

13 January 2016

Mr Phil Clarke
PID Act Review
Office of the Queensland Ombudsman
GPO Box 3314
BRISBANE QLD 4001

Dear Mr Clarke

REVIEW OF THE PUBLIC INTEREST DISCLOSURE ACT 2010

Thank you for the opportunity to make a submission about the operation of the *Public Interest Disclosure Act 2010* (PID Act). This submission is about complaints of reprisal, and incorporates comments on PID status (item 81 of the Issues Paper) and Review rights (item 10 of the Issues Paper).

Under the PID Act the Commission has the function of dealing with complaints of reprisal. A complaint to the Commission is an alternative option to a court action for the statutory tort of reprisal.

Complaint process

The PID Act provides that chapters 6 and 7 of the *Anti-Discrimination Act 1991* (AD Act) apply to a complaint of reprisal as if the complaint were about an alleged contravention of the AD Act. Chapter 6 of the AD Act provides for vicarious liability for contraventions of workers and agents, and chapter 7 provides for enforcement, including what the Commission may do and what the tribunal may do.

The Commission's function in relation to complaints is to endeavour to resolve the complaint through conciliation.

A complaint to the Commission must be made within one year of the alleged reprisal, unless the complainant shows good cause for the complaint to be accepted after one year has expired.

The complaint must be in writing and must set out reasonably sufficient details to indicate an alleged reprisal. In assessing whether a complaint meets the threshold for acceptance, the Commission takes the allegations at their highest, that is, on the basis that the complainant will be able to prove the facts alleged.

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If a complaint is accepted, all parties to the complaint are notified and directed to participate in a conciliation conference.

The process for the conciliation conference is at the discretion of the Commission. It usually involves the parties talking through the issues and then negotiating towards a resolution through the conciliator. The conciliator will help the parties identify issues and risks as well as options for resolving the complaint. It is not the function of the Commission to decide facts or issues in dispute or to decide the complaint. If a complaint cannot be resolved through conciliation it may be referred to the Queensland Civil and Administrative Tribunal (tribunal) where it can be heard and determined.

Statistics

Complaints to the Commission may include more than one ground and may be accepted on more than one ground. For example:

- a person may alleged discrimination on the basis of their race as well as their sex;
- a complaint of sexual harassment may include allegations of sex discrimination;
- a complaint of reprisal may include allegations of impairment discrimination.

A table of the number of reprisal complaints received and accepted in the five year period from commencement on 1 January 2011 to 31 December 2015 is attached. In the five year period, the Commission received 38 complaints that included the ground of reprisal, and 23 grounds of reprisal were accepted. This reflects an acceptance rate of 60%. This is consistent with the overall acceptance rate which is usually around 60%, the most recent in 2015 being 56%.

Of the 15 reprisal complaints that were not accepted in the period:

- 10 included allegations of other unlawful conduct, e.g. discrimination; and
- 4 of those complaints were accepted on the basis of the other allegations.

The reasons for not accepting complaints of alleged reprisal included:

- the alleged reprisal happened before 1 January 2011;
- the complaint was made out-of-time; and
- there was no causal link between the disclosure and the alleged detriment.

Of the 23 accepted reprisal complaints:

- 2 resolved through conciliation;
- 5 are ongoing;

- 13 were referred to the tribunal;
- 1 was unresolved after conciliation but not referred to the tribunal;
- 1 was withdrawn; and
- 1 was lapsed by the Commission as misconceived or lacking in substance.

Of the 18 finalised accepted reprisal complaints, the conciliation rate is 11% and the referral rate is 72%. These rates are disproportionate to the overall rates, which are usually around 56% for conciliation and around 26% for referral.

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 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. For example, 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.

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.

Issues in dealing with complaints of reprisal

As indicated above, resolving complaints of reprisal through conciliation is difficult. These are some of the issues identified by our complaint managers:

Assessing whether there has been a PID

The first step for complaint managers is to assess whether the complaint satisfies the threshold in section 136 of the AD Act, that is, whether it indicates an alleged contravention, in this case, a reprisal. In assessing the complaint the complaint manager considers each of the elements of the alleged contravention.

One of the elements of a complaint of reprisal is the making of, or intention to make a public interest disclosure; or involvement in a proceeding under the PID Act. Most complaints of reprisal arise out of the making of a public interest disclosure rather than a perceived intention to make a disclosure or

involvement in proceedings under the PID Act. In most cases the complainant provides a copy of a letter from the entity acknowledging the disclosure has been assessed as a public interest disclosure. The difficulty for complaint managers is where there isn't such an acknowledgement from the entity.

Where there is no written acknowledgment by the agency that a disclosure has been assessed as a PID, the options for the Commission are either:

- assess whether it is arguable that a PID has been made – that is, that the complaint made to an agency arguable constitutes a PID; or
- accept a statement by the complainant that a PID was made.

If the first option is adopted, the Commission's complaint managers are effectively taking on the assessment role that is usually undertaken by a specialist unit of the relevant agency. It can also result in 'double-handling' of PID assessment. In either option, if the status of the disclosure is in dispute, it will be for the tribunal to determine whether the disclosure was a PID.

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 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.

Difficulties in assessing, in the context of alleged reprisal, whether a disclosure was a PID, might be alleviated to some extent if the unlawful grounds for reprisal were extended to include the making of a purported PID.¹

Reprisal under the PID Act is in many ways analogous to victimisation under the AD Act. Both reprisal and victimisation are offences that also give rise to a civil claim, and both involve detriment with a causal link to behaviour that includes making a complaint or involvement in proceedings. In terms of these grounds, victimisation under the AD Act is broader in that it is not necessary for the complaint to be made in any particular way, or that the complaint is pursued, or that the conduct complained of did amount to a contravention of the AD Act. For example, a worker may claim a decision discriminates against them because of their family responsibilities. It may however be a reasonable term and not unlawful discrimination. If a person causes a detriment to the worker because of the claim, victimisation happens.

The Commission suggests that broadening the unlawful grounds for reprisal to include a purported PID would be consistent with objectives promoting the public interest by disclosure of wrongdoing and protecting disclosers from reprisal.

¹ Purported PIDs are included in the definition of a public interest disclosure for agency record keeping (section 29) and the referral or dealing with a public interest disclosure made to a member of the Legislative Assembly (sections 34 and 35).

Ambiguous terms

Complaint managers report that ambiguity in the PID Act cause a great deal of uncertainty both before and after a complaint 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 the 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 objective of the section 44 of the PID Act in providing a low cost remedy for a person who has suffered a reprisal.²

Other concerns

Despite many of our staff having backgrounds in the law, the PID Act is criticised as being difficult to navigate and unnecessarily complex. Sections refer to something which is defined in another section or Act.

For example, one of the types of information that can be the subject of a PID by a public officer is 'maladministration that adversely affects a person's interest in a substantial and specific way'. 'Maladministration' is defined in the schedule by reference to 'administrative action', which is separately defined in the schedule. Maladministration is so broad it can include any action or decision that was wrong, including discrimination or other contraventions of the AD Act. The qualifier is that it must have adversely affected a person's interests in a substantial and specific way.

'Substantial and specific' is a requirement for most of the information that can be a 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.

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

- require a chief executive officer to establish reasonable procedures to ensure that public interest disclosures made to the entity are properly assessed and, where appropriate, properly investigated and dealt with – section 28(b);
- require the procedures to be published – section 28(2);
- enable the oversight agency to make standards about the way in which public sector entities are to deal with public interest disclosures – section 60; and

² See the Explanatory Notes to the Public Interest Disclosure Bill 2010 at page 15 – 'Clause 44 creates a new low cost remedy for a person who has suffered a reprisal'.

- require the chief executive to develop and implement a management program consistent with any standard made by the oversight agency.

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, an 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. The review will hopefully help identify whether the current system is the best way of achieving the objectives of encouraging the disclosure of wrong-doing, addressing wrong-doing in a timely and appropriate way, and protecting disclosers from reprisal.

I trust the information in this submission is of assistance to your review.

Yours sincerely



NEROLI HOLMES
Acting Anti-Discrimination Commissioner

Reprisal complaints

Year	Received reprisal grounds	Accepted reprisal grounds	Not accepted reprisal grounds	Percentage accepted reprisal grounds	All accepted grounds	Percentage of accepted grounds
2011 - Jan to June	2	1	1	50%	789	0.1%
2011-12	4	1	3	25%	604	0.2%
2012-13	9	4	5	44%	610	0.6%
2013-14	4	3	1	75%	617	0.5%
2014-15	13	9	4	69%	548	1.6%
2015 – June to Dec	6	5	1	83%	261	1.9%
Totals	38	23	15	60%	3,429	0.7%

Complaints may be made or accepted under more than one ground