Queensland Government

Office of the
Director-General

Department of
National Parks, Sport and Racing

Our Ref: CTS 26724/15
Your Ref: 2015-00225

Mr Phil Clarke
Queensland Ombudsman
GPO Box 3314
BRISBANE QLD 4001

Dear Mr ~~Clarke~~ Phil

Thank you for your letter of 3 November 2015 inviting the Department of National Parks, Sport and Racing (NPSR) to provide a submission to inform the review of the *Public Interest Disclosure Act 2010* (the Act), which you are currently undertaking.

The attached document addresses those issues in the discussion paper on which NPSR wishes to make substantive comment. Overall, NPSR's experience with the Act indicates that the legislation has achieved its objectives of promoting disclosures in the public interest and of protecting disclosers. Consequently, the comments provided are directed towards improving the current arrangements rather than proposing significant changes.

Should your officers have any further enquiries or require clarification on any of the comments, please have them contact [redacted] on [redacted] or via email [redacted]

Yours sincerely

[redacted]

Tamara O'Shea
Director-General
15.01.16.
Encl

Level 7
111 George Street Brisbane
PO Box 15187 City East
Queensland 4002 Australia
Telephone + 61 7 3338 9301
Facsimile + 61 7 3338 9335
Website www.npsr.qld.gov.au
ABN 11 322 391 452

REVIEW OF THE PUBLIC INTEREST DISCLOSURE ACT 2010 (THE PID ACT)

SUBMISSION FROM NATIONAL PARKS, SPORT AND RACING (NPSR)

Are the PID provisions for assessment and investigation appropriate or should other options be considered?

Decision-making

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 potential 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.

It is therefore 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*, which provides:

> ***30 Decision-maker for application to agency***
>
> *(1) An access application to an agency must be dealt with for the agency by the agency's principal officer.*
>
> *(2) The agency's principal officer may delegate the power to deal with the application to another officer of the agency.*
>
> *(e) an officer of the entity who has the function of receiving or taking action on the type of information being disclosed.*

Agency with primary responsibility for the matter to make the decision

The Corporate Service provider to NPSR (the service provider) recently had a case in which a contractor made the same disclosure to both the service provider and to another agency. While the service provider determined that the discloser did not qualify for protection under the Act, the other agency was on the verge of affording PID status when the service agency alerted it to the nature of the person's employment.

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 primary 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.

Review Rights

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.

Statements of Reasons

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

Other decision-making issues

To assist in administering the Act, agencies would benefit if the agency responsible for internal reviews 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 legislation. For example, if experience indicates that agencies should always take a particular action to ensure the welfare of a discloser, that action could be mandated through a mechanism similar to the Directives the Public Service Commissioner issues under the *Public Service Act 2008.*

What is the effect of including two categories of disclosers ('any person' and 'public officer') in the PID Act?

The inclusion of two categories of disclosers presupposes that only people within those categories will be 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.

Should consideration be given to adding a public interest test for disclosures by public officers that are substantially workplace complaints?

Yes. 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 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.

Should the PID Act be 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?

Yes. This could be linked to the capacity to make a public interest determination discussed above. 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.

Should the PID 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?

Yes. 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.

Should the PID Act be more explicit about how disclosures by former public officers should be managed?

While agencies would clearly benefit from greater guidance on the management of disclosures, including such guidance in the Act would not easily provide its amendment over time. Rather, it would be administratively preferable if such guidance were to be incorporated in the practitioner guidelines and/or directives proposed previously.

What is the impact of having multiple reporting pathways? Is this encouraging disclosures?

While the availability of multiple reporting pathways has encouraged disclosures, requiring that a disclosure be made through one of those pathways can impose a 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.

Other issues

Option to withdraw

It is not uncommon for a person to reveal information without intending to make a disclosure and without an understanding of the personal implications of doing so. While the act of making a "PID" is less stigmatised than "whistleblowing", it is not completely unproblematic for disclosures. Consequently, consideration should be given to whether disclosers should be offered the option of:

- refusing PID status; and
- refusing to have further involvement in the investigation of the disclosure.

While this may impose some limitations on the agency's capacity to investigate the matter, it would protect people against inadvertent disclosures.

Case Management Arrangements

PIDs occasionally find themselves in risky situations that are not immediately apparent to those responsible for coordinating the PID arrangements. Consequently, it is possible that a PID coordinator could, for example, approach a particular individual to serve as a case manager without knowing that that person actually poses a potential threat to the discloser.

Given this, it is proposed that it be a requirement that PID coordinators seek the consent of the discloser before revealing their identity as a discloser to any person. That requirement could either be included in the Act itself, or be mandated in a Directive (see "Other decision-making issues" above).