase in disclosures likely following expansion of the scope and coverage of the PID Act, I consider this will be outweighed by the likely benefits ... in volunteers receiving the benefit of the protections provided in the PID Act for making a disclosure.

Accordingly, I support your recommendation to expand the term 'public officer' in the PID Act to include volunteers, contractors, students and unpaid trainees.¹⁰⁰

Findings

There is general support among submitters, and from those agencies and parties consulted during the review, for widening the definition of 'public officer' at s.7 of the PID Act to include volunteers, contractors and those working with public officers in employment-like arrangements. The term 'public officer' should be defined so as to cover all persons engaged in performing duties within or for a public sector entity, whether permanent or temporary, full-time, part-time or casual, whether for payment or not. This should include students, trainees, interns and others engaged in professional development or work-experience placements.

The PID Act and the PID Standard require agencies to 'offer protection from reprisals',¹⁰¹ conduct a risk assessment and 'ensure protective measures are in place which are proportionate to the risk of reprisal, and the potential consequences of reprisal'. The existing framework provides sufficient flexibility to develop a protection plan suited to the individual situation of the discloser, regardless of their employment circumstances.

Given the increasing use of contract service arrangements within the public sector, the definition of 'public officer' should also be extended to include persons engaged under a contract of

⁹⁷ Submission 22.

⁹⁸ Submission 19.

⁹⁹ Queensland Fire and Emergency Service 2015-16 Annual Report, p.16.

¹⁰⁰ Letter dated 25 October 2016 from Mark Roche AFSM, Acting Commissioner, Queensland Fire and Emergency Services.

¹⁰¹ Refer to s.28(1)(e).

service as well as individuals and organisations engaged under contracts for service (as well as the employees of such contracted organisations).

Widening the definition of 'public officer' in the PID Act would:

- promote the objects of the Act by facilitating disclosures of wrongdoing in the public sector by those engaged in performing a function in or for a public sector agency
- support a pro-disclosure culture within public sector agencies
- provide more equitable access to PID protections
- simplify the assessment of disclosures for agencies
- improve consistency with practice in other Australian jurisdictions.

It is acknowledged that broadening the definition of 'public officer' in the manner proposed is likely to have the consequence of increasing the number of PIDs made annually to proper authorities under the PID Act.

It is considered that the benefits of expanding the protections of the PID Act to all those engaged within public sector agencies outweigh the potential costs of dealing with additional PIDs which may arise.

Recommendation 9

The definition of 'public officer' at s.7 of the PID Act should be amended to encompass all persons performing duties in and for public sector entities, whether paid or unpaid, so as to include volunteers, contractors (including the employees of organisations engaged under contracts for service), trainees, students and others in employment-like arrangements in the public sector.

4.1.7 Post-employment considerations for public officers

The PID Act is currently silent about employment separation and PID protections. The issues paper raised the question of whether the PID Act should be more explicit about how disclosures by former public officers should be managed.

A public officer concerned about reprisal if they make a PID while still an employee of a public sector entity may choose to disclose information immediately prior to or at the time their employment with that entity concludes, in order to minimise or manage the risks of reprisal.

Submissions

There was support from submitters for extending 'public officer' status to people who have recently left public sector employment:

PID should be applied post-employment for a specified timeframe e.g. 2 years. This is particularly important as some whistleblowers nearing retirement etc. may be reluctant to report even with PID protections, as they fear potential financial loss/punishment.

Central Queensland Hospital and Health Service¹⁰²

The majority of submitters who commented indicated that there is a lack of clarity in terms of how to apply the PID Act with respect to former public officers:

¹⁰² Submission 12.

It is Council's view that the PID Act could be more detailed on the issue of employment separation and PID protections.

Council of the City of Gold Coast¹⁰³

There was also support for the view that public officers who make PIDs should continue to receive protection after their employment ceases:

Protections under the Act should remain as many former officers re-enter or transfer around the sector and reprisal risk may remain due to relationships and professional networks within the sector.

Department of Infrastructure, Local Government and Planning¹⁰⁴
Department of State Development and Co-ordinator-General¹⁰⁵

Some submitters noted that there are practical considerations with respect to what action an agency can take to manage the risk of reprisal or prevent the taking of a reprisal against a discloser once they have left the agency's employment:

Public sector entities are able to provide protections to their own officers because they have direct influence over the workplace circumstances of those people. Where an officer has departed the organisation, the public sector entity no longer has this influence and any protections put in place by the entity could only concern those matters which are logically within the entity's jurisdiction.

Queensland University of Technology¹⁰⁶

Findings

Extending the definition of 'public officer' in the PID Act to encompass former officers, even for a finite timeframe, would build confidence among public officers and encourage them to make disclosures. This in turn would benefit public sector entities by encouraging disclosures to be made, and potentially preventing a continuation of any wrongdoing that is subsequently identified.

It would also motivate former public officers to make PIDs about information that was not previously disclosed during their employment. This could not only bring to light new information but potentially assist entities investigating a PID by a current public officer. It is recognised that such a change could raise practical concerns for entities about risk assessment and risk management of reprisal.

Providing a post-employment timeframe within which a former public officer may make a PID would be consistent with the provisions in other legislation. For example, under the *Ombudsman Act 2001*, a complaint must be made within '1 year after the day the complainant first had notice of the action' complained about.¹⁰⁷ Under the *Anti-Discrimination Act 1991*, 'a person is only entitled to make a complaint within 1 year of the alleged contravention of the Act'.¹⁰⁸ Both these Acts provide for exceptions in special circumstances.

Any former public officer who has made a PID, regardless of the time that has passed since their employment would, if they considered they were subject to reprisal under s.40 of the PID Act, be able to make a PID under s.12(1)(d).

As discussed above, concerns about the ability of an agency to protect a former employee from a risk of reprisal suggest a deficit in information and training rather than in the legislation. For a former employee who is not a client of the agency and has no ongoing engagement with their former employer there is likely to be limited risk. Where there is a risk, the existing framework provides scope for an individualised protection plan based on the particular case circumstances.

¹⁰³ Submission 4.

¹⁰⁴ Submission 1.

¹⁰⁵ Submission 2.

¹⁰⁶ Submission 5.

¹⁰⁷ Refer to s.20(1)(c) <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/O/OmbudsA01.pdf>.

¹⁰⁸ Refer to s.138(1) <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/A/AntiDiscrimA91.pdf>.

Recommendation 10

The PID Act should be amended to provide that the Act continues to apply to a 'public officer' for up to 12 months after separation from employment (or termination of their appointment as a contractor, or the end of their engagement as a volunteer, student or similar), for the purpose of making a PID and receiving the protections under the PID Act.

4.2 *How PIDs are made*

4.2.1 *Who can receive a PID*

The PID Act articulates a decentralised model to give a discloser options to whom they may make a PID.

Chapter 2, Part 2, Division 2 of the PID Act establishes a range of persons or entities who may receive a PID. Division 3 sets out how a disclosure may be made.

Section 15 provides that a public sector entity is a proper authority to which a disclosure may be made if the information which is the subject of the disclosure relates to the conduct of the entity or any of its public officers, anything the entity has the power to investigate or remedy, or concerns reprisal relating to a previous disclosure.

Under s.17, a PID may be made to 'a proper authority' in any way including anonymously. A disclosure can be made to the chief executive officer of a public sector entity, a person who directly, or indirectly, supervises or manages the discloser or a person who has the function of receiving or taking action on the type of information being disclosed (such as an ethical standards officer).

A disclosure may be made to a Minister, if the Minister is responsible for the administration of the department. If the proper authority is a public sector entity with a governing body it may be made to a member of its governing body. Under s.14 a PID may also be made to a member of the Legislative Assembly. The effect of these provisions is that a discloser has numerous alternatives regarding to whom they may make a disclosure.

As noted in the recent review of the Commonwealth PID Act:¹⁰⁹

Some states and territories have a strongly centralised model in which one body assesses, and may even investigate all PIDs. Variations of this approach have been adopted in VIC and the NT and were recommended in SA. These jurisdictions identified their centralised model as key to ensuring consistent treatment of PIDs. They saw it as a way to ensure that their legislation targets the kind of wrongdoing it is intended to address and limits the administrative burden on smaller agencies.

Submissions

Responses to the issues paper highlighted both advantages and disadvantages of the current model operating under the PID Act:

Providing multiple options for reporting a PID allows disclosers to choose a path they feel is appropriate and offers the greatest level of protection. The Ombudsman may wish to consider clarifying the current section 17 that states if an agency has a reasonable procedure for making a PID that avenue must be used, however the following subsection provides a list of other avenues a discloser may contact. The University believes the primary advantage is making the process as easy as possible for the discloser. However, providing a number of options does rely on a collaborative relationship between reporting agencies to ensure PIDs are provided to the investigative agency in a prompt and efficient manner.

University of Queensland¹¹⁰

¹⁰⁹ Review of the Public Interest Disclosure Act 2013, Mr Phillip Moss AM, 15 July 2016

<https://www.dpmc.gov.au/resource-centre/government/review-public-interest-disclosure-act-2013>, p.27-28.

¹¹⁰ Submission 26.

This provides the disclosure [sic] with flexibility for reporting a PID, which facilitates in the reporting of wrongdoing, a key objective of the PID Act ... This is also advantageous in smaller sized entities due to confidentiality and the types of disclosures being made.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹¹¹

This increases the risk that a PID may be incorrectly assessed or dismissed as many managers do not have a sufficient level of skill or experience to properly identify and deal with a PID. Advantages – multiple options for disclosers to report matters, increases ability for a discloser to preserve anonymity. Disadvantages – increases risks for agencies of incorrect identification and assessment, loss of key information and risk of loss of confidentiality if the matter passes through many hands.

Department of Infrastructure, Local Government and Planning¹¹²
Department of State Development and Co-ordinator-General¹¹³

It is Council's view that having various reporting avenues open to employees can cause confusion. There are a variety of compaction [sic] issues that make "options reporting" problematic such as inconsistent advice, a higher possibility of information being potentially mismanaged, passage of time delays and confusion. It is Council's view that the Queensland Ombudsman's Office should create a procedure that outlines how a PID is to be managed, thus ensuring certainty for the discloser and consistency across the public sector.

Council of the City of Gold Coast¹¹⁴

One disadvantage is that more people may be appraised about the PID than necessary. For example, if a discloser lodges a PID with a member of an entity's governing body, it is likely that the member (or their executive support staff) will refer the matter down the chain of command. The matter may be brought to the attention of several parties before it reaches the person in the organisation who is responsible for managing PIDs.

Queensland University of Technology¹¹⁵

There is currently no single point of contact for disclosers. Disclosers may be unsure of where to report; a single point of contact to deal with all PIDs independently would simplify and improve transparency. Advantage – more options of who they can report a PID to. Disadvantage – May not be handled appropriately. No consistent approach across the state as to how these matters are handled.

Central Queensland Hospital and Health Service¹¹⁶

In the submission in response to the issues paper from the Queensland Audit Office,¹¹⁷ the Auditor-General highlighted an issue in relation to s.19 of the PID Act which limits the application of the PID Act with respect to a Government Owned Corporation (GOC) or rail government entity. Section 6 of the PID Act excludes a GOC from the definition of a 'public sector entity', and a 'public officer' is defined at s.7 by reference to their role as an employee of a public sector entity. Therefore, currently, an employee of a GOC or rail government entity may only make a PID under s.12 (any person) or under s.19.

Section 19 limits an employee of a GOC or rail government entity to making a PID of corrupt conduct or reprisal to the GOC, rail entity or the CCC. The Auditor-General proposed that the PID Act be amended to include the Queensland Audit Office as a proper authority for GOC PIDs under s.19.

¹¹¹ Submission 24.

¹¹² Submission 1.

¹¹³ Submission 2.

¹¹⁴ Submission 4.

¹¹⁵ Submission 5.

¹¹⁶ Submission 12.

¹¹⁷ Submission 13.

Findings

I consider there are advantages to the ‘no wrong doors’¹¹⁸ approach, which affords disclosers multiple options both internally and externally through which they can make their disclosure. Therefore, I am supportive of a decentralised model for making and receiving PIDs.

Providing multiple options for a discloser to make a PID helps to overcome the reticence in coming forward that a discloser, apprehensive about reprisal, may experience. Such an approach is not dependent on the discloser having detailed knowledge of the provisions of the PID Act, but places the responsibility on public sector entities to ensure recipients of PIDs are adequately informed about how to receive and respond to them.

Given the substantial diversity in the size and nature of public sector entities across Queensland, a single prescriptive model is unlikely to be satisfactory to all agencies. The current approach allows agencies flexibility, while not preventing them from implementing centralised internal PID management regimes if that is considered desirable.

The most significant disadvantage of the decentralised model is the reliance on supervisors, managers and officers of the entity who have ‘the function of receiving or taking action on the type of information being disclosed’.¹¹⁹ To effectively respond to a PID, those officers must have knowledge of the PID Act, understanding of the public sector agency’s PID policy and procedures, the capacity to identify a PID, and awareness of the internal resources available to support disclosers as well as to assist them in taking action in relation to a PID.

While s.28 of the PID Act requires that chief executive officers must establish reasonable procedures to deal with PIDs, and must publish those procedures on a publicly accessible website, there is no legislative obligation on an agency to ensure that its staff are informed of the procedures, much less those officers who are responsible for implementing them.

The PID Standard states that, as a minimum, a management program developed under s.28(d) of the PID Act should include a training strategy. While s.60 of the PID Act provides that a standard issued by the oversight agency is binding on a public sector entity, a standard does not carry the same weight as the Act.

Recommendation 11

The PID Act should continue to provide multiple pathways for a PID to be made and allow disclosers to choose to whom they make their disclosure.

Recommendation 12

Section 28(1) of the PID Act should be amended to require that chief executive officers of public sector entities ensure that public officers are provided with information about their rights and responsibilities under the PID Act.

Recommendation 13

Section 28(1) of the PID Act should be amended to require that chief executive officers of public sector entities ensure that supervisors, managers and other officers with responsibility for receiving and assessing disclosures are provided with appropriate training to fulfil their responsibilities.

¹¹⁸ Review of the Public Interest Disclosure Act 2013, Mr Phillip Moss AM, 15 July 2016

<https://www.dpmc.gov.au/resource-centre/government/review-public-interest-disclosure-act-2013>, p.26.

¹¹⁹ Refer to s.17(3)(e).

As discussed above, Section 19 limits an employee of a GOC or rail entity to making a PID of corrupt conduct or reprisal to the GOC, rail entity or the CCC.

Given the role of the Auditor-General includes receiving concerns about financial mismanagement about GOCs, I consider the Auditor-General's submission that the Auditor-General also be a 'proper authority' for disclosures has merit.

Recommendation 14

Section 19(2) of the PID Act should be amended to allow an employee of a GOC or rail government entity to make a disclosure to the Auditor-General, in addition to the GOC, rail government entity and the Crime and Corruption Commission.

4.2.2 Managing PIDs to multiple agencies

Under s.15 of the PID Act, a public officer may make a PID to their own agency and also to an investigative agency. This is considered to be an important option for encouraging disclosers to make a PID. There is no obligation to report internally first.

Given the subjective process of assessing a complaint, it is possible that the two agencies concerned could assess the same matter differently. The agencies may then follow different processes to manage the matter which raises questions about how any subsequent allegation of reprisal would be managed.

Submissions

Some submitters argued in favour of disclosers having the option to make a PID to multiple agencies despite the potential that different agencies may deal with the matter inconsistently, which may expose the discloser to risk of reprisal:

I think it is important to provide disclosers with an option to report to an agency not connected to the subject organisation. I expect the incidence of multiple investigations and separate outcomes would be low and not insurmountable in terms of managing complaints of reprisal.

Darling Downs Hospital and Health Service¹²⁰

On the question of multiple pathways for reporting a public interest disclosure, and the suggestion that different agencies may follow different processes to manage the matter, thus raising the question about how any subsequent allegation of reprisal would be managed – it is noted that over the last three years of the PID Act's operation, PID's about reprisal action account for less than 2% of reported PIDs. Given the low incidences of reported reprisals the QPS does not consider this is a systemic issue requiring further work.

Queensland Police Service¹²¹

The majority of submissions on this issue did highlight challenges when two or more agencies are involved in dealing with a PID. Many of these also offered possible solutions to address these challenges, which generally focused on the themes of encouraging internal reporting, making the agency with responsibility for the subject matter of the PID responsible for initial assessment and management of the PID, and providing guidance to agencies on how to manage PIDs which have been made to multiple entities.

The Department concurs with the views expressed in the issues paper regarding the implications of two agencies concurrently assessing/managing a matter and suggests that the Act be amended

¹²⁰ Submission 21.

¹²¹ Submission 3.

such that in the first instance the matter should be referred internally unless special circumstances exist. This would help to avoid overlap and/or differing assessment or actioning.

Department of Education and Training¹²²

Although multiple reporting pathways provide choice to disclosers it can be problematic for agencies and result in duplication of workload and inconsistent advice to disclosers.

The Ombudsman may wish to consider if matters should be reported internally in the first instance, and in the event a matter is reported to an external agency then they should be required, where appropriate, to liaise with the relevant agency to manage the PID.

University of Queensland¹²³

Managing PIDs can have significant resource implications for the responsible agency. Consequently the Act should incorporate a provision providing that the initial power to determine if a disclosure qualifies as a PID should be limited to the agency that, in practice, will bear responsibility for managing the PID. This would have the added benefit of avoiding the possibility that a person might receive inconsistent decisions from different agencies.

...

While the availability of multiple reporting pathways has encouraged disclosures, requiring that a disclosure be made through one of those pathways can impose decision-making overlay that is bureaucratic and inconsistent with the intent of the Act. Consequently it is proposed that the Act be amended to:

- specify preferred rather than required pathways; and
- allow disclosures to be accepted as long as the circumstances indicate the discloser has sought to make a PID, irrespective of whether they do so through one of the preferred pathways.

Department of Environment and Heritage Protection¹²⁴
Department of National Parks, Sport and Racing¹²⁵

This creates potential for inconsistent responses and confusion. Clear guidelines for agencies to follow, and a separation of duties, would improve the management, with oversight by an independent body.

Central Queensland Hospital and Health Service¹²⁶

We recommend the legislation needs to be made clearer on the point of a public sector entity's responsibilities for ensuring the discloser is protected when information is given to multiple agencies some as PIDs and some not.

If QAO has received a request for PID status that has been assessed as a PID but the discloser has also told other agencies including the private sector, it is unclear where QAOs responsibility ends.

Can an individual expect QAO to intervene and prevent another party from taking any reprisal action when they have also been provided the information or are aware of the individual disclosing the information to other entities?

If the individual is going to disclose information to other entities, do they have to request PID status from each entity?

¹²² Submission 22.

¹²³ Submission 26.

¹²⁴ Submission 8.

¹²⁵ Submission 16.

¹²⁶ Submission 12.

... our recommendation that consideration is given to ... clarifying an agencies responsibilities when information is provided to multiple agencies.

Queensland Audit Office¹²⁷

There is no provision in the PID ACT as to how matters should proceed when two or more pieces of legislation are involved.

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One submitter suggested centralised receipt and assessment of PIDs:

Providing one central point for receipt and assessment of PIDs – with the oversight body.

Department of Infrastructure, Local Government and Planning¹²⁹
Department of State Development and Co-ordinator-General¹³⁰

Findings

For the reasons discussed above, I do not favour a centralised model for receipt and assessment of PIDs. However, I acknowledge that there are a number of procedural challenges which can arise when a discloser makes their disclosure to multiple agencies. The PID Act does not currently make specific provision for this situation.

I note the suggestions of a number of submitters that disclosers be encouraged or required to first make their disclosure to the agency most directly responsible for the wrongdoing, that is, the disclosure should be made internally before it can be made externally. I am of the view that the potential advantages of such an approach for agencies are outweighed by the disadvantages for disclosers, including risk of reprisal, and disincentives for potential disclosers.

A better response to the issues identified by submitters would be to place a responsibility on agencies to take reasonable steps during the assessment of information to identify whether a disclosure has been made previously or simultaneously to another agency. The volume of PIDs made annually across the Queensland public sector is not so large that this should be an onerous responsibility.

Section 28(1)(b) of the PID Act requires that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that PIDs made to the entity are properly assessed.

Section 30 of the PID Act permits a public sector entity to decide not to investigate or deal with a PID on various grounds, including that:

- the disclosure has already been investigated or dealt with by another appropriate process
- the disclosure should be dealt with by another appropriate process, or
- another entity that has jurisdiction to investigate the disclosure has notified the entity that investigation of the disclosure is not warranted.

Conducting a 'proper' assessment of a PID would arguably include consulting with the discloser to identify what action they have already taken in relation to their disclosure, including whether the same information has been provided to another agency. Clearly, this would not be possible if a disclosure is made anonymously.

A proper assessment would also involve making enquiries to determine whether the disclosure has already been investigated or dealt with, whether there is another appropriate process to which the disclosure should be directed, or whether there is another entity which either has or

¹²⁷ Submission 13.

¹²⁸ Submission 20.

¹²⁹ Submission 1.

¹³⁰ Submission 2.

could investigate the matter. Making such preliminary enquiries would involve a degree of consultation, cooperation and information exchange between the public sector entity assessing the disclosure, the referral entity and possibly other public sector entities to which the discloser has forwarded their disclosure.

There is currently no guidance in the PID Act setting out what a public sector entity may or may not do in undertaking the assessment of a PID, or a purported PID.

Section 65(3) of the PID Act specifies that confidential information, as that is defined at s.65(7), can be disclosed in only certain specified circumstances, including for the purposes of discharging a function under the PID Act. Section 65(1) contains a penalty for intentionally or recklessly disclosing confidential information other than in accordance with s.65(3).

The function of undertaking an assessment of a PID is implied but not explicitly provided for in the PID Act. In the absence of any guidance or examples, officers of public sector agencies engaged in assessing disclosures would be justifiably uncertain about the extent to which it is legitimate for them to consult another public sector entity while assessing a disclosure.

Recommendation 15

The PID Act should be amended to provide specific authority for chief executive officers of public sector entities to take reasonable steps to assess disclosures before determining whether the disclosure is a PID, whether the entity should decide no action is required in accordance with s.30 or whether referral of the disclosure is required in accordance with s.31. This should include consultation with the discloser (where practicable), and other public sector entities.

Recommendation 16

Section 65(3) of the PID Act should be amended to clarify that making a record of confidential information or disclosing it to someone else is permitted for the purpose of taking reasonable steps to assess disclosures, including consultation with other public sector entities.

4.2.3 PIDs to journalists

Section 20 of the PID Act sets out when a PID may be made to a journalist. This section allows a person who has already made a PID to a proper authority to provide substantially the same information to a journalist if:

- the entity has decided not to investigate or deal with the disclosure
- if the entity has investigated but did not recommend taking any action in relation to the disclosure, or
- if the entity did not notify the person, within six months of the disclosure being made, whether or not the disclosure was to be investigated or dealt with.

Submissions

There were only eight comments in response to the questions raised in the issues paper about s.20 of the PID Act. Significantly, two responses were from persons who had made disclosures under the PID Act. Both raised concerns about the timeliness of PID investigations and the impact this had on a discloser's ability to exercise their rights under s.20:

If an agency decides to investigate there is no end point on how long their enquiries can take. This effectively means that by making a quick decision to investigate the agency can confer the

confidentiality provisions of the ACT on the discloser and prevent media involvement without ever finishing their investigation or providing their report.

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... it took a report in [media outlet] ... to galvanise the agency into communicating with me at all. In the closing paragraph of the agency's letter was an injunction not to go to the media again and if I didn't care for the upshot after nearly two years of (investigation?) time spent, to take up my concerns with the State Ombudsman.

CONFIDENTIAL¹³²

Generally, agency responses indicated limited experience with the application of this section:

The department is not aware of when this option has been used. It is considered that this is appropriate as it stands.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹³³

Not in the experience of this department. However, journalists often refer to "whistleblowers" as their source which creates uncertainty and perpetuates unhelpful myths about PIDs. This provision is important to maintain transparency and accountability.

Department of Local Government and Planning¹³⁴

Three respondents made suggestions for amendment:

A discloser made their PID to a journalist after their PID was not acknowledged within six months ... The Ombudsman may wish to consider if reasonable effort needs to be made by a discloser to ensure the agency has received the PID.

University of Queensland¹³⁵

Whilst s20 provides for when an officer may make a disclosure to a journalist it does not consider penalties for inappropriate disclosures of relevant information to journalists.

Consideration should be given to expanding this provision to include penalties for inappropriately disclosing relevant information to journalists where a department is dealing with the matter, including by a discloser.

Queensland Health¹³⁶

Alternative escalation or appeal process should be included e.g. Ombudsman.

Central Queensland Hospital and Health Service¹³⁷

Findings

The capacity for a discloser to make a PID to a journalist in specific circumstances as provided at s.20 is a valuable protection. While it may be rarely used, it ensures that in exceptional situations where matters have not been dealt with adequately by an agency, a discloser can bring a PID to public attention while retaining the protections available under the PID Act.

¹³¹ Submission 20.

¹³² Submission 14.

¹³³ Submission 24.

¹³⁴ Submission 1.

¹³⁵ Submission 26.

¹³⁶ Submission 19.

¹³⁷ Submission 12.

In light of the submissions, and the outcome of consultations with parties in the latter stages of the review, I am not persuaded that there are any issues with the framing of s.20 of the PID Act, or the operation of that section that warrant attention.

The issues raised by disclosers about timeliness of PID management by public sector entities are discussed below.

I am satisfied that the penalty provision at s.65(1) which applies to the disclosure of confidential information is sufficient to deal with any inappropriate disclosure of information to a journalist. Agencies could also take action for a breach of their Code of Conduct if they identified an instance where an officer inappropriately disclosed information to a journalist.

4.3 *How PIDs are managed*

4.3.1 *PID status*

Under Chapter 2 of the PID Act, a discloser need not specifically identify a complaint as a PID, nor request that the matter be treated as a PID, for it to be a PID under the PID Act.

It is an agency's obligation to assess the disclosure and act according to the PID Act requirements. In its current form, the PID Act does not give an explicit role or right to a discloser to 'declare' a matter a PID or not a PID.

The PID Act does not give a discloser the option of electing that their disclosure not be treated as a PID or withdrawing a PID once made.

Submissions

There were very few comments from submitters on the questions about PID status suggesting that respondents are generally satisfied with these aspects of the PID Act.

This does seem to be a very rigid approach and may well have a chilling effect on would be disclosers. The inability to withdraw a complaint in particular may be a concern for disclosers. It is often the case that complaints are made in the heat of the moment or based on inaccurate or misunderstood facts and as such the ability to withdraw is an important safeguard. I think the message as it stands for a discloser is 'if you make a complaint there is no going back' and understandably that may be discouraging to some. I can perhaps understand the concept of not providing a discloser with the right to elect if the complaint is treated as PID or not as that will assume a reasonably good understanding of the legislation which not all disclosers will have. Furthermore a discloser may also not appreciate the gravity of the information being disclosed so may elect to not treat it as a PID when it may lead to uncovering serious corruption or fraud.

In terms of agencies this approach means there is very little filter in terms of complaints so it is a very broad base and will no doubt have an effect on resources that are required to be devoted to this aspect.

Darling Downs Hospital and Health Service¹³⁸

Disclosers ought to be given the option to not be formally declared as the discloser, provided they are able to be afforded adequate protection under a common law duty of care.

University of Queensland¹³⁹

A particular concern regarding the receipt and assessment of PIDs highlighted the lack of a specific power in the PID Act to determine if a disclosure is a PID:

While section 17 of the PID Act provides that a person can make a disclosure to a number of identified officers, there is no specific power for determining if a disclosure actually meets the definition of a public interest disclosure in either section 12 or 13 of the Act. While it is appropriate that disclosers retain a range of options for disclosing information, the complexities associated with determining if a disclosure actually qualifies for protection under the PID Act necessitate that the power to make that determination be explicitly limited to those qualified to do so.

Therefore, it is proposed that the Act incorporate a provision limiting the power to make determinations under the Act to principal officers (e.g. Directors-General) and to officers to whom the power is delegated. That provision could take a form similar to section 30 of the *Right to Information Act 2009* ...

¹³⁸ Submission 21.

¹³⁹ Submission 26.

To ensure a discloser is best placed to exercise their review rights, it is proposed that the Act require the agency that makes the initial determination to provide the discloser with:

- a formal statement of reasons explaining the decision not to afford PID status; and
- details of the discloser's review rights.

Department of Environment and Heritage Protection¹⁴⁰
Department of National Parks, Sport and Racing¹⁴¹

As previously suggested, PIDs should be directed to a single oversight agency for consistency and accountability of assessment. Once assessed the status of the matter should be confirmed with the discloser and the agency to which the matter is directed.

Department of Infrastructure, Local Government and Planning¹⁴²
Department of State Development and Co-ordinator-General¹⁴³

Findings

It is a well-understood principle of dispute resolution that while a complaint handler is the 'owner' of the complaint management or resolution process, the complainant retains 'ownership' of the content of their complaint. Accordingly, the complainant has the right to withdraw their complaint if they choose to do so.

A distinction can be drawn between a complaint, where the complainant has a direct interest in the subject matter and the outcome, and a PID where information is disclosed in the public interest. Once a PID has been made, in my view, the information becomes the responsibility of the public sector entity which has received it. It is not consistent with the objects of the PID Act that a discloser be able to withdraw their disclosure. Once the information has been provided to a proper authority, it is the duty of that agency to assess the information, determine whether it is a PID, and take appropriate action.

Equally, it is not reasonable that the availability of the protections under the PID Act be conditional upon the election of the discloser at the time their disclosure is made. Public sector entities are required to undertake a risk assessment as soon as possible after receiving a PID¹⁴⁴ in order to determine the level of support and protection required by the discloser and others associated with the PID (including, witnesses and those who may be wrongly suspected of being the discloser). The risk of reprisal will not be static, but will fluctuate over time as the investigation of the PID progresses and any subsequent action is taken. While a discloser may feel they do not need protection from reprisal at the time of lodging their PID, it is important that the public sector entity take appropriate steps to protect the discloser from potential reprisal from the outset.

Determining whether or not information amounts to a disclosure under the PID Act, and thereby attracts the protections under the PID Act, is an administrative decision. The discloser should not be obliged to determine whether or not the information falls within the requirements of the PID Act such that it can be defined as a PID. It is not reasonable that all public sector employees, or members of the public who may be entitled to make a PID under the PID Act, should have sufficient knowledge of the PID Act to enable them to determine whether their particular disclosure is a PID and identify it accordingly.

It should continue to be the responsibility of public sector entities to assess information disclosed to them to determine whether it amounts to a PID, irrespective of whether the discloser has requested that the matter be treated as a PID.

¹⁴⁰ Submission 8.

¹⁴¹ Submission 16.

¹⁴² Submission 1.

¹⁴³ Submission 2.

¹⁴⁴ Refer to Public Interest Disclosure Standard No. 1, s.6.6.

Currently there is no specific requirement in the PID Act that an agency determine whether information which is purported to be a PID, does in fact amount to a PID. There is evidence from complaints to the Office, and anecdotally from requests for advice from agencies, indicating that on occasion disputes will arise between an agency and the person claiming to have made a PID about whether the disclosure does fall within the provisions of the PID Act.

It is appropriate that the PID Act specifically provides for the chief executive officer of the proper authority receiving a PID or a purported PID (directly or on referral) to have the power to make a decision about whether the disclosure complies with the provisions of the PID Act.

It would be appropriate, and consistent with the requirements set out at s.30(2) and (3) of the PID Act (as well as other administrative decision-making processes),¹⁴⁵ that the person making the PID or purported PID be provided with a decision about whether the information they disclosed was assessed as a PID, including reasons for the decision and information about review rights.

Recommendation 17

The PID Act should be amended to provide that chief executive officers of public sector entities may assess a disclosure and determine whether the disclosure is a PID in accordance with the PID Act.

Recommendation 18

The PID Act should be amended to require a chief executive officer, who has assessed a disclosure, to provide the discloser with a written decision informing them whether the disclosure has been assessed as a PID in accordance with the PID Act, including reasons for the decision and information about the discloser's review rights.

4.3.2 Informing a person who has made a PID

Section 32 of the PID Act sets out what information is required to be given to a person who has made a PID. This includes requirements to confirm that the disclosure was received, describe the 'action' proposed and, if action has been taken in relation to the disclosure, a description of the results of the action.

The PID Act does not set out any timeframe in which a PID must be assessed, the timeframe for giving information to a person who has made a PID under s.32, or any timeframes or benchmarks for undertaking the investigation of a PID.

The only timeframe provided in the PID Act is that in s.20, which indicates that where an agency has not notified the discloser within six months after the date of the disclosure whether the disclosure was to be investigated or dealt with that the person may make their disclosure to a journalist.

Submissions

A number of submitters commented on the necessity to further prescribe the information that should be provided to disclosers. There was a variety of perspectives, from some respondents suggesting there was sufficient clarity, to others indicating further clarity may be helpful:

¹⁴⁵ See for example s.23(4) of the *Ombudsman Act 2001* which requires that where the Ombudsman cannot investigate a complaint or refuses to investigate or continue to investigate a complaint the Ombudsman must inform the complainant of the decision and the reasons for the decision as soon as reasonably practicable.

This is adequately set out in the PID Standard.

Department of Infrastructure, Local Government and Planning¹⁴⁶
Department of State Development and Co-ordinator-General¹⁴⁷

It is Council's view that the PID Act adequately prescribes what information should be provided to disclosers.

City of Gold Coast Council¹⁴⁸

No, this is not considered necessary.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹⁴⁹

Disclosers will receive information about the results of actions arising from the PID which the entity believes is reasonable. Disclosers will not necessarily receive all of the information to which they believe they are entitled. It is not for disclosers to determine what information they will, or will not, receive; that is a matter for the entity to determine, however disclosers rarely understand this fact. Some information, for example legal advice provided to the entity which the entity relies upon to determine its actions, may be legally privileged and not disclosable.

Queensland University of Technology¹⁵⁰

It would in my view be useful to clarify the extent of information that is required to be provided.

Darling Downs Hospital and Health Service¹⁵¹

The University supports further information being provided on the actions arising from a PID, as disclosers may have different levels of expectation on the current term ('a description of the results of the action').

University of Queensland¹⁵²

With respect to the utility of incorporating timeframes for the management of PIDs or communication with disclosers, again there was a broad spectrum of views expressed:

Whilst the PID ACT confers an expectation that matters will proceed expeditiously in reality there would appear to be little guidance or monitoring of this. There are no trigger points at which the agency is required to account for the time taken, effectively meaning that an investigation could drag on for eternity with no need to advise the Ombudsman until a final report is made. Whilst the Ombudsman is required to provide an annual statistical report on Public Interest Disclosures why is it not required that each agency is required to produce their own report of PID received and progress/outcome? Surely this would be true transparency?

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Yes, especially given the six month limit at which disclosure to a journalist can be made. Perhaps setting a time of within one month would allow for assessment and preliminary enquiries to be completed.

Department of Infrastructure, Local Government and Planning¹⁵⁴
Department of State Development and Co-ordinator-General¹⁵⁵

¹⁴⁶ Submission 1.

¹⁴⁷ Submission 2.

¹⁴⁸ Submission 4.

¹⁴⁹ Submission 24.

¹⁵⁰ Submission 5.

¹⁵¹ Submission 21.

¹⁵² Submission 26.

¹⁵³ Submission 20.

¹⁵⁴ Submission 1.

¹⁵⁵ Submission 2.

It is important that matters are dealt with in a timely manner to prevent the situation where the 'Discloser' is using the PID as a form of reprisal against reasonable management action thereby causing significant losses to an organisation associated with investigations, protections against alleged reprisals and potential detrimental impact on the health and wellbeing of Subject Officers ... It is also important that the process of investigation is taken in a timely manner so as to minimise the impact on all parties and to deal with genuine PIDs effectively.

Logan City Council¹⁵⁶

I think this would only be feasible if there is a very defined and standardised process of investigating PIDs but given the broad nature and the number of agencies that are involved in instigating [sic] PIDs setting timeframes may be impracticable but perhaps thought may be given to provide the ability of a discloser to request a progress report at defined intervals.

Darling Downs Hospital and Health Service¹⁵⁷

No. It's completely dependent upon the nature and complexity of the matter. Some matters may require extensive data analysis which can take weeks, followed by several more days or weeks for the analysis to be thoroughly reviewed and understood by the investigator before any findings can be made. Sometimes it is simply not possible to provide a time frame for the short to medium term.

Queensland University of Technology¹⁵⁸

The University does not believe the Act should contain explicit timeframes for responding to disclosers as the ability to meet such provisions will depend on the agency and the complexity of the matter.

University of Queensland¹⁵⁹

Generally other timeframes also apply, including the department's complaint management processes, and therefore existing strategies are considered appropriate.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹⁶⁰

Findings

Based on the submissions received, it appears that the majority of submitters are clear about the information required to be provided to disclosers in accordance with s.32 of the PID Act. Further detail is already provided in PID Standard.¹⁶¹ I do not consider that any amendment is required to the PID Act with respect to the type of information required to be provided to disclosers.

I have concerns about the timeliness of communication with disclosers and the investigation of PIDs. Evidence from complaints to the Ombudsman about the management of PIDs suggests that delays in PID management are frequently an issue for complainants.

The Office reported on the findings from such complaints in 'Improving the management of Public Interest Disclosures' (Advisory No. 20) published in September 2014.¹⁶² In two separate cases there had been significant and unjustified delays of up to three years in investigating and finalising PIDs. To take such an extended period of time to complete the investigations was unreasonable to both the disclosers and the subject officers. I stated in that publication that:

¹⁵⁶ Submission 9.

¹⁵⁷ Submission 21.

¹⁵⁸ Submission 5.

¹⁵⁹ Submission 26.

¹⁶⁰ Submission 24.

¹⁶¹ Refer to Public Interest Disclosure Standard No. 1, s.6.5.

¹⁶² <https://www.ombudsman.qld.gov.au/improve-public-administration/reports-and-case-studies/ombudsman-advisory>.

While the PID Act does not set a specific time within which a PID investigation must be finalised, entities are required to act within a reasonable time. Six months to complete a PID investigation is considered a reasonable benchmark, unless the matter is unusually complex or exceptional circumstances exist.

Mandating timeframes in the PID Act for key stages of the PID management process and for communication with disclosers will ensure that public sector entities act on disclosures in a timely manner and more closely monitor the progress of PID matters. It will also provide an additional source of data (timeliness) which can be collected and reported, and will assist the Office in monitoring the performance of public sector entities.

I consider that there is merit in the suggestion that it would be reasonable to expect that a public sector entity could undertake preliminary enquiries and complete the assessment of a disclosure within one month of the receipt of the disclosure.

There is also merit in the suggestion that disclosers should receive progress reports, however, in my view disclosers should not be required to request them. Rather, it would be appropriate that the public sector entity provide a status report to the discloser regularly, for example, every two months while the investigation of the PID is ongoing, until any action arising from the investigation has been finalised. The status report would necessarily be framed in such a way as to preserve confidentiality as required by s.65 of the PID Act.

I remain of the view that six months to complete a PID investigation should be sufficient in all but the most complex matters. Where the investigation of a PID has extended beyond six months from the date the matter was assessed as a PID, it would be good practice that the public sector entity review the progress of the investigation.

I also consider it would be reasonable that a discloser who is dissatisfied with the progress of the public sector entity's investigation of a PID should also have a right to request a review. Such a review should be conducted external to the public sector entity to ensure independence and impartiality. This could be initiated by amending the PID Act to provide that a discloser may apply to the oversight agency for review of a PID investigation where a PID has not been finalised within six months from the date the matter was assessed as a PID. Such an application by a discloser should not be dependent upon the discloser having first made a complaint about the timeliness or progress of the PID investigation to the entity, or using the complaints management process of the entity. Requiring the discloser to use such processes would inevitably expose them to risk in terms of their confidentiality. Rather, the right to make such an application should be triggered based on the date the matter was assessed by the entity as a PID.

Upon application for review by a discloser in such circumstances, the oversight agency would seek information from the entity as to the status of the review, the expected completion and the reasons for the investigation not having been finalised. The oversight agency would be in a position to provide guidance to the public sector entity, if required, or assurance to the discloser that the investigation is being managed appropriately.

Recommendation 19

The PID Act should be amended to require a chief executive officer of a public sector entity to complete the assessment of a disclosure, and communicate in writing the outcome of that assessment to the discloser, within one month of receipt of the disclosure.

Recommendation 20

The PID Act should be amended to require a chief executive officer of a public sector entity to provide a status report on the management of a PID to the discloser every two months, commencing from the date the discloser was informed that the disclosure had been assessed as a PID, until the PID has been resolved/closed or action finalised.

Recommendation 21

The PID Act should be amended to provide that a discloser may apply to the oversight agency for review of a PID investigation if the discloser has not been advised by the public sector entity managing the PID that the PID has been finalised within six months from the date the disclosure was assessed as a PID.

Recommendation 22

Section 29(1) and (2) of the PID Act should be amended to require the chief executive officer of a public sector entity to which a disclosure is made or to which a disclosure is referred (under s.31 or s.34) to include key dates as part of the proper record of the disclosure, including the date the disclosure is received, the date the assessment of the disclosure is completed, the dates when any investigation is commenced and completed, and the date when the PID is resolved/closed or action finalised.

4.3.3 Providing protections for ‘a public officer’ who is not employed by an entity

Public officers have a choice about making a PID within their organisation (reporting internally) or to an agency able to investigate or remedy (reporting externally). However, where the entity is not the discloser’s employer (reporting to an external body), the practicality of managing the risk of reprisal and providing protections arises.

Section 28(1)(e) requires the chief executive officer of a public sector entity to establish procedures to ensure that officers of the entity are offered protection from reprisal. Section 31(3) provides limited guidance in that it cautions referring a disclosure to another entity if there is an unacceptable risk of reprisal, and s.31(4) provides that in considering whether the risk is unacceptable the entity must, if practicable, consult with the discloser.

Section 65 of the PID Act allows for confidential information to be disclosed for the discharge of a function under this Act or another Act but there is no explicit consideration of how risks to disclosers or others associated with a PID investigation should be managed when more than one agency is involved.

Submissions

The issues paper raised the question of whether the PID Act should be more specific about how protection should be provided to a discloser who is not an employee of the investigating agency. There was general support among respondents for the principle that protection should be provided to public officers (and others associated with a PID investigation), when they make a PID to an entity other than their employing entity:

This appears to be a gap in the current legislation.

Department of Infrastructure, Local Government and Planning¹⁶³
Department of State Development and Co-ordinator-General¹⁶⁴

¹⁶³ Submission 1.

The PID Act should provide protection to a discloser who is not an employee, as an external discloser may still fear and be exposed to reprisal and discrimination.

Central Queensland Hospital and Health Service¹⁶⁵

That would seem to be desirable though it is unclear what sort of protections can in fact be provided in such circumstances.

Darling Downs Hospital and Health Service¹⁶⁶

It is the Council's view that in some circumstances, yes, it would be appropriate to provide PID protection to a discloser who is not an employee.

Council of the City of Gold Coast¹⁶⁷

Some respondents had suggestions about how this could be addressed:

The Department agrees the PID Act should be more specific regarding the provision of support/protection to those disclosers not employed by the agency receiving the complaint.

Equally, the PID Act should be more specific about what protections should be provided by an investigative agency i.e. the CCC to public officers outside of their agency. For example, consideration may need to be given to engaging the relevant PID Coordinator of the relevant external agency to assist in ensuring the discloser is sufficiently protected within their employing agency.

Queensland Health¹⁶⁸

It is difficult for a public sector entity who employs a discloser to determine the extent of its protection obligations towards a discloser, when the discloser has lodged a PID with another public sector entity and advised their employing entity that they have done so. The entity where the discloser has lodged the PID has responsibility to determine a protection plan for the discloser. To what extent does the employing entity have protection obligations and how do these fit in with the protection plan of the external entity?

... any protections put in place by an entity should only concern those matters which are logically within the entity's jurisdiction and that there should be no liability to put arrangements in place elsewhere.

Queensland University of Technology¹⁶⁹

... communication between entities may warrant clarification. Issues have become highlighted in instances whereby a public officer makes a disclosure to a department (other than their employing agency). The receiving department is limited to the protections able to be afforded and risk strategies implemented ... The transfer of information between entities is an area for consideration and clarification, either through legislation or other supporting tools ... clarification on the obligations to seek consent, and protections limited to an entity who is not an employer would be of benefit. It is currently understood that the position is that the entity cannot inform the other entities with[out] the disclosers consent. Privacy considerations must also occur.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹⁷⁰

¹⁶⁴ Submission 2.

¹⁶⁵ Submission 12.

¹⁶⁶ Submission 21.

¹⁶⁷ Submission 4.

¹⁶⁸ Submission 19.

¹⁶⁹ Submission 5.

¹⁷⁰ Submission 24.

The University recommends the Act contain additional information on providing protection to a discloser who is not an employee. For instances where two agencies may have an established formal working relationship the Ombudsman may also wish to consider allowing the agency to liaise with the discloser's employer, where appropriate, to discuss protections from reprisal, and what each agency can provide.

University of Queensland¹⁷¹

Findings

The views expressed in submissions in response to the issues paper reinforce anecdotal evidence from enquiries about managing PIDs raised with the Office, that a particular area of challenge for public sector entities is managing PIDs where the discloser is a public officer of another public sector entity.

A threshold issue that also arises in enquiries from agencies to the Office concerns whether or not, in light of the current definition of 'public officer' at s.7 and the reference to 'the entity' in that section, a public officer may make a PID to or about a public sector entity of which they are not an employee. It is certainly implied in the PID Act that this is the case, for example s.31(1)(a) can be read to encompass a PID from a public officer about another public sector entity. As beneficial legislation the PID Act should justifiably be read as broadly as possible.

As it appears there is confusion among some agencies on this question, it would be appropriate to clarify in the PID Act that a public officer is not limited to making a PID concerning information under s.13 only about their own agency.

With regard to managing the risk of reprisal for a public sector officer in regard to a PID being managed or investigated by an agency other than their employer, I am sympathetic to the view that there are practical impediments to implementing protection strategies outside the agency's jurisdiction. Equally, a chief executive officer is not in a position to meet their obligations under s.28(1) to protect public officers of the entity from reprisal if the entity investigating a PID does not disclose sufficient information to enable an effective risk assessment to be completed.

While the preservation of confidentiality of the discloser in accordance with s.65 is a key obligation, s.65(f) already permits the disclosure of information by a person 'if the person reasonably believes that making the record of disclosing the information is necessary to provide for the safety or welfare of a person'.

In my opinion, the most practical solution is to provide for the public sector entity managing or investigating the PID to conduct a risk assessment (as required by section 6.6 of the PID Standard), in consultation with the discloser (where feasible). In the course of doing so, where necessary, the entity should also consult with the discloser's employer or any other stakeholder. Ideally, the consultation should occur with the employing entity's PID Coordinator who has expertise in the PID Act and is at arm's length from day-to-day management of the discloser.

Where a protection plan is prepared to protect the discloser from reprisal that requires action to be taken, this would be negotiated between the two entities.

I consider that the detail of the procedures can be adequately addressed in a Public Interest Disclosure Standard. However, the PID Act should be amended to articulate the principles underpinning the procedures and to authorise the public sector entities to engage in consultation about the risk assessment in such circumstances.

¹⁷¹ Submission 26.

Recommendation 23

The PID Act should be amended to clarify that a public officer may make a disclosure of information about any public sector entity, not limited to the public sector entity within which they are employed or engaged.

Recommendation 24

The PID Act should be amended to provide that the chief executive officer of a public sector entity managing or investigating a PID must consult the discloser (where practicable), before contacting the discloser's public sector employer or other stakeholders for the purpose of undertaking a risk assessment regarding the risk of reprisal to the discloser.

Recommendation 25

The PID Act should be amended to provide that the chief executive officer of a public sector entity must give reasonable help to another public sector entity that is managing or investigating a PID for the purpose of completing a risk assessment regarding the risk of reprisal to the discloser or others associated with the disclosure.

4.3.4 Obligations on public sector entities

Part 2 of the PID Act addresses the responsibilities for 'public sector entities'. Section 28 requires chief executive officers to establish reasonable procedures for dealing with PIDs and to publish them on a public facing website. Visibility reviews undertaken by this Office indicate that while State Government departments' compliance with this obligation is high, compliance is lower for local government and public service offices and statutory bodies.

The PID Standard establishes further obligations for public sector entities about how the entity must prepare for a PID and the actions to be taken when a PID is received.

Section 28(e) of the PID Act places an explicit obligation on chief executive officers of public sector entities to offer protection from reprisals by the entity or other public sector officers of the entity.

There is no obligation on chief executive officers to establish procedures that take account of the interests of subject officers.

The PID Act objects make specific reference at s.3(c) to ensuring 'appropriate consideration' is given to the interests of subject officers. However, there is little reference in the PID Act to how this object is to be achieved. This object is specifically addressed by way of:

- s.65(1) and (7) which limit the disclosure of confidential information and specify that identifying information about subject officers falls within the definition of confidential information; and
- s.65(4) which permits the disclosure of confidential information for the purpose of affording natural justice to 'a person whose rights would otherwise be detrimentally affected', which would benefit subject officers.

The objects at s.3(c) and the confidentiality provisions at s.65 that would protect the confidentiality of subject officers are equivalent to provisions in the repealed *Whistleblowers Protection Act 1994*. However, the repealed Act also stipulated that the requirement to make a

PID to an appropriate entity was in part intended to ensure that 'unfair damage is not caused to the reputations of persons against whom disclosures are made by inappropriate publication of unsubstantiated disclosures'.¹⁷² A similar provision was not incorporated into the PID Act when it was passed.

It is noted that some 40-45% of PIDs reported to the oversight agency are not substantiated. Even if it were to be assumed that in some cases the subject officer had committed a wrongdoing but there was insufficient evidence identified during investigation to demonstrate this, it is safe to conclude that in a significant proportion of the unsubstantiated cases the subject officer had not committed any wrongdoing.

A comparative analysis of PID legislation in other jurisdictions in Australia, in terms of the extent to which there is specific reference to protecting the interests of subject officers, demonstrates a wide diversity in approach. There are a number of strategies identified in the legislation reviewed:

- acknowledgement of the interests of subject officers in the objects of the legislation (for example, in ACT PID Act¹⁷³ and WA PID Act¹⁷⁴)
- requirements on oversight agencies and/or public sector entities to make and publish policies, procedures or guidelines dealing with the interests of subject officers (for example, in VIC PD Act¹⁷⁵ and ACT PID Act¹⁷⁶)
- provisions which require public sector entities to take specific action to support subject officers (for example, to provide access to employee assistance programs and support staff in TAS PID Act¹⁷⁷)
- provisions which deal with confidentiality and which directly or indirectly have the effect of protecting the identity of a subject officer (for example, in ACT PID Act¹⁷⁸ and WA PID Act¹⁷⁹)
- provisions requiring confidentiality in the conduct of an investigation of a PID, which would also protect the identity of a subject officer during the course of the investigation (for example, in TAS PID Act¹⁸⁰)
- provisions providing that an exception to the obligation of confidentiality in respect of information relating to the disclosure, including information which could reveal the identity of the discloser, is the requirement to afford natural justice (procedural fairness) in the course of the investigation of a PID (for example, NSW PID Act¹⁸¹ and WA PID Act¹⁸²). This would principally benefit a subject officer who could expect to be provided with sufficient information about the allegations made against them to allow them to properly respond to those allegations.

Submissions

There were only six submissions in response to the section of the issues paper dealing with s.28. The substance of the comments focused on whether the requirement to develop and publish PID procedures was valuable and appropriate:

Yes.

Darling Downs Hospital and Health Service¹⁸³

¹⁷² Section 10(2)(b) *Whistleblowers Protection Act 1994* (repealed)

https://www.legislation.qld.gov.au/LEGISLTN/REPEALED/W/WhistleblowA94_05E_100701.pdf.

¹⁷³ Refer to s.6.

¹⁷⁴ Refer to 'Explanation of Act'.

¹⁷⁵ Refer to s.57(2).

¹⁷⁶ Refer to s.33(2)(b)(ii).

¹⁷⁷ Refer to s.62A(1)(f) and (g).

¹⁷⁸ Refer to s.26(3).

¹⁷⁹ Refer to s.16(3).

¹⁸⁰ Refer to s.23(3) and s.47.

¹⁸¹ Refer to s.22.

¹⁸² Refer to s.16(1)(b).

¹⁸³ Submission 21.

It is Council's view that developing and publishing our own organisation's PID Policy was valuable because it was the first step in educating our employees and members of the public (i.e. members of the public who want to make environmental complaints). It also promotes transparency which is an extremely important concept to the Council for the City of Gold Coast.

Council of the City of Gold Coast¹⁸⁴

A more consistent state-wide approach to ensure consistency across all entities would be beneficial.

Central Queensland Hospital and Health Service¹⁸⁵

While it is considered important that a current policy is in place, some entities are very small in size and therefore this is not always appropriate ... A single Queensland Government policy would assist. This could be accompanied by a draft procedure which would then allow the entity (particularly those small in size, to adopt and modify the procedure to suit their operations), while referring and applying the whole of government policy. This is similar to the Code of Conduct for the Queensland Public Service, and other whole of government policies.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹⁸⁶

The University believes the current provisions that agencies are to develop and publish a PID policy are valuable, however consideration should be given to including a penalty regime for non-compliance. The Ombudsman may wish to consider that in instances where the agency does not have a PID policy framework in place, a generic policy written by the Ombudsman be imposed. The policy would remain in place until such time as the agency developed its own policy.

University of Queensland¹⁸⁷

... to the extent that different agencies will have different units assigned to PID management and localised complaint procedures and communication methods/preferences. The essence of the policy is the same across all agencies so only localised contact information and procedures need be published and members of the public can obtain information from the Queensland Ombudsman's Office website.

Department of Infrastructure, Local Government and Planning¹⁸⁸
Department of State Development and Co-ordinator-General¹⁸⁹

The issues paper invited submissions on the objects of the PID Act, and the extent to which they remain valid and effective. There were few comments from submitters in relation to s.3(c). The following observations were notable in raising the interests of subject officers:

The PID Act makes very little reference to the interests of subject officers (i.e. respondents). Respondents to complaints often express the view that provisions for PID protections are unfairly weighted towards complainants, with little or no regard for respondents' rights during a complaint and investigation process.

Queensland University of Technology¹⁹⁰

Item (d) should include – '*and natural justice to persons that are the subject of a PID*' ... There is a lack of support for subject officers throughout the process ... These provisions can be manipulated by

¹⁸⁴ Submission 4.

¹⁸⁵ Submission 12.

¹⁸⁶ Submission 24.

¹⁸⁷ Submission 26.

¹⁸⁸ Submission 1.

¹⁸⁹ Submission 2.

¹⁹⁰ Submission 5.

vexatious complainants to harass, intimidate and discredit innocent parties as a form of reprisal against reasonable management action.

Logan City Council¹⁹¹

Findings

The responses to the issues paper demonstrate support for the requirement at s.28(2) that the PID procedures of public sector entities be published. Some submitters propose that the oversight agency develop model procedures which should apply generally, if an entity has not developed and approved its own specific procedures. Given the broad range of entities in Queensland, in terms of sector of operation, size, function and capacity, developing a model procedure which would meet the needs of all entities is inherently problematic.

The Office currently undertakes periodical visibility reviews in the course of its oversight responsibilities. The Office has also issued the PID Standard which identifies in detail the practical issues an agency's procedure should address and a self-assessment checklist to assist agencies to assess their own policies and procedures. The Office also provides a review service and gives agencies advice about PID policies and procedures.

The approach I prefer is to continue to engage with public sector entities where it is identified through the visibility review that an entity does not have a publicly available procedure in accordance with the PID Act.

With respect to giving effect to object 3(c), I do consider that legislative amendment is required. There is a public interest in ensuring that the objects of the PID Act are fulfilled, the PID Act balances the interests of all parties, and the management of PIDs by public sector entities is fair and reasonable.

As a general proposition, subject officers would arguably have an interest in:

- access to general information about the management of PIDs within the public sector entity they are employed by, including support available to subject officers (such as the entity's employee assistance program)
- confidential and fair assessment and investigation of PIDs
- protection of their identity as a subject officer during and after the assessment and investigation of a PID concerning them
- procedural fairness during the investigation of a PID concerning them and in the course of any action taken as a result of substantiation of that PID
- protection from disadvantage or detriment where a PID concerning them is not substantiated
- reasonable communication concerning the outcome of investigation of a PID concerning them.

While the primary purpose of the PID Act is and should remain the facilitation of PIDs and the protection of disclosers, there is little legislative or other direction or guidance for public sector entities on how to ensure that subject officers are accorded fair and reasonable treatment during the management of PIDs under the PID Act.

The PID Act does not contain adequate provisions to ensure that appropriate consideration is given to the interests of persons who are the subject of a PID.

¹⁹¹ Submission 9.

Recommendation 26

Section 28 of the PID Act should be amended to include a requirement that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that the interests of subject officers are taken account of in the assessment and investigation of PIDs.

Recommendation 27

Section 28 of the PID Act should be amended to include a requirement that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that procedural fairness is accorded to all parties (including the discloser, subject officer and witnesses) in the conduct of assessment and investigation of PIDs.

Recommendation 28

The PID Act should be amended to include a requirement that the chief executive officer of a public sector entity must establish reasonable procedures to ensure that an employee of the entity who has been the subject of a PID that has not been substantiated is offered protection from detriment by the entity or other public officers of the entity.

Recommendation 29

The PID Act should be amended to include a requirement that the chief executive officer of a public sector entity that has investigated a PID must provide reasonable information in writing to the person who is a subject of the PID (the subject officer); including that the PID has been investigated, the finding at the conclusion of the investigation, obligations of the subject officer in relation to confidentiality, the support available to the subject officer, and if the matter was not substantiated that they are afforded protection from detriment.

4.3.5 An entity with power to investigate or remedy

The PID Act does not specifically address how investigative or remedy agencies must deal with PIDs. Investigative agencies, when dealing with PIDs, have obligations under the PID Act as well as the duties set out in their own enabling legislation. For example, the *Crime and Corruption Act 2001* and the *Ombudsman Act 2001* include considerations for the protection of those helping with investigations.

Submissions

Among the few responses to the issues paper on this issue, there were generally no concerns raised.

Currently, if a matter is assessed as a PID pursuant to section 12(1)(a) of the Act, the matter is managed in accordance with the department's complaints management process. Additional 'confidentiality' provisions apply and additional information is provided to the discloser regarding what action they can take in the event they experience or believe they have experienced retribution as a result of reporting a PID to the department.

Department of Communities, Child Safety and Disability Services¹⁹²

¹⁹² Submission 10.

... it does not seem feasible to try to standardise investigative processes. Unless there are clear and specific concerns that the investigative processes being utilised by agencies are deficient then I would not see [sic] a basis to intervene.

Darling Downs Hospital and Health Service¹⁹³

... usual complaint and investigation processes are applied.

Department of Natural Resources and Mines and
Department of Energy and Water Supply¹⁹⁴

The University believes the current arrangements are appropriate, and has no suggestions for suggestions [sic] or options for further consideration.

University of Queensland¹⁹⁵

No concerns were raised by the CCC during informal consultation in the latter stages of the review, about that agency's ability to simultaneously meet the requirements of the PID Act and the Crime and Corruption Act.

There were, however, comments in relation to the application of the PID Act with respect to the *Health Ombudsman Act 2013*:

In hindsight I realise that making a Public Interest Disclosure and a complaint under the Health Ombudsman Act confused the matter for all concerned. There is no provision in the PID Act as to how matters should proceed when two or more pieces of legislation are involved.

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... the *Health Ombudsman Act 2013* ... [the HO Act] came into force on 1 July 2014. It established the role of the Health Ombudsman and a system for dealing with complaints and other matters relating to the health, conduct or performance of health practitioners and the services provided by health service organisations.

...

The protections and requirements for managing a complaint provided in the HO Act also appear to be contained in the PIDA, providing for a level of duplication ...

I note that section 10 of the PIDA ("other protection saved" suggests that the PIDA anticipates other legislative schemes operate in parallel, presumably to ensure all available protections are accessible by complainants. In the case of the HO Act and the PIDA, the dual application of both Acts to health service complaints places additional administrative burdens on my office, without any additional protection of information. As such, I question the value of the dual application.

Regarding the requirement of the 'Public Interest Disclosure Standard' to report public interest disclosures (PIDs) to the oversight agency, you may be aware that I report both publicly and to the Health and Ambulance Services Parliamentary Committee on all health service complaint management activities undertaken by my office. These reports are very comprehensive ...

The requirement on me to report PIDs to the Queensland Ombudsman, which are also health service complaints included in my reports to the Parliamentary Committee and the public is difficult to rationalise or justify.

In summary, having undertaken an assessment of the provisions of both Acts, I support the review

¹⁹³ Submission 21.

¹⁹⁴ Submission 24.

¹⁹⁵ Submission 26.

¹⁹⁶ Submission 20.

of the PIDA considering whether specific complaint schemes such as the scheme administered by me, should be exempt from the provisions of the PIDA.

Office of the Health Ombudsman¹⁹⁷

The Health Ombudsman also provided a table detailing comparisons of key provisions contained in the PID Act and the Health Ombudsman Act.

Findings

As a matter of principle, I do not support the exclusion of any agency or any complaints scheme from the ambit of the PID Act. I consider that the protections against reprisal and the confidentiality provisions in the PID Act should be available to all disclosers, and indeed all parties involved in the investigation of disclosures, whether or not they might also benefit from protections in other legislation.

I acknowledge the concerns raised by the Health Ombudsman in relation to duplication with respect to health service complaints. However, the fact that there is some duplication does not limit the Office of the Health Ombudsman (OHO) from performing its statutory role of receiving, assessing and investigating complaints in accordance with the Health Ombudsman Act.

The PID Act affords public officers the right to make a PID to the OHO about matters for which it is a proper authority, for example concerning ‘a substantial and specific danger to public health or safety’,¹⁹⁸ and to receive the protections available under the Act. The PID Act also operates to facilitate disclosures of information by public officers who are employed by the OHO (whether made to the OHO or to another public sector entity), and to afford them protection against reprisal. In my view, it is essential that all public officers have access to the PID regime, therefore it is not appropriate to exclude the OHO from the operation of the PID Act.

The recommendations made above at 4.3.3 will assist in managing the practical implications of ensuring appropriate risk assessment and protection plans are implemented.

Potential issues with duplication are already adequately addressed by s.10 of the PID Act.

While I accept that the Health Ombudsman is required to report elsewhere in relation to health service complaints, in order to ensure that the report I am required to produce in accordance with s.61 of the PID Act contains complete information about ‘the performance by public sector entities of the requirements of this Act’, it would be inappropriate to exclude data from a key complaint agency such as the OHO.

Recommendation 30

All public sector entities, as defined at s.6 of the PID Act, should continue to be bound by the Act without exception.

4.3.6 Preserving confidentiality

Section 65 of the PID Act details the requirements for preserving confidentiality. While confidentiality is considered an important element in discloser protection, it is not guaranteed by the PID Act. Section 65(3) sets out when a person may make a record of confidential information or disclose it to someone else.

¹⁹⁷ Submission 23.

¹⁹⁸ Refer to s.13(1)(c).

Some areas of challenge for public sector entities and disclosers in relation to confidentiality are:

- applying the natural justice provisions under s.65(5)(a)
- responding to requests for confidential PID information from another entity for processes under another act (such as WorkCover or another investigative body).

Stakeholders sought clearer direction about obligations on disclosers and subject officers to maintain confidentiality during and after an investigation.

Submissions

Two responses to the issues paper identified no concerns with the current framing of s.65, for example:

It is Council's view that section 65(3) of the PID Act is appropriate and should not be amended.

Council of the City of Gold Coast¹⁹⁹

However, particular concerns were raised about the operation of this section with regard to the obligations of disclosers and other parties to a disclosure to maintain confidentiality, and the compulsory disclosure of information to other entities:

It is considered the Act does not adequately address the confidentiality obligations of the discloser and the subject officer. The University would recommend Section 65 of the Act be amended to explicitly state that confidentiality should be maintained by all parties (including witnesses).

University of Queensland²⁰⁰

The discloser's obligation to maintain confidentiality is not clear in the Act. They sometimes seek guidance on the extent to which they can discuss their complaint with other parties, internal or external to the public sector entity (e.g. unions, legal advisors); noting that the Act (Chapter 6, section 65) states that a person must not disclose confidential information to anyone, other than in particular circumstances (set out in sub-section 3).

Queensland University of Technology²⁰¹

S65 could be expanded to include examples involving the disclosure of confidential information to other entities, for example WorkCover.

It is unclear in the PID Act whether the disclosure of complaint information that also forms part of a WorkCover claim is an appropriate disclosure or whether this is considered 'an appropriate discharging of a function under another Act'.

This issue was raised during the 12 months review of the PID Act. Further guidance within the PID Act regarding this issue is recommended.

Currently, s65 only applies to those persons involved in the Act's administration and as a result does not apply to disclosers. Consideration should be given to expanding the application of s65 to include 'disclosers' to assist in protecting relevant information from inappropriate disclosure and exposing disclosers to potential risk.

Queensland Health²⁰²

The issue of WorkCover investigations and requests for information is a noted one amongst PID

¹⁹⁹ Submission 4.

²⁰⁰ Submission 26.

²⁰¹ Submission 5.

²⁰² Submission 19.

Coordinators. There could be some tightening up of the provisions to deal with WorkCover matters or to limit the extent of information available to that agency.

Department of Infrastructure, Local Government and Planning²⁰³
Department of State Development and Co-ordinator-General²⁰⁴

Where-ever possible, discloser details (noting that this can include more than just name and job role) should have the protection of law across legislation and across jurisdictions. Where different legislation has applicability, there should be clear priority given to the rights and obligations of the discloser under the Public Interest Disclosure Act, ideally by reference back to that Act. Further, The protections given to disclosers under the Act should be given priority in situations where parties are compelled to produce information in legal processes initiated by others. By way of example, consideration should be given to allowing discloser details to be withheld from disclosure where documents containing such information are required to be produced under subpoena or summons in other court proceedings. Without this, the protections offered to disclosers under the Act can effectively be undermined.

Queensland Rail²⁰⁵

... the department agrees there may be instances, as identified by the Issues paper that require the provision of information for other purposes.

The PID Act does provide arrangements for information to be provided for the purpose of discharging another Act, which is appropriate. With regard to natural justice processes identified in the Issues paper, the department agrees this can be difficult. The usual course of redacting and de-identification of identifying information before providing to a respondent is the usual course however confidentiality cannot be guaranteed particularly in circumstances where by the nature of the matter and the particulars, the identity of the disclosure can be surmised or presumed.

Department of Natural Resources and Mines and
Department of Energy and Water Supply²⁰⁶

Findings

Section 65(1) of the PID Act is written in broad terms that can be interpreted as requiring that all parties to a PID, including the discloser, subject officer and witnesses, are required to maintain confidentiality. However, the use of the example of a public officer receiving a PID at s.65(2) does not assist the ordinary reader to clearly interpret the PID Act in that way.

It would benefit all parties to a PID, and public sector entities responsible for implementing the PID Act, if it were clearly stated that a discloser, subject officer, witness and any other party involved in the making or dealing with a PID is required to keep that information confidential.

There ought to be only limited exceptions to this obligation to maintain confidentiality to allow a discloser, subject officer, witness or other party the capacity to consult with a representative (such as a union representative or legal advisor), to obtain support (for example, consult with a counsellor, employee assistance service or support person nominated by the public sector entity) or to consult with a health service provider.

The competing obligations of confidentiality under the PID Act in the context of requests for disclosure of information under other legislation are more complex.

When an information request is made under another administrative scheme, in accordance with other legislation, questions arise about competing legislative objects and priorities.

Under the *Right to Information Act 2009*, release of information that is defined as 'exempt information' is considered on balance to be contrary to the public interest, although an agency may decide to give access. Schedule 3 of the *Right to Information Act* lists 'exempt information'

²⁰³ Submission 1.

²⁰⁴ Submission 2.

²⁰⁵ Submission 18.

²⁰⁶ Submission 24.

and includes information the disclosure of which is prohibited under s.65(1) of the PID Act. However, s.65(1) provides a number of exceptions at s.65(3), including s.65(3)(g) 'if authorised under a regulation or another Act'. This creates potential confusion for a decision-maker determining an application under the Right to Information Act.

However, before information identifying a discloser, subject officer or another party is released, both those parties and the relevant public sector entity would likely be entitled to be consulted by the decision-maker, to have any objections considered, and to have rights of internal review and appeal to the Information Commissioner before the information could be disclosed to the applicant. This process provides a measure of protection for the parties to a PID.

In assessing and investigating entitlement to compensation, entitlement to claim damages or any offence under the *Workers Compensation and Rehabilitation Act 2003*, an authorised person may require a person to give information or produce documents in accordance with s.532C.²⁰⁷ There is a penalty for non-compliance 'unless the person has a reasonable excuse'. A claimant or worker can request copies of documents relating to their application for compensation or claim for damages in accordance with s.572 of the *Workers Compensation and Rehabilitation Act*.

It is reasonably foreseeable that circumstances can arise where in the process of investigating an application for compensation or claim for damages, a public sector entity is required to disclose documents relating to the receipt, assessment or investigation of a PID, and that these documents would contain confidential information as defined at s.65 of the PID Act. It would follow that the information would inevitably be released to the applicant or claimant whether in the course of affording that person procedural fairness in determining their application or claim, or as a consequence of a request under s.572 of the *Workers Compensation and Rehabilitation Act*.

There is no right on the part of other parties to the PID matter to be informed that information disclosing their involvement in a PID, that is confidential under s.65 of the PID Act, has been released to WorkCover and could be released to the applicant/claimant.

It would afford some comfort to the parties to a PID and provide guidance to public sector entities responding to requests for information made under the *Workers Compensation and Rehabilitation Act* if there was clarity about the extent to which it is possible to withhold information that is confidential under the PID Act from release.

Recommendation 31

Section 28 of the PID Act should be amended to make explicit that all parties to a PID (including the discloser, subject officer and witnesses) must not intentionally or recklessly disclose confidential information to anyone, except as required to cooperate with the assessment or investigation of a PID by a public sector entity, or as reasonably necessary to consult a representative, support person or health service provider.

Recommendation 32

The PID Act should be amended to make explicit whether and to what extent the chief executive officer of a public sector entity may withhold confidential information, as defined in s.65, from disclosure in response to an information request made under the *Workers Compensation and Rehabilitation Act 2003*.

²⁰⁷ Refer to <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/W/WorkersCompA03.pdf>.

4.4 Reprisal considerations

A key feature of the PID Act is that it provides protection from reprisal for those who make disclosures, or help with PID investigations.

Section 40 of the PID Act addresses reprisal and grounds for reprisal. A reprisal includes causing, or attempting or conspiring to cause, detriment to another person because, or in the belief that the other person, or someone else has made, or intends to make a PID, or the other person or someone else is, has been, or intends to be involved in a proceeding under the PID Act against any person.

Section 41 makes a reprisal an offence that attracts a maximum penalty of 167 penalty units or two years imprisonment. The PID Act Schedule 4 defines detriment to include:

- (a) personal injury or prejudice to safety; and
- (b) property damage or loss; and
- (c) intimidation or harassment; and
- (d) adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; and
- (e) financial loss; and
- (f) damage to reputation, including, for example, personal, professional or business reputation.

The PID Act creates a range of 'proper authorities' to receive PIDs, including PIDs about reprisal. The PID Act also requires chief executive officers of public sector entities to ensure that 'public officers of the entity are offered protection from reprisals by the entity or other public officers of the entity'.²⁰⁸ Section 43 addresses the issue of vicarious liability of a public sector entity for the contravention of s.40 by an employee during the course of employment. However, the PID Act does not place any specific responsibility on public sector entities for dealing with or responding to reprisals.

Submissions

In some cases, agencies that responded to the issues paper were satisfied with the current legislative framework for dealing with reprisal:

Given the low incidences of reported reprisals the QPS does not consider this is a systemic issue requiring further work.

Queensland Police Service²⁰⁹

I am not aware of any specific concerns that have been raised relative to this issue.

Darling Downs Hospital and Health Service²¹⁰

Several agencies considered the provisions generally adequate but sought additional clarification or guidance on implementation:

The University considers the current provisions are adequate, however the Ombudsman may wish to consider providing clarification on how to deal with an alleged or actual reprisal.

University of Queensland²¹¹

It is Council's view that the PID Act provisions for protection from reprisal are effective but more procedural guidance on what an employee's rights are when they are experiencing reprisal and the subject officer has ceased working for Council need to be explored ... It is the Council's view that the PID Act is silent as to how reprisal action is to be managed. It would be beneficial for a

²⁰⁸ Refer to s.28(1)(e).

²⁰⁹ Submission 3.

²¹⁰ Submission 21.

²¹¹ Submission 26.

set of guidelines to be developed and issued by the Queensland Ombudsman's Office for all public sector organisations.

Council of the City of Gold Coast²¹²

The department has not had any instances of allegations of reprisal, however further clarification and guidance would be of benefit.

Department of Natural Resources and Mines and
Department of Energy and Water Supply²¹³

Clarity would be useful about the circumstances where, under the Act, action is considered to be reprisal action. The Act states that a person must not take detrimental action against another person because that other person has made a PID. Clearly detrimental action is not acceptable and must be addressed; however, if a person takes detrimental action against another person because they are aware that person made a complaint, does this action meet the definition of reprisal action under the Act? The person undertaking the detrimental action may be aware that the other person has made a complaint, but they might not know that the complaint has been lodged as, or is being managed as, a PID. Are they liable, under the Act, for undertaking reprisal action when they don't know a PID has been made? The presumption is that they are not, but this could be clarified.

Queensland University of Technology²¹⁴

Two agencies considered that the oversight agency should monitor, detect and take action in relation to reprisal, which is well beyond the current scope of the oversight agency responsibilities under the PID Act:

Disclosers and persons assumed to be disclosers or their supporters can suffer subtle psychological pressure and isolation that is not readily identifiable as reprisal. Most public sector officers maintain that making a PID will detrimentally affect their career and reputation ... There have been no publicly reported cases of a person in Queensland ever having been charged with or convicted of "reprisal". The Act provides a range of protections. A more rigorous and well-resourced oversight agency could monitor and detect reprisal and take appropriate action.

Department of Infrastructure, Local Government and Planning²¹⁵
Department of State Development and Co-ordinator-General²¹⁶

There was also a proposal for legislative change from a discloser who sought the reversal of onus of proof in relation to questions of reprisal and reasonable management action:

It is left to the discloser to prove that the 'unlawful ground is a substantial ground for the act or omission that is reprisal' (section 40(5) of the Act). I believe this is unsatisfactory. I believe there should be a reversal of the onus of proof in this context. That is, the Act should state that it is presumed that a person took reprisal action in relation to the discloser, unless the person proves otherwise.

... a manager may take reasonable management action in relation to an employee who has made a disclosure only if the manager's reasons for taking the action do not include the fact that the employee has made a disclosure.

For the employee to prove that the manager did not take reasonable management action, the employee would need to prove that the manager's reasons for taking the action do not include the fact that the employee has made the disclosure. I suggest that this would be very difficult to prove.

²¹² Submission 4.

²¹³ Submission 24.

²¹⁴ Submission 5.

²¹⁵ Submission 1.

²¹⁶ Submission 2.

This provision could be easily circumvented by an unscrupulous manager who does not record, or state, that one of the reasons for taking management action in relation to an employee is the fact that the employee has made a disclosure.

I believe there should be a reversal of the onus of proof in this context. That is, the Act should state that it is presumed one of the reasons for taking management action in relation to an employee is the fact that the employee has made a disclosure, unless the manager proves otherwise.

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The submission by the ADCQ²¹⁸ is particularly instructive in assessing the effectiveness of the current arrangements for dealing with reprisal, given the role of the ADCQ in receiving complaints of reprisal in accordance with s.44 of the PID Act. As noted in the ADCQ submission, in the Explanatory Notes to the Public Interest Disclosure Bill 2010,²¹⁹ the rationale for s.44 was described as:

Clause 44 creates a new low cost remedy for a person who has suffered a reprisal. It enables the person to make a complaint under the Anti-Discrimination Act 1991 and the complaint can be dealt with under chapters 6 and 7 of the Anti-Discrimination 1991 as if the complaint were about an alleged contravention of that Act. If a person commences proceedings in a court under section 42, they can not then subsequently make a complaint in relation to the reprisal under the Anti-Discrimination Act 1994 and vice versa, if a person makes a complaint in relation to a reprisal under the Anti-Discrimination Act 1991, they can not subsequently commence proceedings under section 42 in relation to the reprisal.

The ADCQ submission provides data in relation to the usage of this scheme which demonstrates that in the period from 1 January 2011 to 31 December 2015 only 23 grounds of reprisal had been accepted (an average of less than five a year). The ADCQ points out that:

... 8 of the 23 accepted reprisal complaints have been made by 2 people; 4 complaints each. That means 35% of the accepted complaints have been made by 2 people.²²⁰

Of the 23 accepted complaints of reprisal, only two had been resolved by conciliation and a further five were ongoing at the time of the ADCQ's submission. Thirteen matters unresolved at conciliation had been referred to the Queensland Civil and Administrative Tribunal. At the time of its submission, ADCQ reported that:

Unfortunately, to date there have not been any published decisions by the tribunal dealing with reprisal. To our knowledge, nor has there been any decision by the courts on a civil claim for reprisal and neither has there been any prosecution for the offence of reprisal.

Subsequently, the decision of the Queensland Civil and Administrative Tribunal in the matter of *Flori v State of Queensland & Ors* [2016] QCAT 080 was delivered on 15 June 2016.²²¹ In that case the application was dismissed but the Tribunal provided some guidance on interpreting and applying the PID Act.

The ADCQ points out the inherent difficulties involved in attempting to resolve complaints of reprisal through conciliation:

The low conciliation rate and the extremely high referral rate are indicative of difficulties in resolving complaints of reprisal through conciliation. Usually by the time a complaint of reprisal is made to the Commission the relationship between the parties has broken down almost irretrievably. It is not unusual for the parties to have been involved in other proceedings, such as

²¹⁷ Submission 7.

²¹⁸ Submission 11.

²¹⁹ <https://www.legislation.qld.gov.au/Bills/53PDF/2010/PublicInDiscB10Exp.pdf>.

²²⁰ Submission 11, p.3.

²²¹ <http://archive.sclqld.org.au/qjudgment/2016/QCAT16-080.pdf>.

disciplinary matters, workers' compensation claims and appeals, and proceedings in the Industrial Relations Commission. An unsatisfactory outcome or response to an initial disclosure often culminates in further disclosures or purported disclosures, a poor work environment, sick leave, performance management and claims of reprisal.

Where the alleged reprisal is of an ongoing nature and unresolved through conciliation, further complaints of reprisal are often made.

Findings

Effectively protecting disclosers from reprisal involves four elements:

- ensuring appropriate systems, policies and procedures are in place to protect disclosers generally from reprisal
- conducting a risk assessment and if necessary implementing a protection plan for an individual discloser after they have made a disclosure
- taking action to manage any instance of reprisal that should arise
- providing the means for the discloser to obtain reparation and restitution if they suffer detriment.

The evidence from the submissions supports the view that while public sector entities generally have satisfactory policies and procedures in place, there are weaknesses in the other elements.

This is consistent with the results reported in 'Whistleblowing Processes & Procedures – An Australian & New Zealand Snapshot' which presents the preliminary results of the *Whistling While They Work 2: Improving managerial responses to whistleblowing in the public and private sectors* research project. The study surveyed 702 organisations across Australia and New Zealand about employee and managerial experiences of whistleblowing. Notably, 54 of the 437 public sector organisations participating in the survey were from Queensland, including 33 State Government agencies and 21 local governments (12.3% of the total public sector respondents across Australia and New Zealand). It was reported that:

... prior public sector research indicates that while organisations may have processes which encourage and facilitate staff reporting of wrongdoing, and deal with alleged wrongdoing, often the weakest elements have been mechanisms for protection and support of staff who report ... These results indicate that this broad challenge remains in the public sector.²²²

The report went on to highlight that:

Where staff experience reprisals, conflict, stress or other detrimental impacts for reporting, a substantial proportion of organisations report having no or limited processes for seeking a resolution. The most common responses were management intervention to stop the problem ... and disciplinary action against the persons responsible for the problems ... However, if such reprisals or detrimental impacts occur ... [o]nly 16.4% of organisations reported having mechanisms for ensuring adequate compensation or restitution for the whistleblower – including ... 16.9% of public sector organisations ...²²³

The report concludes that:

These results thus point to immediate areas where apparent weaknesses in processes may be addressed by clearer identification of successful practice and improvements in knowledge and guidance. At the same time, other gaps, such as the lack of processes for seeking adequate resolutions in cases of detrimental impact, may require a combination of stronger management commitment and regulatory reform.²²⁴

²²² A J Brown, Nerisa Dozo and Peter Roberts, *Whistleblowing Processes & Procedures – An Australian & New Zealand Snapshot*, November 2016, <http://www.whistlingwhiletheywork.edu.au/wp-content/uploads/2016/11/Whistleblowing-Processes-Procedures-Snapshot-Prelim-Results-Griffith-University-8-Nov-2016-FINAL2.pdf>, p.12.

²²³ Ibid, p.13.

²²⁴ Ibid. p.14.

The recommendations made above, in particular at section 4.3.3, will contribute to providing greater clarity for public sector entities about their responsibilities to prevent and manage reprisal, including where more than one entity is involved.

Further guidance to public sector entities, through a revision of the Public Interest Disclosure Standard and the development of additional information resources will also support entities in meeting the challenge of preventing and managing reprisal.

Although the PID Act provides a number of pathways for pursuing action where a discloser has been subject to detriment, the evidence is that they are often limited in their practical application. Conciliation is not an effective mechanism for addressing reprisal where the discloser has already suffered detriment or where the matter has been ongoing and parties have become fixed in their negotiating positions.

A further challenge for a discloser is to prove reprisal to the criminal standard under s.40 of the PID Act. This presents an onerous impediment to achieving a practical outcome to a detriment experienced by a discloser for which they seek acknowledgment and a resolution.

As an alternative, the PID Act might be amended to include an administrative process to deal with reprisal which a discloser, witness or another party involved in a PID matter has experienced. This process would not be focused on determining criminal liability, but on testing whether the allegations of reprisal have been met administratively, and on the agency and discloser (or witness, or other party involved in a PID matter), reaching an expeditious resolution.

It is envisaged that under such an administrative redress scheme, a discloser or other party who considers they have experienced a detriment (as defined in Schedule 4 to the PID Act), as a result of making a disclosure, or their involvement in a PID, can make application to the chief executive officer of the public sector entity for redress. If the entity acknowledges that the discloser or other party has experienced detriment, then the focus would be on the entity and the discloser, or other party, implementing an administrative remedy.

If the discloser, or other party, is dissatisfied with the outcome of their redress application, they could request a review under the PID Act.

The benefits of such a scheme would include agencies taking timely action to address detriment experienced by disclosers and other parties to a PID.

An administrative redress scheme such as this could operate effectively alongside the existing mechanisms for addressing reprisal.

Section 40 of the PID Act extends protection from reprisal not only to a person who has made or intends to make a disclosure or be 'involved in a proceeding under the Act' (or who is believed to have done or intend to), but to 'someone else'. There are no examples to assist public sector entities in interpreting and applying s.40. The Explanatory Notes to the Public Interest Disclosure Bill 2010 also provide no guidance.²²⁵

It can be interpreted that the right to make a complaint of reprisal extends to family, friends, colleagues and associates who are subjected to detriment because of their relationship to a person who has or is believed to have made a PID or has or is believed to have been otherwise involved in a PID, for example, as a witness.

Anecdotal evidence from PID Coordinators attending training workshops conducted by the Office indicates that the breadth of scope of s.40 is not clearly appreciated. The framing of the section and the absence of any examples guiding interpretation of the section is of particular concern given that most public sector entities will only infrequently be required to assess PIDs alleging reprisal and therefore will not develop significant experience in applying s.40.

²²⁵ Public Interest Disclosure Bill 2010 <https://www.legislation.qld.gov.au/Bills/53PDF/2010/PublicInDiscB10Exp.pdf>.

Recommendation 33

The PID Act should be amended to provide for an administrative redress scheme for disclosers, witnesses and other parties who have experienced detriment as a result of their involvement in the making, assessment or investigation of a PID.

Recommendation 34

Section 40 of the PID Act should be amended to clarify who is protected from reprisal, and to include examples to assist in the interpretation and application of the Act.

4.5 Review rights

Section 30(3) of the PID Act provides a specific right of internal review for a discloser when an agency has decided not to investigate or deal with a PID. However, the PID Act is silent on review rights for dealing with other administrative decisions or actions about PIDs.

If a discloser is dissatisfied with an agency's decision to find a PID unsubstantiated, or with the actions taken by the agency in responding to a PID, the PID Act does not provide for any internal or external review of the agency's decision or actions. It is open to a discloser to seek external review by the Ombudsman under the *Ombudsman Act 2001*. However, there is nothing in the PID Act requiring an agency to inform a discloser about their rights of review.

In light of the recommendation that the PID Act be amended to require public sector entities to assess and determine whether a disclosure is a PID in accordance with the PID Act (Recommendation 17), it would be appropriate that there should be a specific right of review of that decision.

If the recommendation to provide for an administrative redress scheme for disclosers, witnesses and other parties who have experienced detriment is adopted (Recommendation 33), it would be appropriate to provide a right of review in relation to decisions made in response to applications made under that scheme.

Submissions

There was a dichotomy in the perspectives expressed by stakeholders in response to the issues paper. Either they considered that review rights under the PID Act were sufficient in isolation or in conjunction with administrative complaints management processes, or it was considered that review rights were absent or lacking:

The existing review rights, applied for administrative decisions of PIDs, are considered appropriate and in line with other complaint management processes.

Department of Natural Resources and Mines and
Department of Energy and Water Supply²²⁶

... [review rights] are adequate and appropriate.

Darling Downs Hospital and Health Service²²⁷

On the assumption that agencies have a complaints management policy with a review process embedded within it, the University considers the current review rights sufficient.

University of Queensland²²⁸

The Act is clear. It states (at Chapter 3, Part 2, Section 30) that a person, who receives notification that the matter they have raised will not be investigated under the PID Act, may apply to the Chief Executive Officer of the entity for a review of the decision within 28 days after receiving the written reasons. Like any other complaint process, once a matter has been responded to and internal review processes have concluded, the next point of review is to raise the matter with an appropriate external body.

Queensland University of Technology²²⁹

²²⁶ Submission 24.

²²⁷ Submission 21.

²²⁸ Submission 26.

²²⁹ Submission 5.

There appears to be limited options available under the Act. The oversight body could have a more robust review system and procedure.

Department of Infrastructure, Local Government and Planning²³⁰
Department of State Development and Co-ordinator-General²³¹

The introduction of a provision restricting the initial determinative power on PIDs to a single agency should be accompanied by a right for those disclosers who are not afforded PID status to apply to have that decision reviewed. It is therefore proposed that the Act be amended to incorporate a right of review to an external body, such as the Queensland Ombudsman.

Department of Environment and Heritage Protection²³²
Department of National Parks, Sport and Racing²³³

Unfortunately, there is no provision in the PID Act about the finality or otherwise of an agency decision assessing whether a disclosure is a PID, nor is there provision for a review of an agency decision as to whether a disclosure is a PID. In the absence of an external review of an assessment decision, it would be inappropriate for an agency decision to be binding on the court or tribunal in proceedings for an alleged reprisal.

Anti-Discrimination Commission Queensland²³⁴

As the maker of a PID I was provided with no option to appeal the proposed course of action under the PID Act 2010. Conversely, under the Health Ombudsman Act 2013 there is provision to ask for a reconsideration of decision and a clearly articulated appeals process.

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Findings

The different opinions expressed by agencies as to whether there are adequate review rights within the PID Act is suggestive of a level of confusion among stakeholders. While some consider that there are 'limited options' others consider that agency complaints processes will remedy any deficit in the legislation.

If there is some confusion by public sector entities, there is undoubtedly also confusion experienced by disclosers about their rights, and the availability of complaint processes as a forum to pursue concerns about administrative decisions made under the PID Act.

Section 18 of the Ombudsman Act relevantly provides that the Ombudsman may investigate administrative action of an agency if a complaint is made about the administrative action.²³⁶ Administrative action is defined widely at s.7 to include a decision, a failure to make a decision and a failure to provide a written statement of reasons for a decision. The Ombudsman only has the power to make a report and recommendations²³⁷ in circumstances where, following an investigation, the Ombudsman considers the administrative action falls within the parameters of s.49(2), that is, the administrative action was taken contrary to law, was unreasonable, unjust, oppressive or improperly discriminatory, etc. There is no power to make binding determinations.

In order to assure disclosers (and other parties) of their review rights, and to make unequivocal the responsibilities of public sector entities with respect to PID administrative decision-making, it would be preferable to have rights of review explicitly provided for in the PID Act.

As noted in the submission by the ADCQ, given the significance of the decision by an agency about whether or not a matter is a PID, and the implications for later processes, such as a

²³⁰ Submission 1.

²³¹ Submission 2.

²³² Submission 8.

²³³ Submission 16.

²³⁴ Submission 11.

²³⁵ Submission 20.

²³⁶ Refer to <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/O/OmbudsA01.pdf>.

²³⁷ Refer to s.50 *Ombudsman Act 2001*.

complaint under the *Anti-Discrimination Act 1991* of reprisal, it is particularly important that there be a right of review provided in the PID Act.

Anecdotal evidence from complaints received under the Ombudsman Act, and enquiries from agency PID Coordinators, indicates that where disagreement arises at the outset between the discloser and entity about whether a matter is a PID, it can take some time to finalise. During that period, if the entity has incorrectly determined the matter, the discloser is potentially at risk in that they are not afforded the protections under the PID Act.

A review of a decision as to whether a public sector entity has correctly determined whether a disclosure is a PID in accordance with the PID Act should be immediately subject to external review. This review should be conducted by the oversight agency and result in a determination that is binding on all parties.

It would be appropriate to provide for a short timeframe for determination of such reviews. In this way, an independent and impartial decision, applying expertise in the interpretation and application of the PID Act, can be made quickly.

In the event the review concludes the PID Act was correctly applied, the discloser can be provided with further information to explain the application of the PID Act. If it is found that the public sector entity has erred, the matter can be promptly returned to the agency for immediate action on the PID in accordance with the PID Act.

A right of review in respect of decisions made in relation to the proposed administrative redress scheme should also be provided in the PID Act. Again, such reviews should be conducted by the oversight agency, and result in a binding determination concerning whether the allegations of detriment have been substantiated. The PID Act should also provide flexibility for the oversight agency to make recommendations to the parties about remedies where detriment has been found.

Recommendation 35

The PID Act should be amended to make explicit the internal and external review rights available for each administrative decision made under the Act.

Recommendation 36

The PID Act should be amended to provide a right of external review to the oversight agency where a discloser is dissatisfied with the outcome of a public sector entity's assessment and determination about whether a disclosure is a PID (as recommended at Recommendation 17).

Recommendation 37

The PID Act should be amended to provide a right of external review to the oversight agency where a discloser, witness or other party who has experienced detriment as a result of their involvement in a PID, is dissatisfied with the outcome of a public sector entity's assessment and determination of an application under the administrative redress scheme (as recommended at Recommendation 33).

4.6 *Role and powers of the oversight agency*

Section 59 of the PID Act establishes the main functions of the oversight agency. This includes:

- monitoring the management of PIDs;
- reviewing the way entities deal with PIDs generally, or particular PIDs; and
- performing an educational and advisory role.

The Office of the Ombudsman became the oversight agency from 1 January 2013. The Office has generally discharged its responsibilities by:

- monitoring compliance with the PID Act and publishing PID statistics in its annual report
- reviewing complaints about how PID matters have been managed by public sector entities
- developing and publishing information resources about PIDs on its website, conducting training for PID coordinators and communicating advice in response to queries.

Section 60 provides that the oversight agency may make standards about the way in which public sector entities deal with PIDs. The PID Standard was promulgated with effect from 1 January 2013.²³⁸

Section 33 specifies that the oversight agency may make, under s.60, a standard that requires chief executive officers of agencies to give the oversight agency all or any of the information the chief executive officer is required to keep a record of in respect of a disclosure as set out at s.29. Section 29(1)(d) and s.29(2)(e) require that a chief executive officer must record 'any other information required under a standard made under section 60'. However, there is no legislative power on the part of the oversight agency to compel a public sector entity to submit or provide access to any information.

The PID Act provides no other specific powers to the oversight agency. For example, there is no provision for the oversight agency to require an entity to act in a particular way in response to a PID.

Submissions

Two common themes emerged in the responses to the issues paper. There was particular comment about the suggestion that the oversight agency undertake additional auditing and compliance activities, with some cautioning against it due to existing compliance obligations on public sector entities. There were also proposals for additional educational and advisory activity to support entities.

The current oversight functions of the Office of the Queensland Ombudsman in relation to the PID Act are appropriate ...

Queensland Police Service²³⁹

The Office of the Ombudsman is a more appropriate agency to have oversight of the PID Act. Important considerations are to ensure that Disclosures are carefully considered taking into account all other factors that may be the trigger for the PID so as to ensure that the process is not being used to create disruption to services in reaction to other matters. It is also important that the process of investigation is taken in a timely manner so as to minimise the impact on all parties and to deal with genuine PIDs effectively.

Logan City Council²⁴⁰

²³⁸ The content of Public Interest Disclosure Standard No. 1 replicated the standard previously issued by the Public Service Commission.

²³⁹ Submission 3.

²⁴⁰ Submission 9.

Consideration should be given to whether the oversight agency, in this case the Ombudsman's Office, could play an additional role in auditing agencies in their management of public interest disclosures.

Queensland Rail²⁴¹

A formal audit and reporting mechanism to monitor and oversight compliance would be beneficial.

Central Queensland Hospital and Health Service²⁴²

That would raise the importance of compliance with department and agency senior management but would have resourcing implications for the oversight agency.

Department of Infrastructure, Local Government and Planning²⁴³
Department of State Development and Co-ordinator-General²⁴⁴

The University considers the functions of the oversight body are appropriate ... the Act should provide a requirement for the oversight agency to audit and report on compliance. Consideration may wish to be given to amending the Queensland Ombudsman's PID reporting database to indicate if a subject officer has resigned during the investigation process.

University of Queensland²⁴⁵

Public sector entities are already required to report to the Queensland Ombudsman on PID management. In considering this question, the Queensland Ombudsman is encouraged to give thought to the already substantial audit and reporting requirements placed upon the public sector entities, particularly universities which have very diverse activities already subject to extensive audit and reporting obligations.

Queensland University of Technology²⁴⁶

Most public sector entities already have significant reporting and auditing requirements. Careful consideration must be given before adding to these. Any such requirements come with increased compliance costs and there should be clear and demonstrable advantages in doing so.

Darling Downs Hospital and Health Service²⁴⁷

The introduction of the PID Act has not, in isolation promoted an increase in public interest disclosures.

Although internal awareness campaigns have assisted in providing information to public officers working within the department it does not promote awareness in the wider community.

The Qld Ombudsman could take a more proactive role in promoting the PID Act not only to public officers but to the general public.

Queensland Health²⁴⁸

To assist in administering the Act, agencies would benefit if the agency responsible ... was to issue:

- de-identified case notes to build up a body of precedent; and
- practitioner guidelines to assist in decision-making.

Further, the PID Act might also incorporate a provision allowing, where appropriate, the agency administering the legislation to mandate actions that will give practical effect to the intent of the

²⁴¹ Submission 18.

²⁴² Submission 12.

²⁴³ Submission 1.

²⁴⁴ Submission 2.

²⁴⁵ Submission 26.

²⁴⁶ Submission 5.

²⁴⁷ Submission 21.

²⁴⁸ Submission 19.

legislation. For example, of experience indicates that agencies should always take a particular action to ensure the welfare of a discloser, that action could be mandated...

Department of Environment and Heritage Protection²⁴⁹
Department of National Parks, Sport and Racing²⁵⁰

... should the example raised in the Issues Paper surrounding new provisions to require an entity to act in a particular way to a PID be further considered, examination of the other existing legislative requirements (and oversight bodies) should be had as to the further interaction and workability of this.

For example, a public officer makes a disclosure of corrupt conduct and therefore the PID Act provisions and CC Act provisions apply. Requiring a department to act in a particular, as advised by two separate oversight agencies may result in a range of issues, including conflicting requirements or delays.

It is recognised that the Queensland Ombudsman provides statistical information within its Annual Report, however does not report on agency compliance with the Act, however historically the oversight agency has ensure [sic] departmental compliance so far as policies and procedures. Department's do however report detailed information of each PID received to the Queensland Ombudsman through the online database and this may service as a source for compliance audits with the PID Act. It should be noted that departments are also audited through other means such as ethics reviews, as to the compliance with policies and procedures, and further complaints audits such as the CCC.

Department of Natural Resources and Mines and
Department of Energy and Water Supply²⁵¹

One respondent, however, sought a radical shift in how the PID Act is overseen:

Experience has shown to QWAG that the existing watchdog authorities over misconduct, crime and maladministration in Queensland may not be suited to the 'associated' role of protecting whistleblowers ... the watchdogs appear to be as committed as the agencies to controlling whistleblowers, and their disclosures ... Therefore, QWAG submits that the remedy to ensure the survival of whistleblowers would best be done by a watchdog authority with the sole statutory responsibility aimed at the survival of whistleblowers, namely an independent Whistleblowers Protection Authority [WPA] reporting direct to Parliament.

Whistleblowers Action Group Queensland Inc²⁵²

Findings

The benefits of implementing a more strategic and widespread compliance model than has been undertaken to date, would include the opportunity to identify systemic failings across sectors and within agencies. This monitoring would not be intended to take the place of a review function about how particular PIDs have been dealt with. Indeed, evidence from review outcomes and from complaints about a particular PID management process may well be useful intelligence in framing audits and other compliance activities.

The concerns expressed by some respondents about the potential additional burden compliance activities may involve is acknowledged. The limited additional burden that may be involved (principally in responding to requests for information) would benefit all public sector entities, and the community more generally, by identifying areas for improvement. This would make a positive contribution to fulfilling the public interest in ensuring the PID Act is being implemented effectively.

²⁴⁹ Submission 8.

²⁵⁰ Submission 16.

²⁵¹ Submission 24.

²⁵² Submission 25.

To support further compliance activity, it is proposed that public sector entities be required to record some additional data about their management of PIDs, in particular:

- the support provided to a discloser as required by s.28(1)(a)
- if no action is taken under s.30 the grounds under s.30(1)
- whether a review is requested as permitted under s.30(3), and if so, on what grounds and details of the outcome.

It is also considered that the requirement to provide information to the oversight agency at s.33 should include a requirement to provide information in a timely way. Analysis of PID data entered into the PID database indicates widely fluctuating timeframes within which entities provide data on PIDs. This variability impacts on the accuracy of the data available for reporting, and the reliability of the analysis and conclusions that can be drawn.

One of the most significant ways the oversight agency can impact on compliance with the PID Act is through education and awareness activities with public sector entities. There is continuing interest by agencies in training and publications provided by the Office. Any changes to the PID Act will need to be accompanied by the development of publications, online resources and briefings to ensure that agencies understand a revised PID Act, and are adequately supported in implementing their changed obligations.

Recommendation 38

The PID Act should be amended to make explicit the oversight agency has authority to audit public sector entities' compliance with the Act, and to request information and receive cooperation from public sector entities in undertaking audits and other compliance activities.

Recommendation 39

Section 29(1) and (2) of the PID Act should be amended to require the chief executive officer of a public sector entity to keep a proper record for each disclosure of the support provided to a discloser as required by s.28(1)(a); if no action was taken under s.30, the grounds under s.30(1); whether a review was requested as permitted under s.30(3), and if so, on what grounds and details of the outcome.

Recommendation 40

Section 33 of the PID Act should be amended to make explicit that the chief executive officer of a public sector entity must give to the oversight agency any or all information mentioned in s.29 for each disclosure within 30 working days of each disclosure being resolved/finalised.

Appendix A: **A review of the *Public Interest Disclosure Act 2010* Issues paper**



A review of the *Public Interest Disclosure Act 2010*



Issues paper

November 2015

Privacy and confidentiality

Any personal information in your comment or submission will be collected by the Office of the Queensland Ombudsman (the Office) for the purpose of undertaking the review. The Office may contact you for further consultation on the issues you raise, and your submission and/or comments may be provided to others with an interest in the review.

Submissions provided to the Office in relation to this issues paper will be treated as public documents. This means that, in all but exceptional cases, they may be published on the Office's website, together with the name of each person or organisation making the submission. If you would like your submission, or any part of it, to be treated as confidential, you must clearly state this in your submission.

Please note, however, all submissions may be subject to disclosure under the *Right to Information Act 2009*, and access to applications for submissions, including those marked confidential, will be determined in accordance with that Act. Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers matters relating to the review.

For more information about submissions and how the Office will deal with them, see Appendix 2 of this issues paper.

Issues paper for the review of the *Public Interest Disclosure Act 2010*

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If you need a translator, call 131 450. If you are deaf, or have a hearing or speech impairment: contact us through the National Relay Service. For more information, visit: www.relayservice.gov.au

Foreword

Disclosures about wrongdoing in the public sector are an important part of the public sector's system of accountability. The community has a right to expect that the public sector will build and maintain strong systems for identifying and responding to serious wrongdoing and provide appropriate support and protection to those who come forward with information. It is in the public interest that these systems operate efficiently and effectively and are comprehensive in their coverage.

This issues paper is the first step in the review of the operations of the *Public Interest Disclosure Act 2010* (the PID Act). As the oversight agency for the PID Act, the Office of the Queensland Ombudsman will undertake the review and report to the Attorney-General and the Speaker of the Parliament.

In the first five years of the PID Act's operation, a number of issues have arisen for consideration in the review. These issues include:

- the scope of matters that may be classified as a 'public interest disclosure' (a PID)
- the definition of 'public officer' for the purpose of making a PID
- the process requirements of the PID Act on agencies and individuals
- application of the reprisal provisions in the PID Act
- the role and powers of the PID Act oversight agency.

I encourage public sector entities, public officers, disclosers and others in the community to consider the issues in this paper and respond with submissions. I also welcome comments and proposals in relation to other aspects of the operation of the PID Act.

The closing date for submissions to this issues paper is **Friday 15 January 2016**.

Your input will help inform the collective understanding of how the PID Act currently operates and contribute to proposals for its reform.

Phil Clarke
Queensland Ombudsman
2 November 2015

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1. Terms of reference

The purpose of the *Public Interest Disclosure Act 2010* (PID Act) is to 'facilitate disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures'.

The objects of the PID Act are to:

- promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector
- ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with
- ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure
- provide protection from reprisals to persons making public interest disclosures.

Section 62 of the PID Act requires that the oversight agency must carry out a review of the operation of the Act and that review must commence within five years after the commencement of that section.

The Office of the Queensland Ombudsman (the Office) is the oversight agency for the PID Act. As the PID Act commenced on 1 January 2011, the review must commence prior to 1 January 2016.

Scope

This review will consider the operation of the PID Act. In accordance with s.62(3) of the Act, the objects of the review will include:

1. deciding whether the main objects of the PID Act remain valid
2. deciding whether the PID Act is achieving its main objects
3. deciding whether the provisions of the PID Act are appropriate for achieving its main objects.

Out of scope

For the purpose of this review, the following issues are out of scope:

- the definition of corrupt conduct (under s.15 of the *Crime and Corruption Act 2001*)
- complaints about how a specific PID is currently being managed by a public sector entity.

Methodology

The Office will publish an issues paper to:

- inform stakeholders about the operations of the PID Act
- provide information about known issues with the operations of the Act
- pose questions to prompt feedback and comments from stakeholders for further consideration.

Stakeholders are invited to make written submissions in response to the issues paper. Submissions may address the issues identified in the issues paper or other matters related the operation of the PID Act.

Data, feedback and ideas generated from this consultation process will inform the review and the Ombudsman will then consider how to proceed. Further processes may include additional research and consultation.

A final report on the outcome of the review of the PID Act will be prepared by the Ombudsman. Material from stakeholder submissions may be incorporated in the Ombudsman's final report on this review.

Reporting timetable

The Ombudsman is required to give the Attorney-General and the Speaker of the Parliament a report about the outcome of the review. The Attorney-General must, as soon as practicable after receiving the report, table the report in the Legislative Assembly.

The final report will be provided to the Attorney-General and Speaker by 31 December 2016.

2. Purpose of this paper

This paper seeks to inform stakeholders about the current operations of the PID Act, identify issues for consideration and call for submissions.

It provides:

- background information about the creation of the PID Act and identifies significant amendments to the Act since its commencement
- a statistical summary about PIDs reported in Queensland since the commencement of the PID Act
- a summary of issues about the application of the PID Act and questions for consideration.

This is the first step in the Ombudsman's review of the PID Act.

The Ombudsman will use submissions to inform the review process, which may include further consultation.

More information about PIDs is available in **Appendix 1** and fact sheets and publications are available at:
<http://www.ombudsman.qld.gov.au/>

3. Call for submissions

Individuals, groups and organisations are invited to make a written submission in response to the terms of reference and this issues paper.

Submissions may:

- address all or some of the questions posed in this paper
- address other matters about the operations of the PID Act and PID Standard
- provide other information or commentary relevant to this review.

Submissions in response to this issues paper are due by: **Friday 15 January 2016.**

To lodge a submission:

Email PIDreview@ombudsman.qld.gov.au

Mail PID Act Review
Office of the Queensland Ombudsman
GPO Box 3314
BRISBANE QLD 4001

Publication of submissions

Submissions provided to the Office of the Queensland Ombudsman in relation to this paper will be treated as public documents.

This means that, in all but exceptional cases, they may be published on the Office of the Queensland Ombudsman website. Submitted materials may be incorporated in Ombudsman publications about this review.

If you would like your submission, or any part of it, to be treated as confidential, you are asked to indicate this clearly in your submission.

More information about submissions

For further information about how to make a submission and how the Ombudsman will use submissions see **Appendix 2**.

A complete set of the consultation questions is provided in **Appendix 3**.

4. Background and statistics

In August 2009, the Queensland Government released a paper, *Integrity and Accountability in Queensland*,¹ to prompt public discussion on integrity and accountability and seek public input on proposals for reform. In November 2009, following consideration of public submissions and advice from experts, the government released the *Response to Integrity and Accountability in Queensland*² (the Integrity Response). In a range of reforms, the Integrity Response committed to reforming the *Whistleblowers Protection Act 1994* (WP Act) to reflect best practice and the proposed reforms also took account of the recommendations of the *Whistling While They Work*³ project.

The Public Interest Disclosure Bill 2010 was introduced to the Queensland Parliament in August 2010. The PID Act was given assent on 20 September 2010 and commenced on 1 January 2011.

Under s.60 of the PID Act, the oversight agency may make standards about how agencies manage PIDs. The Ombudsman established the Public Interest Disclosure Standard No.1 for this purpose on 1 January 2013.

The PID Standard sets standards for how public sector entities must manage PIDs and establishes the process for reporting statistical information about PIDs to the oversight agency.

4.1 Amendments

The PID Act has been amended since commencement with the most significant modifications relating to:

- changing the oversight agency from the Public Service Commission (PSC) to the Queensland Ombudsman (effective 1 January 2013)

- changing a PID category from 'official misconduct' to 'corrupt conduct' to be consistent with changes to the *Crime and Corruption Act 2001* (effective 1 July 2014).

The definition of corrupt conduct includes four elements and, in effect, sets a higher threshold for reporting than 'official misconduct'. 'Corrupt conduct' is focused on more serious matters than the previous wider definition of 'official misconduct'. Some matters that would previously have been categorised as official misconduct do not meet the new tests for corrupt conduct and are therefore no longer categorised as PIDs.

4.2 Statistical summary

Under the PID Standard, public sector entities must report statistical information about PIDs received to the PID oversight agency. The oversight agency must then prepare an annual report about the operation of the Act, including statistical information about PIDs.

The Office of the Queensland Ombudsman reported PID statistics in its annual reports for 2012-13, 2013-14 and 2014-15. For the period January 2011 to June 2012, the PSC (then the oversight agency) reported PID statistics.

Over the period of the PID Act's operations, the number of reported PIDs has varied. Reported PIDs in 2011-12 and 2012-13 were similar (1,183 and 1,140) but this dropped to 535 in 2014-15.

Over the last three years of the PID Act's operation:

- Most PIDs (80-90%) were about 'corrupt conduct' or 'official misconduct'.
- PIDs about maladministration accounted for between 2-7% of reported PIDs.
- Other PID types account for the remainder. PIDs about reprisal action account for less than 2% of reported PIDs.
- Most PIDs (80-90%) are reported by employees of a public agency.
- State government departments account for the largest percentage of reported PIDs (55-65% each year).
- A finding of 'substantiated' is reported in 40-50% of PID investigations finalised each year.

¹ Queensland Government, *Integrity and Accountability in Queensland*, Brisbane, 2009.

² Queensland Government, *Response to Integrity and Accountability in Queensland*, Brisbane, 2009.

³ P Roberts, J Olsen and AJ Brown, *Whistling while they work - towards best practice whistleblowing programs in public sector organisations*, Griffith University, Brisbane, 2009.

The commencement of the 'corrupt conduct' definition has had an impact on the number of PIDs reported to the oversight agency in 2014-15.

A smaller number of PIDs in the new category of 'corrupt conduct' (415 in 2014-15) were reported when compared with the number of 'official misconduct' PIDs in the previous year (658 in 2013-14).

3-year statistical summary⁴

1. PIDs by type

	2012-13		2013-14		2014-15	
	No.	%	No.	%	No.	%
Corrupt conduct		--		--	415	77.6
Official misconduct	1,036	90.9	658	90.8	26	4.9
Maladministration	15	1.3	16	2.2	40	7.5
Environment	0	0.0	5	0.0	5	0.9
Disability	41	3.6	14	1.9	20	3.7
Misuse of public resources	33	2.9	20	2.8	15	2.8
Public health/safety	4	0.4	7	1.0	5	0.9
Reprisal	11	1.0	5	0.7	9	1.7
Total	1,140		725		535	

Notes: A PID may include more than one type of disclosure therefore, the number of PIDs by type may exceed the number of PIDs reported by agency or discloser type.

2. PIDs by agency type

	2012-13		2013-14		2014-15	
	No.	%	No.	%	No.	%
Department	626	56.1	436	62.5	292	59.3
Local government	96	8.6	83	11.9	68	13.8
University/TAFE	32	2.9	23	3.3	11	2.2
Statutory authority	220	19.7	111	15.9	103	20.9
GOCs	136	12.2	39	5.6	12	2.4
Public service office	6	0.5	6	0.9	6	1.2
Total	1,116		698		492	

3. PIDs by discloser type

	2012-13		2013-14		2014-15	
	No.	%	No.	%	No.	%
Anonymous	67	6.0	29	4.2	20	4.1
Manager/supervisor	51	4.6	13	1.9	10	2.0
Auditor	20	1.8	3	0.4	0	0.0
Employee of agency	919	82.3	632	90.5	424	86.2
Employee of another public sector agency	27	2.4	9	1.3	16	3.3
Member of the public	30	2.7	12	1.7	22	4.5
Unknown	2	0.2	0	0.0	492	0.0
Total	1,116		698		492	

⁴ For further statistical information, refer to the Queensland Ombudsman Annual Reports available at www.ombudsman.qld.gov.au.

5. The main objects of the PID Act

The purpose of the PID Act is to facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection for those who make disclosures.

Section 3 of the PID Act sets out the main objects of the Act as:

- (a) to promote the public interest by facilitating public interest disclosures of wrongdoing in the public sector; and
- (b) to ensure that public interest disclosures are properly assessed and, when appropriate, properly investigated and dealt with; and
- (c) to ensure that appropriate consideration is given to the interests of persons who are the subject of a public interest disclosure; and
- (d) to afford protection from reprisals to persons making public interest disclosures.

Questions

Do the objects of the PID Act remain valid?

Are there other ways of promoting the disclosure of wrongdoing and providing protection to disclosers that should be considered?

Has the PID Act been effective in promoting public interest disclosures?

Are the PID Act provisions for assessment and investigation appropriate or should other options be considered?

Are the PID Act provisions for protecting the interests of disclosers and subject officers adequate and appropriate? What alternatives might be considered?

Are the PID Act provisions for protection against reprisal effective? What works well in the current arrangements? What opportunities are there for improvement?

6. Who can make PIDs and what they are about

6.1 Two different types of disclosers

The PID Act, ss.12 and 13, establishes a wide scope of matters that may be PIDs but creates two classes of discloser: 'any person' and 'public officer'.

Under s.12, certain PIDs may be made by 'any person'. This includes disclosures about a substantial and specific danger to the health and safety of a person with a disability, substantial and specific danger to the environment or reprisal.

Under s.13, disclosures in a broader range of categories may be PIDs when made by a 'public officer'. For example, a disclosure about corrupt conduct may be a PID when made by a 'public officer' (such as fraud) but is not a PID when made by a member of the public.

Questions

What is the effect of including two categories of disclosers ('any person' and 'public officer') in the PID Act?

Are these provisions appropriate? Are there benefits in continuing this arrangement?

Are there other options that should be considered?

6.2 PID reporting by any person

Under s.12 of the PID Act, certain PIDs may be made by 'any person'. These are disclosures about:

- substantial and specific danger to the health and safety of a person with a disability
- substantial and specific danger to the environment (specifically defined as an offence against the provisions listed in PID Act schedule 2 or a contravention of a condition imposed under a provision mentioned in schedule 2)
- the conduct of another person that could, if proved, be a reprisal.

PID reporting by agencies shows a very small number of PIDs are being made by a member of the public (fewer than 5% of PIDs a year).

In 2014-15, 22 PIDs were reported from members of the public (most related to 'substantial and specific danger to the health and safety of a person with a disability'). These PIDs included disclosures made to public sector entities about actions taken outside the public sector.

Questions

What is the value of including disclosures about the health and safety of a person with a disability and the environment in the PID framework?

Are there other more appropriate ways to provide support and protection to persons (not public officers) who make disclosures about these issues?

6.3 Meaning of 'substantial and specific'

Sections 12 and 13 of the PID Act uses the word 'substantial and specific' when describing some types of public interest information.

For example, s.12 (1) (a) refers to 'a substantial and specific danger to the health or safety of a person with a disability'; and s.13 (1) (a) (ii) refers to 'maladministration that adversely affects a person's interests in a substantial and specific way'.

The PID Act provides no further guidance on the meaning or application of the phrase 'substantial and specific'.

Questions

Should the PID Act provide more guidance or examples about the meaning of 'substantial and specific'?

Are there alternatives to the use of the words 'substantial and specific'?

6.4 Dealing with public officer complaints about matters that are substantially workplace complaints or grievances

Under s.13(1)(a)(i) of the PID Act, a public officer may make a PID about 'maladministration that adversely affects a person's interests in a substantial and specific way'.

Practical issues arise about how to assess such allegations as PIDs when they overlap with other processes. This is particularly the case with issues which may sometimes be considered as substantially a matter of personal or private interest.

The PID Act has no requirement that these disclosures be considered in the light of a public interest test before being assessed as a PID.

Question

Should consideration be given to adding a public interest test for disclosures by public officers that are substantially workplace complaints?

6.5 Public officers reporting role-related PIDs

Sections 12 and 13 of the PID Act provide that PIDs may be made by public officers, but do not specifically provide for disclosures in the normal course of employment (e.g. an auditor reporting 'corrupt conduct').

Questions

Should the PID Act be made more explicit about disclosures made in the normal course of a public officer's duties?

Should there be further consideration about how role-related PIDs should be managed?

6.6 Changes to employment arrangements for public officers

Section 7(1) of the PID Act provides that 'a public officer, of a public sector entity, is an employee, member or officer of the entity'. This has been interpreted as including officers employed on a permanent, temporary or casual basis but not including volunteers and contractors.⁵

Service delivery arrangements in public sector entities often rely on contractors and volunteers working alongside 'public officers'. If an employee reports a 'public officer' matter, the PID Act applies. However, if a contractor or volunteer makes the same allegation, the PID protection does not apply (although other protections may take effect). A similar issue arises when volunteers and students are in employment-like arrangements. For example, a student-doctor working in a hospital (while on a university placement) or a volunteer providing emergency services.

A further question arises when considering whether the 'public sector entity' is limited to the employing agency (such as a specific department) or the broader employer, such as the Queensland Government. For example, is a Queensland Government department employee 'a public officer' when making an allegation of corrupt conduct about an employee of another department?

Questions

Should the PID Act definition of 'public officer' be widened to include volunteers and contractors?

Should further consideration be given to clarifying the application of the 'public officer' definition?

6.7 Post-employment considerations for public officers

Section 7(1) of the PID Act defines a 'public officer' as an 'employee, member or officer of the entity'.

In practice, this means a former public officer is categorised as 'any person' when making a complaint. A complaint about corrupt conduct by a former officer would not be a PID.

The PID Act is also silent about employment separation and PID protections.

Question

Should the PID Act be more explicit about how disclosures by former public officers should be managed?

⁵ Crime and Misconduct Commission, Queensland Ombudsman and Public Service Commission, *Managing a public interest disclosure program: a guide for public sector organisations*, p. 48.

7. How PIDs are made

7.1 Who can receive a PID

Division 2 of the PID Act establishes a range of persons who may receive a PID. Division 3 sets out how a disclosure may be made.

Under s.17, a PID may be made to another person who directly, or indirectly, supervises or manages the discloser or to others such as the Chief Executive Officer or to a person who has the function of receiving or taking action on the type of information being disclosed (such as an ethical standards officer).

A disclosure may also be made to a Minister (if the Minister is responsible for the administration of the department) or if the proper authority is a public sector entity with a governing body it may be made to a member of its governing body.

Questions

What is the impact of this wide range of options for disclosing a PID?

What are the advantages? What are the disadvantages?

7.2 Multiple pathways for reporting

Under s.15 of the PID Act, a public officer may make a PID to their own agency and also to an investigative agency. This is considered to be an important option for encouraging disclosers to make a PID. There is no obligation to report internally first.

Given the subjective process of assessing a complaint, it is possible that the two agencies concerned could assess the same matter differently. The agencies may then follow different processes to manage the matter which raises questions about how any subsequent allegation of reprisal would be managed.

Questions

What is the impact of having multiple reporting pathways? Is this encouraging disclosures?

Are there options for improving how internal and external reporting arrangements work?

7.3 PIDs to journalist

Section 20 of the PID Act sets out when a PID may be made to a journalist. This section allows a person who has already made a PID to a proper authority to provide substantially the same information to a journalist if:

- the entity has decided not to investigate or deal with the disclosure;
- if the entity has investigated but did not recommend taking any action in relation to the disclosure; or
- if the entity did not notify the person, within 6 months of the disclosure being made, whether or not the disclosure was to be investigated or dealt with.

Questions

How has this option been used?

Are there alternatives that should be considered?

8. How PIDs are managed

8.1 PID status

Under Chapter 2 of the PID Act, a discloser need not specifically identify a complaint as a PID, nor request that the matter be treated as a PID, for it to be a PID under the PID Act.

It is an agency's obligation to assess the disclosure and act according to the PID Act requirements.

The PID Act does not give a discloser the option of electing that their disclosure not be treated as a PID or withdrawing a PID once made.

In its current form, the PID Act does not give an explicit role or right to any person to 'declare' a matter a PID or not a PID.

Questions

What is the effect of these provisions on disclosers? And agencies?

Are there alternatives that should be considered?

8.3 Providing protections for 'a public officer' who is not employed by the entity

Public officers have a choice about making a PID within their organisation (reporting internally) or to an agency able to investigate or remedy (reporting externally). However, where the entity is not the discloser's employer (for example, an investigative entity), the practicality of managing the risk of reprisal and providing protections has been raised as an area of concern by agencies.

Section 65 of the PID Act allows for confidential information to be disclosed to discharge a function under the PID Act or another Act but there is no explicit consideration of how risks to a discloser or others associated with the disclosure should be managed when more than one agency is involved.

Question

Should the PID Act be more specific about providing protection to a discloser who is not an employee of the entity investigating the PID?

8.2 Informing a person who has made a PID

Section 32 of the PID Act sets out what information is required to be given to a person who has made a PID. This includes requirements to confirm that the disclosure was received, describe the action proposed and, if action has been taken in relation to the disclosure, a description of the results of the action. The PID Act does not set any time requirements for these processes; and no guidance is provided about the extent of information necessary to describe action (proposed or taken).

Questions

Should the PID Act be explicit about when information should be provided to disclosers?

Should further consideration be given to clarifying the extent of information to be provided to a discloser about the results of action arising from a PID?

8.4 Obligations on public sector entities

Part 2 of the PID Act sets out the responsibilities of 'public sector entities'. Section 28 requires chief executive officers (CEOs) to establish reasonable procedures for dealing with PIDs and to publish them on a public facing website.

While state government departments' compliance with this obligation is high, compliance is lower for local government and public service offices and statutory bodies.

The PID Standard establishes further obligations about how public sector entities must prepare for a PID and the actions to be taken when a PID is received.

Section 28(e) of the PID Act places an explicit obligation on CEOs to ensure officers are offered protection from reprisal by the entity or other public officers of the entity. There is no specific provision for providing protection for disclosers who are not public officers.

Questions

Are the current requirements for each public sector entity to develop and publish their own PID policy valuable and appropriate?

Are there alternatives that could be considered?

Should further consideration be given to the extent of protections provided by the Act and responsibility for providing that protection?

8.5 An entity with powers to investigate or remedy

While s.28 of the PID Act requires a CEO to establish reasonable procedures for dealing with PIDs, the Act does not specifically address how investigative or remedy agencies must deal with PIDs.

Investigative agencies, when dealing with PIDs, have obligations under the PID Act (beyond s.28) as well as the duties set out in their own enabling legislation. For example, the *Crime and Corruption Act 2001* and the *Ombudsman Act 2001* include considerations for the protection of those helping with investigations.

Questions

Are the current arrangements for 'investigate and remedy' agencies appropriate?

What other options or improvements could be considered?

8.6 Preserving confidentiality

Section 65 of the PID Act sets out the requirements for preserving confidentiality. While confidentiality is considered an important element in discloser protection, it is not guaranteed by the PID Act. Section 65(3) sets out when a person may make a record of confidential information or disclose it to someone else.

Some areas of challenge for public sector entities and disclosers in relation to confidentiality are:

- applying the natural justice provisions under s.65 (5)(a)
- responding to requests for information from another entity (e.g. WorkCover) about confidential PID information.

Questions

Are the current arrangements for confidentiality adequate and appropriate?

Are there improvements that could be considered?

9. Reprisal considerations

A key feature of the PID Act is that it provides protection from reprisal for those who make disclosures, or help with PID investigations. Under s.12, a complaint about reprisal is a PID that can be made by any person.

Section 40 of the PID Act addresses reprisal and grounds for reprisal. A reprisal includes causing, or attempting or conspiring to cause, detriment to another person because, or in the belief that:

- the other person, or someone else has made, or intends to make a PID
- the other person or someone else is, has been, or intends to be involved in a proceeding under the PID Act against any person.

Section 41 makes a reprisal an offence that attracts a maximum penalty of 167 penalty units or two years imprisonment.

The PID Act Schedule 4 defines detriment to include:

- (a) personal injury or prejudice to safety; and
- (b) property damage or loss; and
- (c) intimidation or harassment; and
- (d) adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; and
- (e) financial loss; and
- (f) damage to reputation, including, for example, personal, professional or business reputation.

Determining what constitutes reprisal action and how to appropriately deal with allegations of reprisal is a significant issue for public sector entities.

Queries have arisen about options for responding to claims of detrimental action (in connection with a PID) that could also be considered as a breach of another Act or standard.

While the PID Act creates a range of 'proper authorities' to receive PIDs, including PIDs about reprisal, it does not allocate specific responsibility for dealing with or responding to reprisals.

Questions

Are the current arrangements for managing reprisal adequate and appropriate?

What other options or improvements could be considered?

10. Review rights

Section 30(3) of the PID Act provides a specific review right for a discloser when an agency has decided not to investigate or deal with a PID. However, the Act is silent on review rights for dealing with other administrative decisions or actions about PIDs.

For example, a discloser may have a complaint about a decision to find a PID unsubstantiated or a complaint that actions taken by the agency in responding to a PID were not in accordance with the requirements of the PID Act, Standard or the agency's own PID policy.

Questions

Should the issue of review rights in the PID Act be further considered?

Are there other options or improvements that could be considered?

11. Role and powers of the oversight agency

Section 59 of the PID Act establishes the main functions of the oversight agency.

This includes:

- monitoring the management of PIDs
- reviewing the way entities deal with PIDs
- performing an educational and advisory role.

The Office of the Ombudsman has generally discharged this responsibility by:

- monitoring compliance with the PID Act and publishing PID statistics in its annual report
- reviewing complaints about how PID matters have been managed by public sector entities
- providing information resources about PIDs on its website, education for PID coordinators and advice in response to queries.

Apart from nominating the Ombudsman as the 'oversight agency', the PID Act provides no specific powers to the oversight agency. For example, there is no provision for the oversight agency to require an entity to act in a particular way in response to a PID.

Questions

Are the functions of the oversight body appropriate?

Should there be any requirement to audit and formally report about entities' compliance with PID Act requirements?

Are there other improvements that could be considered?

12. Glossary

corrupt conduct	see s.15 <i>Crime and Corruption Act 2001</i>
discloser	a person who makes a PID
maladministration	see Schedule 4 <i>Public Interest Disclosure Act 2010</i>
PID	a Public Interest Disclosure
public sector entity	<p>includes a department, a local government, a registered higher education provider or TAFE Queensland, an entity established under an Act or under State or local government authorisation for a public, State or local government purpose</p> <p>see s.6 of the PID Act for the complete meaning and exemptions</p>
public officer	an employee, member or officer of the entity
subject officer	the person about whom a PID is made
Ombudsman	the Queensland Ombudsman, appointed under the <i>Ombudsman Act 2001</i>
oversight agency	the Office of the Queensland Ombudsman is the oversight agency for the <i>Public Interest Disclosure Act 2010</i>

Appendix 1 Fact sheet: *What is a Public Interest Disclosure*

This factsheet (Public Interest Disclosures Facts – For Disclosers #1) and more information about PIDs is available at: www.ombudsman.qld.gov.au

What is a Public Interest Disclosure?

An introduction to Public Interest Disclosures and the *Public Interest Disclosure Act 2010*

What is a Public Interest Disclosure (PID)?

A public interest disclosure (PID) is a disclosure in the public interest, of information about wrongdoing in the public sector. For an allegation to be considered a PID and attract the protections under the *Public Interest Disclosure Act 2010*, it must be:

- public interest information
- an appropriate disclosure
- made to a proper authority.

Why make a PID?

Disclosures about wrongdoing in the public sector, by public sector workers and members of the public, help to uncover corruption and other misuses of public resources.

The PID Act encourages the disclosure of information about suspected wrongdoing in the public sector so that it can be properly evaluated and appropriately investigated. Disclosures are an important source of information to help public sector organisations address the wrongdoing and build better systems to reduce the risk in future. An effective system for making public interest disclosures helps to safeguard the integrity of the Queensland public sector.

What can a PID be about?

Only certain types of public interest information can be considered as a PID.

Any person, including a public sector officer, may disclose information about:

- a substantial and specific danger to the health or safety of a person with a disability
- a substantial and specific danger to the environment (as set out in the PID Act)
- reprisal action following a PID.

A **public sector officer** may also disclose information about:

- corrupt conduct by another person
- maladministration that adversely affects someone's interests in a substantial and specific way
- a substantial misuse of public resources
- a substantial and specific danger to public health or safety
- a substantial and specific danger to the environment.

If a disclosure is not a PID matter, it may still be in an important complaint. For more information about agencies that accept and investigate complaints, go to www.ombudsman.qld.gov.au.

What's an appropriate disclosure?

An appropriate disclosure is where:

- the discloser honestly and reasonably believes the information provided tends to show the conduct or danger; or
- the information tends to show the conduct or danger regardless of the discloser's belief.

Information that 'tends to show' wrongdoing or danger must be more than a mere suspicion, there must be information that indicates or supports a view that the wrongdoing or danger has or will occur.

The discloser is not required to undertake any investigative action before making a PID. A disclosure may still be a PID even if the information turns out to be incorrect or unable to be substantiated provided the discloser had a genuine and reasonable belief that it did occur. This allows for genuine misinterpretations of information to fall within the scope of a PID.

Who is a proper authority?

Proper authorities are persons and organisations authorised under the PID Act to receive public interest disclosures.

Examples of proper authorities:

- The public sector organisation that is the subject of the PID. A public sector entity is a proper authority if the disclosure is about the conduct of that entity or its employees.
- An agency you believe has authority to investigate the matter. For example, the Crime and Corruption Commission is a proper authority for disclosures about corrupt conduct.
- The Chief Judicial Officer of a court or tribunal when the report is about suspected official misconduct or reprisal by judicial officers.
- A Member of the Legislative Assembly (an MP).

What protection does the PID Act provide?

Disclosers are entitled to reasonable information about the action taken as a result of the PID. This includes information about the action proposed and, if action is taken, the results of that action.

Reprisal against a discloser is an offence. The PID Act also makes the public sector entity vicariously liable if any of the entity's employees attempt or cause reprisal against a discloser (whether public officer or a member of the public). Public sector entity chief executive officers have specific obligations to ensure public officers who make a PID are supported and offered protection from reprisal.

If you are a public sector officer, you cannot be disciplined for the action of making a PID. However, a discloser's liability for their own conduct is not affected by the action of making a PID. Making a PID does not prevent reasonable management action unrelated to the PID.

The PID Act also provides that appropriate consideration be given to the interests of the person subject to a PID. Sometimes a PID is an honest but mistaken claim and it is important that all public sector officers are treated fairly.

Confidentiality

Strict confidentiality requirements apply to PIDs. Confidential PID information can be recorded or disclosed:

- to administer the PID Act or to discharge a function under another Act (for example, to investigate something disclosed by a PID)
- for a proceeding in a court or tribunal
- with the consent of the person the information relates to (or if the consent of the person cannot be reasonably obtained, if the information is unlikely to harm the interests of the person) or
- if it is essential under the principles of natural justice and reprisal is unlikely.

A PID to a journalist

Under the PID Act, a discloser may make a PID to a journalist if they have already made essentially the same disclosure to a public sector entity that is a 'proper authority' and:

- the entity has decided not to investigate or deal with the disclosure, or
- the entity investigated the disclosure but did not recommend taking any action, or
- the discloser was not notified within six months of making the disclosure whether or not the disclosure was to be investigated or dealt with.

More information

Public Interest Disclosure Act 2010

Thinking about blowing the whistle? Guides available for making, handling and managing public sector Public Interest Disclosures

Other Queensland Ombudsman Public Interest Disclosure Facts

Appendix 2 How to make a submission to the review of the *Public Interest Disclosure Act 2010*

Individuals, groups and organisations are invited to make written submissions in response to the terms of reference and an issues paper for the review of the *Public Interest Disclosure Act 2010* (PID Act). Feedback, proposals and ideas generated from this process will inform the Queensland Ombudsman's review of the PID Act.

If you want to make a PID, or have a complaint about how an agency is currently dealing with a PID, you should contact the relevant proper authority or the Office of the Queensland Ombudsman for information about making a complaint. Current complaints or disclosures will not be dealt with in this review.

What is a submission?

A submission is feedback, comments, ideas or opinions about the operations of the PID Act submitted by an individual, group or organisation.

Submissions may:

- address all or some of the questions posed in the issues paper
- address other matters about the operations of the PID Act and PID Standard
- provide other information or commentary relevant to the objects of this review.

For example, a submission may be:

- short responses to some or all of the questions in the issues paper
- ideas and options for encouraging disclosures about wrongdoing in the public sector
- a proposal for improving an aspect of the PID Act
- examples of problems or challenges faced in applying the PID Act and suggestions for improvement
- a personal story about how the PID Act has affected you
- a formal or academic report about the process of managing public interest disclosures.

An individual, group or organisation may publish their own submission if they choose to do so (for example, publish information from their submission on their organisation's website).

How the Ombudsman will use submissions

The Ombudsman will use submissions to inform the review process, identify issues and contribute to the achievement of the objects of the review.

Material from submissions may be incorporated into review materials including documents, content for presentations, briefings, publications and reports about this review.

Submissions may be published, wholly or in part, on the Ombudsman's website (www.ombudsman.qld.gov.au). The Ombudsman will determine which submissions, if any, will be published.

Where submissions, or material from submissions, are published, personal addresses and contact details will be redacted before publication. Signatures may also be redacted. Where the Ombudsman considers it appropriate, content of submissions may be redacted prior to publication. The Ombudsman will not publish offensive, insulting or defamatory comments or other content which is outside the terms of reference.

The Ombudsman will accept and consider submissions made in confidence. Content from such submissions will not be reproduced in publications about this review. Persons who want their submission treated in this way must clearly state this in their submission. Unless it is made clear that the submitter wants the submission to be treated in confidence, the content will be treated as public. Anonymous submissions will be treated as a submission made in confidence.

The name of each person making a submission, other than those who made submissions in confidence, may be listed in the final report of the review which will be tabled in the Parliament.

Submissions (or information about their content) may also be provided in due course to a parliamentary committee that considers matters relating to the review.

Under the General Retention and Disposal Schedule for Administrative Records (QDAN 249 v.7) submissions are considered to be permanent public records and will be archived according to the *Public Records Act 2002*.

All submissions to this review may be subject to disclosure under the *Right to Information Act 2009* (Qld). Access applications for submissions, including those for which confidentiality has been requested, will be determined in accordance with that Act.

Lodging a submission for consideration in the review

There is no required format for a written submission.

It would be appreciated if each submission had a covering letter identifying the name of the submitter (or group or organisation) and providing contact details (including the name of a contact person if the submission is from a group or an organisation); and, if relevant, a clear statement about any request for confidentiality.

Please do not forward material to the review that you are not the copyright owner of (for example, newspaper articles). If you intend to rely on information in your submission that is not your own work, please provide a reference or link to such material in your submission.

Electronic submissions

Where possible, the Office would appreciate electronic documents suited to printing in an A4 size in PDF format. Other electronic formats such as Word or Excel, will also be accepted. Do not send password protected files.

If we have any difficulty in accessing a document you have provided, we will contact you and seek to make alternative arrangements to receive your submission. All submissions received by email will be acknowledged with a reply email.

Email electronic submissions to: PIDreview@ombudsman.qld.gov.au

Hard copy submissions

Where possible, A4 format documents are preferred. All hard copy documents submitted will be scanned electronically. Original documents should not be provided as submissions will not be returned to submitters. All hard copy submissions received will be acknowledged by letter.

Mail hard copy submissions to:
PID Act Review - Office of the Queensland Ombudsman
GPO Box 3314
BRISBANE QLD 4001

Assistance

If you are unable to make a submission in writing, contact the Office of the Queensland Ombudsman (email PIDreview@ombudsman.qld.gov.au or call 07 3005 7000, or, if outside Brisbane, call 1800 068 908) for information about how we can help you. If you need a translator, call 131 450. If you are deaf, or have a hearing or speech impairment: contact us through the National Relay Service. For more information, visit: www.relayservice.gov.au

Appendix 3 Consultation questions

5. The main objects of the PID Act

Do the objects of the PID Act remain valid?

Are there other ways of promoting the disclosure of wrongdoing and providing protection to disclosers that should be considered?

Has the PID Act been effective in promoting public interest disclosures?

Are the PID Act provisions for assessment and investigation appropriate or should other options be considered?

Are the PID Act provisions for protecting the interests of disclosers and subject officers adequate and appropriate? What alternatives might be considered?

Are the PID Act provisions for protection against reprisal effective? What works well in the current arrangements? What opportunities are there for improvement?

6. Who can make PIDs and what they are about

6.1 Two different types of disclosers

What is the effect of including two categories of disclosers ('any person' and 'public officer') in the PID Act?

Are these provisions appropriate? Are there benefits in continuing this arrangement?

Are there other options that should be considered?

6.2 PID reporting by any person

What is the value of including disclosures about the health and safety of a person with a disability and the environment in the PID framework?

Are there other more appropriate ways to provide support and protection to persons (not public officers) who make disclosures about these issues?

6.3 Meaning of 'substantial and specific'

Should the PID Act provide more guidance or examples about the meaning of 'substantial and specific'?

Are there alternatives to the use of the words 'substantial and specific'?

6.4 Dealing with public officer complaints about matters that are substantially workplace complaints or grievances

Should consideration be given to adding a public interest test for disclosures by public officers that are substantially workplace complaints?

6.5 Public officers reporting role-related PIDs

Should the PID Act be made more explicit about disclosures made in the normal course of a public officer's duties?

Should there be further consideration about how role-related PIDs should be managed?

6.6 Changes to employment arrangements for public officers

Should the PID Act definition of 'public officer' be widened to include volunteers and contractors?

Should further consideration be given to clarifying the application of the 'public officer' definition?

6.7 Post-employment considerations for public officers

Should the PID Act be more explicit about how disclosures by former public officers should be managed?

7. How PIDs are made

7.1 Who can receive a PID

What is the impact of this wide range of options for disclosing a PID?

What are the advantages? What are the disadvantages?

7.2 Multiple pathways for reporting

What is the impact of having multiple reporting pathways? Is this encouraging disclosures?
Are there options for improving how internal and external reporting arrangements work?

7.3 PIDs to journalist

How has this option been used? Are there alternatives that should be considered?

8. How PIDs are managed

8.1 PID status

What is the effect of these provisions on disclosers? And agencies?
Are there alternatives that should be considered?

8.2 Informing a person who has made a PID

Should the PID Act be explicit about when information should be provided to disclosers?
Should further consideration be given to clarifying the extent of information to be provided to a discloser about the results of action arising from a PID?

8.3 Providing protections for 'a public officer' who is not employed by the entity

Should the PID Act be more specific about providing protection to a discloser who is not an employee of the entity investigating the PID?

8.4 Obligations on public sector entities

Are the current requirements for each public sector entity to develop and publish their own PID policy valuable and appropriate?
Are there alternatives that could be considered?
Should further consideration be given to the extent of protections provided by the Act and responsibility for providing that protection?

8.5 An entity with powers to investigate or remedy

Are the current arrangements for 'investigate and remedy' agencies appropriate?
What other options or improvements could be considered?

8.6 Preserving confidentiality

Are the current arrangements for confidentiality adequate and appropriate?
Are there improvements that could be considered?

9. Reprisal considerations

Are the current arrangements for managing reprisal adequate and appropriate?
What other options or improvements could be considered?

10. Review rights

Should the issue of review rights in the PID Act be further considered?
Are there other options or improvements that could be considered?

11. Role and powers of the oversight agency

Are the functions of the oversight body appropriate?
Should there be any requirement to audit and formally report about entities' compliance with PID Act requirements?
Are there other improvements that could be considered?

Issues paper for the review of the *Public Interest Disclosure Act 2010*

Queensland Ombudsman
Level 17, 53 Albert Street
Brisbane QLD 4000

Appendix B: Submissions received in response to issues paper

No.	Organisation	Date
1	Department of Infrastructure, Local Government and Planning	17/12/2015
2	Department of State Development	21/12/2015
3	Queensland Police Service	5/01/2016
4	Council of the City of Gold Coast	7/01/2016
5	Queensland University of Technology	12/01/2016
6	NOT PUBLISHED	13/01/2016
7	CONFIDENTIAL	13/01/2016
8	Department of Environment and Heritage Protection	13/01/2016
9	Logan City Council	14/01/2016
10	Department of Communities, Child Safety and Disability Services	15/01/2016
11	Anti-Discrimination Commission Queensland	13/01/2016
12	Central Queensland Hospital and Health Service	13/01/2016
13	Queensland Audit Office	13/01/2016
14	Peter N Collins	15/01/2016
15	Department of Justice and Attorney-General	15/01/2016
16	Department of National Parks, Sport and Racing	15/01/2016
17	Australian Medical Students Association	15/01/2016
18	Queensland Rail	15/01/2016
19	Queensland Health	15/01/2016
20	CONFIDENTIAL	15/01/2016
21	Darling Downs Hospital and Health Service	16/01/2016
22	Department of Education and Training	18/01/2016
23	Office of the Health Ombudsman	20/01/2016
24	Department of Natural Resources and Mines Department of Energy and Water Supply	29/01/2016
25	Whistleblowers Action Group Queensland Inc.	1/02/2016
26	University of Queensland	9/02/2016