

CORPORATE INPUT TO DISCUSSION PAPER

Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships

Title: Review of the *Public Interest Disclosure Act 2010* Issues paper

Department: Department of Justice and the Attorney-General

Issues:

- **Title ‘Public Interest Disclosures’** – the *Public Interest Disclosure Act 2010* (PID Act) has been in force now for 13 years and essentially replaced the previous iterations of ‘whistle-blowers’ legislation and programs. The name change was in part to do with the negative connotations associated with the term ‘Whistle-blower’. The term *Public Interest Discloser*, despite training and information remains non descriptive and can be confusing to employees and potential disclosers. General feedback from PIDs at initial contact suggest that they understand the principals of whistle-blower protection but not necessarily relate it to a PID until informed. The review could consider re-branding.
- **Training** – The PID Standards require that initial training be provided at point of entry to employees and more specific training is detailed for relevant officers involved in the management of PIDs. With respect to awareness and refresher training for all staff, inclusion of a similar training requirement to that contained in the *Public Sector Ethics Act 1994* (PS Ethics Act) could be included to ensure training must be provided at point of entry and again at regular intervals by the entity. This would ensure PID content is covered and promoted.
 - (Note, PID awareness is covered in our mandatory refresher training every 2 years, but not every department does it that way).
- **Human Rights Act 2019** – There is no need to make specific changes to the PID in relation to the coverage of the Human Rights Act; however, the review may wish to ensure that the PID Act is culturally safe. Note the specific changes to the Public Service Act 2008 and Public Service Commission directive ensuring due consideration if given to ensure cultural safety.
- **Types of PIDs** – PIDs for Public Officers [S13 *PID Act*] (public sector entity) should remain and provide protections for officers disclosing certain types of wrongdoing. However, the provision to provide PID status to members of the public [S12 *PID Act*] should be removed. In the last 12 months, only one PID within the department was for a member of the public, the remaining were employees. The 2017 Ombudsman’s own review of the PID Act also identified that low number of PIDs were made by members of the public in relation to the available provisions. It is noted that at the time the ombudsman recommended they be removed. This is supported.
 - The administration of external PIDs is complex and difficult for agencies to manage. As they are members of the public, assessing and managing risk is difficult, if not at times impossible. Further, departments are unable to moderate or monitor risks in a similar fashion to those of an employee. This creates an unrealistic requirement to manage risks to an external PID.
 - Solution – could be to remove the **Reprisal** provisions altogether from the PID Act and place it in another wider reaching piece of legislation, (such as PS Ethics Act, *Crime and Corruption Act 2001*, of the *Public Sector Act 2022* or equivalent), which could provide that all Reprisal against reports of wrongdoing is an offence. This would then protect all disclosures, including those who do not meet the current PID thresholds of corrupt conduct, serious maladministration, etc and would give officers confidence to report wrong doing more freely. Any consideration should include provisions which allow for natural justice to be fulfilled and ‘grievances’ to still be managed fairly in accordance with the principals of natural justice.
 - **Reprisal provision** - [s40 *PID Act*] - a person’s suspicion, belief or awareness of a PID etc should remain a substantial ground for the conduct amounting to reprisal. It should not be watered down to ‘a contributing’ factor in the alleged action. Reprisal is a serious criminal offence and as such Reprisal should be based on grounds that the conduct was done substantially because of the making (or a belief) of a PID. This would ensure instances of

‘unconscious bias’, while inappropriate and potentially grounds for corrective action etc do not amount to Reprisal as they do not contain the sufficient ‘mens rea’ to prove intent.

- The issues paper discusses the introduction of a **‘public interest test’ or ‘risk of harm’** into the definition. The current criteria is sufficient. Such an introduction would create further confusion as any such test is too subjective.
- **Disclosers state of mind** - [S12 (3), S13 (3) *PID Act*] The current provisions are sufficient and require that the disclosure is to have a honest belief on reasonable grounds that the information demonstrates wrongdoing or the information alone demonstrates wrongdoing regardless of the person state of mind. There is no reason to expand to include further ‘good faith requirements’. This would potentially allow for third hand or rumours of conduct to form the basis of the PID status. While such information may in fact cause preliminary enquiries to confirm information, those relevant persons then may in fact be the PID not the third hand party.
- **Coverage of the act** - Currently the PID Act does not capture volunteers, students, contractors and work experience participants. The Act should be expanded to include these categories. Currently, these persons are captured under departmental policies (and the Public Sector Ethic Act) and are subject to the Code of Conduct to report wrongdoing, manage conflict of interest (COI), privacy etc. Accordingly, they should also be extended the same protections as other employees.
- **Role reporting** – Role reporters should be identified in a separate category and not managed as PIDs (in most cases, unless a risk assessment identified serious risk of reprisal or harm). In many cases role reporters are direct supervisors (required to review and report discrepancies and observations), Auditors, Accountants, Doctors, professional clinicians etc, who have requirement of their role or profession to report certain activity / conduct. In many cases they are not, in those roles, likely to be impacted by the subject officer and will have no (or little) further involvement once reported and enquires commence. The effect of having these types of discloser included as PIDs creates additional administrative burdens including the provision of PID Support officers etc.
 - However, **immunity protections** should still apply for role reporters. (As suggested above, if general reprisal protections were available to all employees under separate legislation, this would promote reporting and reduce the likelihood of reprisal generally).
- **Media and Third Parties**
 - **Media** – Current arrangements [s20 *PID Act*] should remain in place. However, it may be worth considering a further limb to this test, requiring the PID (after the relevant period 6 months) to advise the receiving entity (responsible for managing the PID) that as the receiving entity has not yet provided advice of receiving the PID, what action is intended / and or advised what action was taken, that they will be reporting it to the media (after a further set time frame i.e. 14 days) if advice is not forthcoming. While departments have a responsibility to act and take action and notify the PID [S32 *PID Act*], there may be instances where the action has been taken and has not been effectively communicated for a legitimate reason [s43(4) *PID Act*], i.e. in doing so may seriously impact the disclosers (or anybody’s) health, would impede the investigation of an offence, or adversely affect the confidentiality about the informants existence or identity. There may also be instances where the department loses contact before that advice can be appropriately provided (i.e. employee resigns and moves etc). This could be safeguarded by including a mandatory reporting obligation (via RaPID) to ensure that such a request is detailed and explained which would also allow for Queensland Ombudsman Office oversight under existing arrangements.
 - **Third Parties** – It would be appropriate to include provisions to allow PIDs to communicate their concerns to limited members within their own support network and assist with the prevention of isolation as raised in the discussion paper. It would assist with meeting obligations to ensure cultural safety. Consideration should be given to including provisions which would require a PID to inform the managing agency (prior to any third party release) of whom they intend to disclose to so as to ensure that there is no overlap or COI with the nominated third parties.

- **Opt out protections** – Disclosers should be able to opt out of the PID management program, if they feel that they do not require or simply don't want PID support or contact etc. (indemnity and other protection provisions should remain regarding the actual disclosure itself).
- **Confidentiality Provisions** – The general confidentiality protections and provisions should remain [S65 PID Act]. Consideration could be given to insertion of specific provisions requiring the PID to maintain confidentiality (not withstanding approved Third Party discussions) to ensure that the PID themselves are forced maintain the integrity of any disclosure and subsequent action taken.
 - Further clarification would be appreciated to explain the extent to which agencies could withhold confidential information sought under right to information, Workcover, *Workers' Compensation and Rehabilitation Act 2003*, etc.
- **Welfare of Disclosers** – should remain with the receiving entity (usually the employer). The creation of a new or supplementary oversight body to manage PID welfare would only create a further layer of red tape and strain on an already heavily populated integrity and oversight framework. The oversight body would require direct access to the receiving entity to put in place actions and activities which they (the oversight body) would not likely be able to actively monitor and/or enforce from outside the receiving entity. Nor would an oversight body have the ability to reasonably understand the effect of such actions on the workplace and mitigate any flow on effects. The receiving entity is well placed to know the business, the environmental landscape of the entity and any known concerns relevant to the PID, other witnesses/parties, subject officer/s and workplace in general. However, the establishment of a disclosers support line (or office) for PIDs where they can receive confidential and independent advice would be welcome.
- **Inclusion of rewards scheme for disclosers** – is not appropriate. It is a requirement of an employee's employment to report wrongdoing, not grounds for financial or other advancement. The initiative itself, opens the way for instances of corruption and hard to prove vexatious complaints and thereby diminishing the whole of government integrity framework.

Recommendation:

- The department supports review of the PID Act and recommends that the identified observations be provided to PID Act review team for their consideration.

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