I have researched and published on PIDs and whistleblowing for over 2 decades.[1–5] My expertise has been recognized in the international press[6,7] and the 2009 Federal Inquiry into Whistleblower Protection.[8]

This submission is made under section 3 (i-iii) regarding the adequacy and appropriateness of legislation, procedures, practices and processes relating to the charging and prosecution of criminal offences in the context of CCC investigations, and C) the adequacy and appropriateness of section 49 of the *Crime and Corruption Act 2001*.

Introduction

PCCC Report 108 identified problems with the CCC's use of seconded police officers in the Logan City Council (LCC) fiasco. But the LCC fiasco did not happen in a vacuum. It occurred within a context of multiple pieces of legislation that failed to address the adequacy of procedural requirements. Whatever the problems with S49 that resulted in the LCC fiasco, they originated from multiple problematic sections of the CC and PID Acts.

This submission identifies these as the root cause of systemic failures that culminated in the LCC fiasco. Simply revising or repealing S49 will not address the systemic problems in CCC mishandling PIDs and criminal investigations. Evidence from CCC annual reports indicates that the CCC under-utilises both QPS and seconded officers in the assessment and investigation of PIDs of criminal reprisals. Seconded police officers' lack of experience in assessing PIDs contributed to the tunnel vision of the LCC fiasco. CCC reports indicate that reprisals for having made a PID are treated as administrative issues by CCC administrative officers with apparently little knowledge of criminal investigation.

CCC and Serious corruption

Section 13 of the CC Act states that the commission must focus on more serious cases of corrupt conduct. However, there is no evidence that the CCC can reliably identify PIDs of serious corruption. Evidence from CCC reports and PCCC Report 108 suggest that the CCC is patently unable to assess the validity or seriousness of a PID of corruption in public sector entities. The CC Act, CCC website, CCC annual reports and the PCCC's Report 108 indicate that no objective criteria for assessment of the validity and seriousness of corruption exists.

Assessment of PIDS

S15 of the CC Act provides a definition of corrupt conduct. Data regarding these elements of corrupt conduct in the more than 3,000 PIDs adjudicated by the CCC each year are apparently not collected and are not reported in CCC annual reports. This suggests that the elements of corruption do not play any role in the assessment of PIDs of corruption. The only requirement regarding CCC assessments is that they are "expeditiously assessed" (S35 [1]). There is no indication that allegations of reprisals are ever referred to seconded police as per S49, even when this would be the most appropriate action.

The complete PID assessment protocol as reported on the CCC website[9] is a follows:

The CCC "assesses every complaint it receives to decide how serious it is, whether it warrants investigation, how quickly it must be actioned and who is best placed to investigate it. We determine whether the complaint

- Appears to be genuine and made in good faith
- Is within our jurisdiction."

Every indication, including the CCC website, is that Mr MacSporran accurately described[10] the PID assessment process as a decision being is plucked out of the air based on nothing more than a feeling. Had the CCC routinely referred PIDs of reprisals to officers with law enforcement backgrounds, seconded officers would have been able to make more accurate assessments regarding the criminality of reprisals. They might have identified that the CCC lacks objective criteria by which to assess PIDs of criminal reprisals. Further, the CCC is not able to fulfil Section 24 of the CC Act which requires that CCC functions are based on analysis of data because no data are required in the assessment of PIDs. The silence of the CC Act about criteria in the assessment of PIDs is a root cause of CCC systems failure.

Assessing risk

Risk assessment of whistleblowers is not reported as an activity of the CCC, despite the known risk of reprisals reported in the peer reviewed research. Lack of requirement for risk assessments is a system-wide failure. Had PIDs of reprisals been routinely referred to QPS or seconded officers who receive training in completing risk assessments (in domestic violence, for example)[11] the officers in the LCC fiasco would have been in the habit of completing risk assessments and might have determined the actual level of Ms. Kelsey's risk of detriment.

The research shows that there are strong parallels between domestic violence and employer-actioned reprisals including power differentials, financial control, psychological abuse, coercive control, and in too many cases, lack of appropriate concern by relevant authorities. Absence of risk assessment mandates for whistleblowers is both a CCC systems and a legislative failure.

Blind spots

Reprisals for making a PID are criminal acts. The CCC demonstrates a blind spot for criminal reprisals of whistleblowers, which means that its basic corruption fighting functions - including S49 of the Act - are limited. More than a decade of CCC annual reports do not record a single case where the CCC took action to protect a whistleblower.

There is no recourse for whistleblowers victimised because of this CCC blind spot. The PID Act stipulates that the Ombudsman cannot review any PID made to the CCC. As long as PIDs are dispatched in a timely manner the requirements of the CC Act are met. Simply feeling "satisfied" that a PID isn't genuine or made in good faith, are sufficient grounds for the CCC to conclude that allegations of serious corruption and reprisals are unfounded.

The CC Act is silent about reprisals of whistleblowers, thus promoting CCC blindness to witnesses of serious corruption who become victims of criminal reprisals. This system-wide blind spot probably contributed to the LCC fiasco because the CCC appears oblivious of the need to have *valid* assessment protocols for PIDs of reprisals.

Reprisals in the guise of management action

PIDs of reprisals seem to be handled by the CCC as bureaucratic rather than criminal issues. This is a system wide failure directly arising from deficient legislation. The PID Act - unlike its predecessor the Whistleblower Protection Act - provides a blueprint and permission for reprisals. It describes how to legally enact reprisals. As long as criminal reprisals for making a PID - including demotion, suspension, termination, harassment, coercive control and stalking - are labelled "reasonable management action" requirements of the PID and CC Acts are met. The CCC isn't required to differentiate reprisals from pretextual "management action", or to determine the "reasonableness" of the action, despite voluminous literature that management action is the main vehicle for reprisals. Generally, criminal investigators do not accept a verbal denial from a suspect at face value, but CCC officers handling PIDs of criminal reprisals routinely do so.

Criteria exist to differentiate genuine management action from pretextual management action, but the legislation doesn't require it and the CCC is blind to the need. According to the CCC annual reports, it is unknown how many of the more than 36,000 people who made PIDs to the CCC are victims of reprisals in the guise of "reasonable management action". However the CCC has never reported ANY allegations of reprisals, investigations of reprisals, or requests for protection from reprisals from these 36,000 PIDs. The bureaucratic mindset of the CCC is not geared towards querying such implausible patterns. This demonstrates a systems failure that affects how the CCC enacts S49.

The usual organizational response to allegations of wrongdoing is to accuse the whistleblower of misconduct for an unrelated action. This hides the reprisal motive. Here is an example of how this plays out in the U.S. health sector [12]:

> *Many times a physician is accused of noncompliance with a contract or a policy, when in fact the accuser is retaliating or engaging in efforts to discredit a doctor. I have seen this happen where minority physicians complain about how they are treated and are suddenly investigated for a performance issue.*

This same organisational response is reflected in multiple media reports of corruption scandals in the Queensland public sector where whistleblowers lose their reputations and careers from reprisals masquerading as "reasonable management action". A recent example is Queensland's Integrity Commissioner, Dr Nicola Stepanov.

Management action, reasonable or otherwise, is stressful and professionally threatening. The main workplace process for whistleblowers seeking protection is grievance procedures. Grievance procedures in this context are doomed to fail because the whistleblower is experiencing *deliberate reprisals* rather than a genuine misunderstanding between colleagues of **equal power** with **equal**

commitment to resolving their differences. The mediation process itself becomes an instrument of reprisal.

Typically, allegations brought **by** the whistleblower in their PID are never properly investigated, while minor, bizarre complaints **about** the whistleblower are actively pursued by the organization. The whistleblower loses their job through stress induced ill health, constructive redundancy or termination. They can't apply for another job because they can't get a reference, and the official account is that they lost their job because of misconduct.

This is how the CCC is able to report more than 3,000 PIDs successfully resolved each year. Outcomes are measured by timeliness, not results of criminal investigations of reprisals. It is a grave failure of the CC Act and the CCC not to refer PIDs of reprisals for police investigation.

Reprisals dressed up as "reasonable management action" are traumatizing.[5] In most reprisal/management action the pretextual complaint is minor or bogus, sometimes crafted from hacked work emails or from posts on social media accounts. Whistleblower [redacted] is a well-known Queensland example. [redacted] employer searched his work emails to find instances that could deemed "disrespectful" after he reported concerns about [redacted] fraud in his university department.[14] [redacted] lost his job for "misconduct" [redacted]

Legislation

An analysis of CCC annual reports of the past 20 years shows a steady deterioration of standards in whistleblower protection from reprisals. This is the result of organisational and legislative changes. From 2009 to the current time - during the era of the CCC and the PID Act – there have been no references to reprisals or whistleblowers. During the CMC and Whistleblower Protection Act era, in 2004-5 and 2002-3, the CMC annual report included data on the number of verified and unverified complaints of reprisals. In the 2000-2001 report of the CJC, there was information on both a whistleblower support officer, *and* data on verified and unverified complaints of reprisals.

Two key historical decisions have ramifications for the current situation and the LCC fiasco.

1) In its 1999-2000 report the CJC reported that the whistleblower support function had been transferred to the CJC Complaints Section.

2) In 2009 the PID Act replaced the Whistleblower Protection Act, with dire consequences for whistleblowers (See comparison on next page).

The PID Act effectively <u>removes the protections</u> offered by the Whistleblower protection Act. It provides a blueprint for reprisals that are allowed under the designation "reasonable management action". The PID Act offers no avenue for appeal of retaliatory disciplinary action and no requirement to demonstrate "reasonableness" of management action taken against people who make PIDs.

Whistleblower Protection Act

Appeal against action affected by reprisal

45.(1) This section applies to a public officer who, under an Act, may appeal against, or apply for a review of, any of the following actions—

(a) disciplinary action taken against the officer;

(b) the appointment or transfer of the officer or another public officer to a position as a public officer;

(c) unfair treatment of the officer.

(2) Whether or not the Act specifies grounds for the appeal or application, the officer may also appeal or apply to have the action set aside because it was the taking of a reprisal against the officer.

PID Act

45 Reasonable management action not prevented

(1) Nothing in this part is intended to prevent a manager from taking reasonable management action in relation to an employee who has made a public interest disclosure.

(2) However, a manager may take reasonable management action in relation to an employee who has made a public interest disclosure only if the manager's reasons for taking the action do not include the fact that the person has made the public interest disclosure.

reasonable management action, taken by a manager in relation to an employee, includes any of the following taken by the manager—

(a) a reasonable appraisal of the employee's work performance;

(b) a reasonable requirement that the employee undertake counselling;

(c) a reasonable suspension of the employee from the employment workplace;

(d) a reasonable disciplinary action;

(e) a reasonable action to transfer or deploy the employee;

(f) a reasonable action to end the employee's employment by way of redundancy or retrenchment;

(g) a reasonable action in relation to an action mentioned in paragraphs (a) to (f);

(h) a reasonable action in relation to the employee's failure to obtain a promotion, reclassification, transfer or benefit, or to retain a benefit, in relation to the employee's employment.

Reprisals of whistleblowers are enabled though many gaps and overlaps of authority in the CC an PID Acts:

1. There is no recognition in either the CC or PID Acts that reprisals in the guise of management action are usually enacted by multiple officers in an organisation. Management action requires HR involvement. The involvement of multiple officers in orchestrated reprisals is a more serious crime (S18) than harassment by one colleague, for example. Legislative oversights and the CCC's bureaucratic mindset result in the CCC not referring apparent collusion in retaliatory management action for criminal investigation, as allowed by Section 49 of the Act.
2. S24 of the CC Act states that the CCC performs its function by analysing the information it gathers in performing its functions. Since there is no requirement for criterion-based assessment of PIDs, there is no objective data to analyse. The CCC does not currently have the ability to meet this requirement of the Act.
3. In addition, CCC research is focused on *perceptions* of corruption rather than the actual corruption in public sector entities.[15] Perceptions and attitudes about corruption are poor proxies for corruption. Improvement in the operationalisation of corrupt acts as research variables could be afforded by an amendment to S49. Police officers - who have experience in collecting and evaluating evidence – should be included in CCC research projects as a means of providing insights and expertise. There is little utility in research about perceptions of corruption if the purpose of the CCC is to reduce (real) corruption.
4. S33 of the Act requires the CCC to ensure a complaint about corruption is dealt with in regard to principles set out in S34 which include a) cooperation, b) capacity building, c) devolution and d) public interest. Despite S49 of the Act which enables skilled criminal investigation, the CCC prioritises devolution over public interest when PIDs of serious corruption and criminal reprisals are referred back to the entity to self-investigate. Devolution of alleged reprisals creates a conflict of interest and is a CCC systems and legislative failure.
5. CCC and CMC reports indicate that the prosecution of the criminal act of reprisals against whistleblowers has never occurred. The CCC has not utilised its power to refer PIDs of criminal reprisals to seconded police or QPS, and in so doing has not met its obligations under the Act which requires the gathering of evidence for criminal prosecution (S34).
6. S35B of the CC Act provides the standards in assessing a PID as a) timeframes, b) unspecified "assessment" procedures, c) monitoring of timeframes, and d) what happens if timeframes aren't met. This indicates a bureaucratic rather than investigative mindset. There are no requirements regarding rigour, fairness, and appropriateness of the disposition of a PID. S46 gives the CCC power to take no action if it is "satisfied" that the complaint is frivolous, or would require an "unjustifiable use of resources". This provides an opportunity for every PID to be minimised or dismissed based on subjective "feelings" rather than an objective benchmark. This "gut feeling" assessment was the crux of LCC fiasco.
7. Similarly, S44 of the CC Act stipulates a public official in a Queensland entity only needs to be "satisfied" that a complaint is frivolous or lacks credibility in order for allegations of corruption

to be dismissed. Devolving power to the alleged perpetrating organisation to decide whether allegations of serious corruption about it are frivolous is not in keeping with the public interest.

8. The PID Act precludes the Ombudsman from reviewing any CCC process.

9. The Right to Information Act, precludes whistleblowers from using RTI to gain information about how their PID was assessed, handled and monitored by the CCC.

In summary, the CC Act does not require measurable and objective criteria to EVER be used at any level in decisions regarding the substance of PIDs.

There are additional sections of the CC Act which are problematic regarding the obligations of the CCC's handling of to PIDs and reprisals. Although they are outside the TOR of this Inquiry, they combined to create the perfect storm of the LCC fiasco. The problem is not just in Section 49 where CCC power and seconded police authority were abused. The problem has its origins in the legislation and in the lack of involvement of police (seconded or otherwise) at every stage of the assessment, handling and reviewing PIDs, especially PIDs of criminal reprisals. This also limits the development of the police skill set in this area. Had seconded police officers been routinely involved in criterion based assessment of PIDs, they would have been aware of the need to apply objective assessment processes to EVERY PID, including the Logan City Council one.

Cost of an ineffective CCC

The CCC duplicates the work of existing agencies who are better equipped to handle PIDs. The police are trained to investigate and prosecute corruption, and the Ombudsman is better able to assess the validity of claims of "reasonable management action" following a PID. The Logan City Council fiasco highlights the problems with in-house police, notably the dual loyalty to their professional body, and to the norms of the CCC. Analysis of CCC reports indicates that PIDs have not been adequately assessed or dealt with for over a decade. PCCC Report 108 suggests causes include lack of assessment criteria, lack of knowledge about the sort of evidence indicating criminal reprisals, and a groupthink mentality. Simply amending or repealing S49 will not address the fundamental problems of the CCC's neglect in its handling PIDs, whistleblowers and reprisals.

There is a high dollar cost in having the CCC (inadequately) duplicate the work of QPS and the Ombudsman. The social cost of dealing with serious corruption and reprisals as primarily a perception and training exercise is high. Whistleblowers are disabled by complex PTSD from vindictive "reasonable management action", which also renders them unemployed and unemployable. This causes hardship for their families, and diminishes the pool of skilled employees in Queensland.

Conclusion

A main purpose of the CC Act is to continuously reduce the incidence of corruption in the public sector (S4) by helping units of public administration deal effectively and appropriately with corruption by increasing their capacity (S5). More than a decade of CCC reports indicate that the CCC has failed because it prioritised stakeholder engagement over criminal investigations. It is worth noting that the LCC fiasco was not an investigation of reprisals, but an investigation of an entirely different matter.

Many sections of the CC Act enable criminal reprisals against whistleblowers by not prescribing specific objective criteria in a) the assessment and handling of PIDs, b) risk assessment of whistleblowers, and c) the prioritization of justice over devolution. The PID Act actively enables reprisals under the guise of management action, and the CC Act is complicit by its silence.

The Inquiry into the CCC Investigation of Logan city Councillors discussed a groupthink mentality operant in the CCC. The CC and PID Acts also reflect groupthink assumptions that whistleblowers don't suffer serious reprisals and are prone to complaining and exaggeration. These assumptions are all false. Yet the inference that whistleblowers are vexatious and frivolous permeates the CC and PID Acts:

- Whistleblowers are witnesses to alleged corruption, but aren't afforded the protections of vulnerable witnesses.
- CCC annual reports and the CC Act refer to whistleblowers and PIDs as "complaints", a word with negative connotations in this context.
- The penalties for causing detriment to the safety or career of a witness/whistleblower in the CC Act (S212) are **less** than the penalties for submitting a PID twice or one the CCC thinks is frivolous (S216).

The assumption in both the PID and CC Acts is that CEOs and senior managers of stakeholder entities are inherently more credible than employees who make PIDs. It is noteworthy that [redacted] automatically took sides with the CEO of LCC rather than its councillors.

Recommendations

1. S59 of the CC Act states that the commission must work to achieve optimal use of available resources to avoid needless duplication of the work of units of public administration. Document analysis indicates that the CCC replicates the work of other agencies (notably QPS and the Ombudsman) in the handling PIDs of corruption and reprisals. In keeping with S59 of the Act, my recommendation is to repeal the CC Act and disband the CCC.

However, if this step is deemed too radical, urgent amendments to the CCC and PID Acts are required in terms of how PIDs are assessed, managed, investigated, documented and reported.

2. Allegations of objectively determined serious corruption must be investigated by police officers who have the necessary training and skills. This can be done utilising an amended S49 or by referral to QPS.

3. The CC Act must stipulate that once a PID is objectively assessed as meeting *a predetermined objective threshold* for "serious corruption" a PID is not referred back to the entity which was the subject of a PID. An irreconcilable conflict of interest exists when an entity which is the subject of a PID assessed as "serious corruption" investigates itself.

4. Despite the CCC having the power to refer investigations to seconded police (S49), seconded police are under-utilised in the investigation of allegations of reprisals. However, the LCC fiasco clearly demonstrates seconded officers have a conflict of interest in investigations of alleged reprisals in a CCC stakeholder entity. Allegations of criminal reprisals in CCC stakeholder entities must be investigated by independent criminal investigation organisation (QPS).

5. The CCC must urgently develop objective criteria and protocols in its assessment of PIDs with the input of outside experts in law and law enforcement. This will enable the CCC to demonstrate that it is competent, transparent, impartial, fair, and able to act in the public interest.

6. The PID Act, which overlaps with CC Act is fatally flawed and no one has picked this up in more than a decade. Legislation is urgently required that stipulates any person who makes a PID who is subsequently subjected to "reasonable management action" must have that management action evaluated by an independent, expert body to confirm it was objectively "reasonable". Both the CC and PID Acts need to be urgently re-evaluated regarding unconscious classist assumptions about the relative worth of whistleblowers.

7. The original structure of the CJC demonstrates a greater historical focus on whistleblower support and investigation of reprisals. It appears that moving whistleblower protection into the Complaints Section in 2009 created a situation in which whistleblowers became effectively invisible to the CCC. It is recommended that a separate department dedicated to whistleblower support and protection be re-established.

8. The CC Act should specify that data must be collected regarding the number of allegations and manifestations (types) of reprisals. This data must be included in CCC annual reports.

9. I believe there is a mandate based on the principles of justice to investigate historic cases of reprisals, regardless of the statute of limitations for criminal charges. Sections 16 & 19 of the CC Act allow this. The substantive harm done to whistleblower victims of CCC neglect cannot be undone. However, the stigma of having been declared a vexatious, underperforming employee who keeps "re-agitating" can be ameliorated by the work of a dedicated team committed to correcting the record. Justice demands it.

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