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**A review of the
*Public Interest
Disclosure Act 2010***

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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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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 to 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	0	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?

7.3 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?

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?

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	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 see s.6 of the PID Act for the complete meaning and exemptions
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*

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