



Our ref: EDOCS# 60057

8 February 2017

Dr Patrick Hodder
Committee Secretary
Parliamentary Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Dr Hodder

SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES INQUIRY INTO WHISTLEBLOWER PROTECTIONS

I refer to your letter received by email on 9 December 2016 inviting submissions to the Joint Parliamentary Committee on Corporations and Financial Services (the Committee) Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.

I appreciate the opportunity to make a submission, which is attached.

I acknowledge that if the Committee accepts my submission it may be published on the Committee's website.

As previously advised, Mr Andrew Brown, Deputy Ombudsman, and Ms Louise Rosemann, Principal Advisor PIDs, will be available to appear at the public hearing on 23 February 2017.

Yours faithfully

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Queensland Ombudsman

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SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON CORPORATIONS AND FINANCIAL SERVICES INQUIRY INTO WHISTLEBLOWER PROTECTIONS

Introduction

The Queensland *Public Interest Disclosures Act 2010*¹ (the PID Act) is 'an Act to facilitate the disclosure, in the public interest, of information about wrongdoing in the public sector and to provide protection to those who make disclosures'.

The objects of the PID Act are set out at s.3 and include 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.

Since January 2013 the Office of the Queensland Ombudsman has been the oversight agency for the PID Act. The PID Act provides at s.59 that the oversight agency's main functions are to:

- monitor the management of public interest disclosures (PIDs) including for example by monitoring compliance with the PID Act, collecting statistics about PIDs and monitoring trends in relation to PIDs
- review the way in which public sector entities deal with PIDs generally, or particular PIDs
- perform an educational and advisory role including by promoting the objects of the PID Act, providing advice about PIDs and providing education and training programs about PIDs.

The oversight agency is empowered, under s.60 of the PID Act, to make standards about the way in which public sector entities deal with PIDs. The Queensland Ombudsman has issued Public Interest Disclosure Standard No. 1 (the PID Standard)² which details the actions chief executive officers of public sector entities must take to ensure that their agencies':

- implement a management program, including policies and procedures, for responding to PIDs
- have procedures for receiving, assessing and managing PIDs
- protect the confidentiality of disclosers, subject officers and other persons involved
- provide support for disclosers
- undertake risk assessments and take action to prevent reprisal against disclosers and other persons involved in PIDs.

As required by the PID Act, each financial year the Queensland Ombudsman publishes an Annual Report on the operation of the PID Act. The Annual Report presents statistical data about PIDs reported to the oversight agency, as well as information about

¹ The *Public Interest Disclosures Act 2010* can be accessed at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PubIntDisA10.pdf>.

² Public Interest Disclosure Standard No. 1 is available on the Queensland Ombudsman website at <https://www.ombudsman.qld.gov.au/what-we-do/role-of-the-ombudsman/legislation-and-standard>.

the performance by public sector entities of the requirements under the PID Act and the PID Standard³.

Review of the PID Act

The Queensland Ombudsman recently completed a review of the PID Act. The purpose of the review, as required by s.62 of the PID Act, was to decide whether:

- the main objects of the PID Act remain valid
- the PID Act is achieving its main objects, and
- the provisions of the PID Act are appropriate for achieving its main objects.

In November 2015 the Queensland Ombudsman released an issues paper⁴ in order to:

- inform stakeholders about the operations of the PID Act
- provide information about known issues with the operations of the PID Act
- raise questions and options for amendment to the PID Act to prompt feedback and comments from stakeholders for further consideration.

In total, 26 submissions were received in response to the issues paper, of which 23 have been published on the Queensland Ombudsman's website.⁵ The majority of submissions were received from public sector entities responsible for implementing the PID Act, including 11 State Government departments, two local governments and two public universities. Five submissions were received from parties outside the public sector, including two from people who had previously made PIDs, and two from advocacy groups.

Respondents identified a broad range of issues with the operation of the PID Act. Public sector entities particularly raised concerns about the:

- need for greater clarity about applying key definitions and provisions of the PID Act
- complex drafting of some sections of the PID Act
- requirements for assessing and investigating PIDs
- implications of the confidentiality provisions at s.65
- lack of focus on subject officers.

Disclosers/advocacy groups highlighted concerns about:

- effectiveness of PID Act protections
- lack of clarity when a matter involves more than one public sector entity
- lack of accountability, particularly in relation to timeliness.

The Queensland Ombudsman's review report has been provided to the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for Training and Skills, and the Honourable Peter Wellington MP, Speaker of the Queensland Parliament.

³ The Public Interest Disclosures 2015-16 Annual Report is published at pp.65-70 of the Queensland Ombudsman 2015-16 Annual Report, which can be accessed at <https://www.ombudsman.qld.gov.au/about-us/corporate-documents/annual-report>.

⁴ 'A review of the *Public Interest Disclosure Act 2010*: Issues paper November 2015', available at <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/review-of-the-public-interest-disclosure-act>.

⁵ Refer to <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/review-of-the-public-interest-disclosure-act>.

Until it has been tabled in the Legislative Assembly the report remains confidential. Enquiries about the availability of the report should be made to the Attorney-General's office.

Response to Terms of Reference

In response to the terms of reference for the inquiry, the following submissions are made:

d. compensation arrangements in whistleblower legislation across different jurisdictions, including the bounty systems used in the United States of America

It is submitted that a 'bounty' system for rewarding whistleblowers is not appropriate in the public sector context. There is an obligation on public sector employees to report wrongdoing consistent with their duties and obligations as public servants. In Queensland, employees of public service agencies and public sector entities, and public officials, are bound to adhere to the ethics values set out in the *Public Sector Ethics Act 1994*.⁶ These include 'integrity and impartiality' and 'accountability and transparency'.

Employees of Queensland public service agencies are required to comply with the 'Code of Conduct for the Queensland Public Service', which relevantly states that employees will 'meet our obligations to report suspected wrongdoing, including conduct not consistent with this Code'.⁷ In addition, public sector entities may implement an agency-specific standard of practice or code of conduct consistent with the ethics values.

In accordance with s.18 of the Public Sector Ethics Act 'a public official of a public sector entity must comply with the standards of conduct stated in the entity's code of conduct'. Sections 12D and 13 of the Public Sector Ethics Act extend the application of standards of practice and codes of conduct to 'other persons who are not public officials of the entity who have a contract or other agreement with the entity'. This includes, for example, contractors and their employees, volunteers and students on work experience.

It is submitted that it is not consistent with the duties and responsibilities of a public servant to receive a reward for disclosing information about wrongdoing. The reporting of wrongdoing is integral to the ethical obligations of persons in public sector employment.

A reward for disclosing information about wrongdoing should be distinguished from compensation for detriment or reprisal experienced by a whistleblower as a consequence of making a disclosure of information about wrongdoing. While a public officer should not receive a benefit from being a whistleblower, neither should they experience a detriment.

Public sector employees as well as those engaged in employment-like arrangements within the public sector (such as volunteers, trainees and work-experience students), and contractors and their employees engaged by public sector entities, it is submitted, should all be afforded protection from reprisal or detriment for reporting wrongdoing. They should also have access to fair, free and timely mechanisms for remedying any such detriment.

⁶ Refer to s.4 Public Sector Ethics Act 1994, available at <https://www.legislation.qld.gov.au/LEGISLTN/CURRENT/P/PublicSecEthA94.pdf>.

⁷ Code of Conduct for the Queensland Public Service, Public Service Commission, December 2010, <https://www.qld.gov.au/gov/code-conduct-queensland-public-service>, p.5.

e. measures needed to ensure effective access to justice, including legal services, for persons who make or may make disclosures and require access to protection as a whistleblower;

Protecting whistleblowers from reprisal is one of the main objects of the PID Act. Section 28 of the PID Act requires that chief executive officers of public sector entities must establish reasonable procedures to ensure that public officers who make PIDs are given appropriate support and protected from reprisal.⁸

Section 65(1) of the PID Act makes it an offence to intentionally or recklessly disclose confidential information about a PID except in the limited circumstances related to the administration of the Act permitted under the Act. Confidential information is defined broadly under the PID Act to include information that identifies the discloser (whistleblower) and subject officer, information about the disclosure, information about 'an individual's personal affairs' or 'information that, if disclosed may cause detriment to a person'. Preserving confidentiality is a key element in protecting a whistleblower from reprisal or detriment, by minimising those persons who have access to information which may identify the whistleblower.

Public sector employees in Queensland have access to a comprehensive regime of mechanisms to achieve remedies if their employer fails to adequately fulfil its legislative obligations, including by making:

- a complaint using the public sector entity's employee complaints procedure
- a complaint to the Queensland Ombudsman in accordance with the *Ombudsman Act 2001*
- a complaint to the Crime and Corruption Commission in relation to a contravention of s.41 (offence of taking reprisal), s.65 (preservation of confidentiality) or s.66 (false or misleading information) by a member of the police service or a person holding an appointment in a unit of public administration⁹
- a complaint of reprisal to the Anti-Discrimination Commission Queensland (ADCQ) for investigation or conciliation¹⁰
- an application to the Queensland Civil and Administrative Tribunal (QCAT) for an order prohibiting a person doing an act that may prejudice the investigation or conciliation of a complaint to the ADCQ¹¹
- an application for an injunction to the Queensland Industrial Relations Commission (QIRC) where reprisal has or may cause a detriment and involves or may involve a breach of the *Industrial Relations Act 1999* (Qld)¹²
- an application for an injunction to the Supreme Court where the person is suffering or may suffer a detriment from reprisal and can not apply to the QIRC¹³
- an application to the QIRC for appeal or review of a disciplinary action, appointment or transfer, or unfair treatment because it was the taking of a reprisal¹⁴

⁸ Refer to s.28(1)(a) and (e) of the *Public Interest Disclosure Act 2010*.

⁹ Refer to s.67 of the *Public Interest Disclosure Act 2010*.

¹⁰ Refer to s.44 of the *Public Interest Disclosure Act 2010*. A complaint to the Anti-Discrimination Commission Queensland is dealt with under the *Anti-Discrimination Act 1991*.

¹¹ Refer to the Queensland Civil and Administrative Tribunal website <http://www.qcat.qld.gov.au/matter-types/anti-discrimination-matters/application-process>.

¹² Refer to s.48 of the *Public Interest Disclosure Act 2010*. An application may be made by the employee, an industrial organisation or the Crime and Corruption Commission.

¹³ Refer to s.49 of the *Public Interest Disclosure Act 2010*. An application may be made by the employee or the Crime and Corruption Commission.

¹⁴ Refer to s.46 of the *Public Interest Disclosure Act 2010*.

- an application to the QIRC for relocation on the grounds that it is likely the employee will be subject to reprisal and a practical way to remove or substantially remove the danger of reprisal is to relocate the employee¹⁵
- a claim for damages for the tort of reprisal in the District Court or the Supreme Court.¹⁶

The first four listed complaint processes involve no cost to the whistleblower. There is no fee for an application to QCAT in relation to anti-discrimination matters. Generally there are no filing fees for most applications lodged with the QIRC.¹⁷

It is noted that the Queensland Government adheres to the principle that 'the State and all agencies must conduct themselves as model litigants in the conduct of litigation' including 'paying legitimate claims without litigation, including making partial settlements of claims, or interim payments, where liability has been established and it is clear that the State's liability is at least as much as the amount to be paid'.¹⁸

f. the definition of detrimental action and reprisal, and the interaction between and, if necessary, separation of criminal and civil liability;

The PID Act provides at s.40 that a person must not cause, or attempt or conspire to cause, a detriment to a 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 has been or intends to be involved in a proceeding under the PID Act against any person.

Detriment is defined at Schedule 4 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.

Section 41 makes the taking of a reprisal an indictable offence with a maximum penalty of 2 years imprisonment or 167 penalty units.¹⁹

The broad definition of reprisal has the advantage of providing protection not only to a whistleblower, but also to a person who is assumed to have been a whistleblower as well as someone who is intending to make a disclosure of wrongdoing even if they have not yet done so. In addition, protection extends to the family, friends, colleagues and associates of a whistleblower or purported whistleblower.

¹⁵ Refer to s.47 of the *Public Interest Disclosure Act 2010*.

¹⁶ Refer to s.42 of the *Public Interest Disclosure Act 2010*.

¹⁷ Except for an application by an employee under s.74 of the *Industrial Relations Act 1999* for reinstatement where the filing fee is \$69.60. Refer to the Queensland Industrial Relations Commission website at <http://www.qirc.qld.gov.au/qirc/faq/faq.htm>.

¹⁸ Refer to 'Model litigant principles' published by Department of Justice and Attorney-General at <http://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles>.

¹⁹ From 1 July 2016 the value of a penalty unit is \$121.90, therefore the maximum fine is \$20,357.30.

It is submitted that such broad coverage is necessary to provide effective protection against reprisal action and to ensure that whistleblowers have confidence in the capacity of the scheme to afford them practical protection.

To date there are no known examples of a prosecution for an offence under s.41 of the PID Act. The only decision of QCAT dealing with reprisal was in the matter of *Flori v State of Queensland & Ors* [2016] QCAT 080,²⁰ handed down on 15 June 2016, in which the applicant was unsuccessful. There is one known case of an application to the QIRC claiming reprisal as a ground for termination of employment, however the applicant was unsuccessful both initially and on appeal to the Industrial Court of Queensland.²¹

Some successful outcomes have been achieved by the ADCQ in conciliating complaints of reprisal, however the numbers are small. In its submission to the review of the PID Act the ADCQ provided data in relation to the usage of this scheme which demonstrated that in the period from 1 January 2011 to 31 December 2015 23 grounds of reprisal were accepted. The ADCQ pointed out that²²:

... 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.

Of the 23 accepted complaints of reprisal, 2 had been resolved by conciliation and a further 5 were ongoing at the date of the submission. Thirteen matters unresolved at conciliation were referred to the Queensland Civil and Administrative Tribunal, only one of which has to date resulted in a published decision, as noted above.

In its submission the ADCQ pointed out the inherent difficulties involved in attempting to resolve complaints of reprisal through conciliation:

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.

It is clear that any scheme for remedying or affording redress in respect of reprisal to a whistleblower from making a disclosure should:

- deal with a broad range of types of detriment
- make provision for both financial and non-financial remedies
- focus on the provision of support to the whistleblower to utilise non-adversarial dispute resolution options
- avoid reliance on formal court processes.

²⁰ Decision available from Supreme Court Library Queensland at <http://www.sclqld.org.au/caselaw/QCAT/2016/080>.

²¹ Refer to *Gobus v State of Queensland (Cairns and Hinterland Hospital and Health Service)* [2016] QIRC 018 and *Gobus v State of Queensland (Cairns and Hinterland Hospital and Health Service)* [2016] ICQ 015.

²² Letter from Neroli Holmes, Acting Anti-Discrimination Commission, dated 13 January 2016, p.3 available at <https://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures/review-of-the-public-interest-disclosure-act>.

g. the obligations on corporate, not-for-profit and public sector organisations to prepare, publish and apply procedures to support and protect persons who make or may make disclosures, and their liability if they fail to do so or fail to ensure the procedures are followed;

In Queensland, s.28 of the PID Act requires that chief executive officers of public sector entities must establish reasonable procedures to ensure that:

- public officers of the entity who make PIDs are given appropriate support
- PIDs made to the entity are properly assessed and, when appropriate, properly investigated and dealt with
- appropriate action is taken in relation to any wrongdoing that is the subject of a PID
- a management program for PIDs is developed and implemented, and
- public officers of the entity are offered protection from reprisals by the entity or other public officers of the entity.

The chief executive officer must also publish the procedures on a website accessible to the public. The oversight agency conducts regular visibility reviews to monitor compliance by entities with their obligations under s.28.

Anecdotal evidence from PID coordinators within public sector entities, as well as commentary from submissions to the review of the PID Act, indicates that the development of procedures is seen as a positive step in achieving cultural change. Procedures are not only a statement of intent by senior management, and a guide for officers implementing the procedures, but a training tool and a means for educating employees about their rights and responsibilities. Publishing procedures also sends a message to the wider community about the entities' ethical values, commitment to transparency and openness, and its intention to act on wrongdoing when it is disclosed.