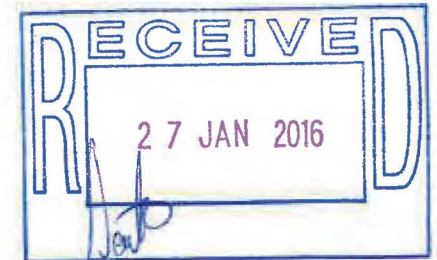


20 January 2016

Mr Phil Clarke
Queensland Ombudsman
GPO Box 3314
Brisbane Qld 4000



Dear Mr Clarke

Review of *Public Interest Disclosure Act 2010*

Thank you for your correspondence of 2 November 2015 and the opportunity to provide a submission regarding the review of the *Public Interest Disclosure Act 2010*.

While I do not have specific comments in response to the questions posed by your issues paper, I would like to take the opportunity to make a submission regarding the application of the PIDA to health service complaints made pursuant to the *Health Ombudsman Act 2013*.

As you will be aware, 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.

Given the importance of health service complaints, and the sensitive nature of the information and relationships involved in health service delivery, the HO Act contains a number of protections for notifiers, complainants and people who assist the Health Ombudsman by providing information. It also contains a number of requirements regarding how a complaint must be dealt with.

The protections and requirements for managing a complaint provided in the HO Act also appear to be contained in the PIDA, providing a level of duplication. Attachment 1 provides a table of comparison of key provisions contained in the PIDA and the HO Act for your information, with annotations to assist you.

I note that section 10 of the PIDA ("other protection saved") suggests that the PIDA anticipates other legislative schemes operating 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 or information. As such I question the value of the dual application.

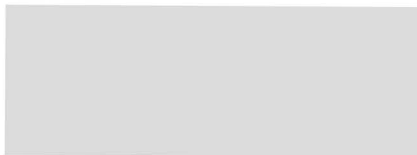
Regarding the requirement of the 'Public Interest Disclosure Standard' to report public interest disclosures (PIDs) to the oversight agency, you may be aware that I report both publicly and to the Health and Ambulance Services Parliamentary Committee on all health service complaint

management activities undertaken by my office. These reports are very comprehensive and can be viewed at www.oho.qld.gov.au

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

Yours sincerely



Leon Atkinson-MacEwen
Health Ombudsman



Attachment 1 Comparison of relevant provisions of *Public Interest Disclosure Act 2010* and *Health Ombudsman Act 2013*.

	<i>Public Interest Disclosure Act 2010</i>	<i>Health Ombudsman Act 2013</i>
SCOPE		
Person protected & subject matter of protection	<p>Section 12(1) - Disclosure by any person. This section applies if a person (whether or not a public officer) has information about:</p> <p>(a) a substantial and specific danger to the health and safety of a person with a disability.</p> <p>...</p> <p>(d) conduct of another person that could, if proved, be a reprisal.</p> <p>...</p>	<p>Section 261 – Reprisal and grounds for reprisal.</p> <p>Reprisal protections are available for any person who makes a health service complaint or provides information or other assistance to the Health Ombudsman, a staff member of the Office of the Health Ombudsman (OHO) or an authorised person.</p> <p>It is immaterial whether they are a public officer or a member of the public.</p>
	<p>Section 13(1) - Disclosure by a public officer. This section applies if a person who is a public officer has information about -</p> <p>(a) the conduct of another person that could, if proved, be—</p> <p>(i) corrupt conduct; or</p> <p>(ii) maladministration that adversely affects a person's interests in a substantial and specific way; or</p>	<p>Section 7 - Meaning of health service. A <i>health service</i> is a service that is, or purports to be, a service for maintaining, improving, restoring, or managing people's health and wellbeing...</p> <p>Section 31 - Meaning of health service complaint. A <i>health service complaint</i> is a complaint about a health service or other service provided by a health service provider.</p> <p>Definitions of a <i>health service</i> and <i>health service complaint</i> are very broad definitions.</p>

		<p>dealt with as the complainant in the matter, but protections would extend to them as a person providing information or other assistance to the Health Ombudsman etc.</p>
<p>How disclosure may be made</p>	<p>Section 17 – How disclosure to be made</p> <p>Disclosure may be made to a proper authority in any way, including anonymously.</p>	<p>Section 33 – How to make a complaint. A person may make a complaint to the Health Ombudsman ... orally, including by telephone, or in writing, including by email or other electronic means...</p> <p>On request the Health Ombudsman must give a person reasonable assistance to make a complaint.</p> <p>The Act is silent regarding anonymous complaints however section 34 provides that the Health Ombudsman may ask the complainant for their name and address. The Health Ombudsman is not required to deal further with a complaint until the complainant complies (s 34(5)).</p> <p>Given the nature of health service complaints it is generally impracticable to deal with anonymous complaints from recipients of health services. However a judgment and risk analysis is made on a case by case basis and complainants are advised if it is possible to deal with the complaint on an anonymous basis, and if it is, if there are limitations to what may be achieved.</p> <p>E.g. a serious complaint about the health, conduct or performance of a registered practitioner made anonymously may be dealt with if the evidence does not rely upon the identity of the complainant being known, i.e. may be proven by reference to records only.</p>

	(b) breach an obligation by way of oath or rule of law or practice or under an agreement requiring the person to maintain confidentiality or otherwise restricting the disclosure of information in relation to a matter.	(ii) is not liable to disciplinary action for giving the information...
Protection from defamation action	<p>Section 38 – Protection from defamation action.</p> <p>Without limiting section 36 [no liability], in a proceeding for defamation, a person who makes a public interest disclosure has a defence of absolute privilege for publishing the information disclosed.</p>	<p>Section 275(4) – Information given to Health Ombudsman and others.</p> <p>Without limiting subsections (2) and (3) [no liability], in a proceeding for defamation, the person has a defence of absolute privilege for publishing the information.</p> <p>Section 276 – Reports and other published information privileged.</p> <p>A person has a defence of absolute privilege for the publication of any defamatory statement made in good faith—</p> <p>(a) for the purpose of the preparation of a report authorised or required to be made under this Act; or</p> <p>(b) in a report authorised or required to be made under this Act; or</p> <p>(c) in information that the Health Ombudsman is authorised or required to publish on a website or publish to the public in another way.</p>
Reprisal	<p>Section 40 – Reprisal and grounds for reprisal</p> <p>(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that—</p> <p>(a) the other person or someone else has made, or intends to make, a public interest disclosure; or</p> <p>(b) the other person or someone else is, has been, or intends to be, involved in a proceeding under the Act against any person.</p>	<p>Section 261 – Reprisal and grounds for reprisal</p> <p>(1) A person must not cause, or attempt or conspire to cause, detriment to another person because, or in the belief that, any person—</p> <p>(a) has made or may make a health service complaint; or</p> <p>(b) has provided or may provide information or other assistance to the Health Ombudsman, a staff member of</p>

	<p>(3) If the claim for damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.</p> <p>...</p>	<p>(3) If the claim for damages goes to trial in the Supreme Court or the District Court, it must be decided by a judge sitting without a jury.</p>
Vicarious Liability of public sector entity	<p>Section 43(1) - Vicarious liability of public sector entity</p> <p>If any of a public sector entity's employees contravenes section 40 in the course of employment, both the public sector entity and the employee, as the case may be, are jointly and severally civilly liable for the contravention, and a proceeding under section 42 may be taken against either or both.</p>	<p>No comparable provision. There is the potential for a health service complaint not to amount to a PID.</p> <p>Complainant/notifier will be protected but there is no liability for employer if complainant is reprised against (Part 17 HO Act). As the legislative scheme is not restricted to health service provision in the public sector application of section 43(1) would create inconsistent treatment of notifiers in public and private health service delivery, and would not be appropriate.</p>
Relocation of a public service employee	<p>Section 47 – Relocation of public service employee.</p> <p>Application for relocation by a public service employee on the basis it is likely a reprisal will be taken against the employee and relocation is the only practical way to remove or substantially remove the danger of reprisal.</p>	<p>Not available in HO Act. See comments above regarding necessary consistency between management of complaints and notifications about matters relevant to public and private health service delivery.</p>
Injunctions	<p>Chapter 4 Part 3 – Injunctions regarding reprisal</p>	<p>No injunction provisions available.</p>
Obligations of entity managing complaint		
Chapter 3 Part 2	<p>Section 28 – Reasonable procedures to deal with PIDS</p> <p>Section 29 - Record of disclosure</p> <p>Section 30 – when no action required</p>	<p>The HO Act establishes certain processes that must be undertaken, which are comparable with Chapter 3 Part 2:</p> <p>Section 33 – How to make a complaint – requires a record to be made of oral complaints. Records are created of all</p>

	<p>A person who gains information because of their involvement in the administration of the PIDA must not make a record or intentionally or recklessly disclose the information to anyone, except for specified circumstances provided in section 65(3).</p> <p>Max penalty for breach 84 PU</p>	<p>A person must not disclose confidential information to anyone else except to the extent the disclosure is permitted under this section.</p> <p>The provision relates to Health Ombudsman, staff member, inquiry member, member of committee or panel, authorised person, person engaged by the Health Ombudsman to help in the performance of the Health Ombudsman's functions.</p> <p>Max penalty for breach 100 PU</p>
<p>False or misleading information</p>	<p>Section 66 – False or misleading information. A person must not make a statement intending it to be acted on as a PID, that intentionally contains false or misleading information in a material particular</p> <p>Max penalty – 167 PU or 2 years imprisonment</p>	<p>Section 264 – False or misleading information. A person must not, in relation to the administration of the HO Act, give information that the person knows is false or misleading in a material particular to the Health Ombudsman, a staff member of the Office of the Health Ombudsman or an authorised person.</p> <p>Max penalty -100 penalty units.</p>

