



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: PuLC:CBvk270123

27 January 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: natalie.cooper@lawcouncil.asn.au

Dear Dr Popple,

Inquiry into the provisions of the Public Interest Disclosure Amendment (Review) Bill 2022

Thank you for the invitation to contribute to the Law Council's submission to the inquiry into the provisions of the Public Interest Disclosure Amendment (Review) Bill 2022 (**Bill**).

The Law Society's comments are informed by its Public Law Committee and are confined to a discrete issue in respect of the proposed removal of section 65 from the *Public Interest Disclosure Act 2013* (Cth) (**PID Act**).¹

The purpose of the existing section 65 is to prevent inappropriate use or disclosure of information obtained through processes under the PID Act. The Bill proposes to remove the so-called "general secrecy offence" under the existing section 65 in its entirety and to replace it with express permission for the disclosure of what is currently protected information, among government agencies.

In our view, the proposed change may adversely affect trust and confidence in the protections provided to whistle-blowers, thereby undermining a key object of the PID Act (that is, to encourage and facilitate the making of public interest disclosures). The proposed change may also increase the risks of breaches of confidentiality and misuse of disclosed information.

In the Second Reading Speech, the Attorney-General states:²

The bill will also repeal the general secrecy offence in the Public Interest Disclosure Act to support better information sharing between agencies in relation to a disclosure. The Moss review noted that the secrecy offence unnecessarily limits agencies' ability to respond to alleged wrongdoing and disclosures, and has impeded the ability of senior management to access information about the performance of their agency.

¹ The Moss Review recommended that "the secrecy offences relating to the use or disclosure of information about a PID (protected information) be repealed as these offences unnecessarily limit agencies' ability to respond to alleged wrongdoing" (recommendation 16).

² Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022, 3925 (Mark Dreyfus, Attorney-General)

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/26233/0183/hansard_frag.pdf;fileType=application%2Fpdf.

Repealing the general secrecy offence will ensure agencies can share information appropriately to effectively manage disclosures and carry out ordinary business actions.

The 2016 *Review of the Public Interest Disclosure Act 2013* by Mr Philip Moss AM (**Moss Review**) concluded that the offence hampers agencies' ability to use and share protected information to respond to disclosures, guide their management decisions, brief Ministers, or respond to media enquiries, due to fear of prosecution that was exacerbated by an overly cautious approach taken by legal advisers.³ It may be that the description of section 65 as a "secrecy offence" may have contributed to that concern.

We suggest that if the legislation works as intended, the most appropriate agency or agencies will be the one(s) investigating disclosed matters, managing disclosures and responding to alleged wrongdoing. They are authorised, to the extent consistent with the objects and other provisions of the Act, to use disclosed information to assess the relevant agency's performance and carry out related actions including briefing Ministers. The need for further disclosure to other agencies or media is not clear.

While disclosure of identifying information would continue to be prohibited under section 20 of the PID Act, this may not be sufficient to ensure that further disclosure of disclosed information (currently defined as "protected information") would not ultimately, even if inadvertently, identify a whistle blower or otherwise be misused.

We suggest that the concerns raised may be better addressed by amending the existing section 65 rather than removing the protection altogether. The following could be considered:

- renaming the section "prohibited disclosure or use";
- adding a public interest exception in sub-section 65(2); and
- adding any other specific exceptions that are reasonably necessary to ensure that a protected disclosure can be investigated by the most appropriate agency or agencies.

Other amendments included in the Bill, such as removal of employment grievances from the scope of the PID Act, may also help to address the issues raised. In our view, the amendments proposed in relation to sections 64 to 66 of the PID Act should be reassessed in the context of the more extensive reforms which we understand will be proposed later this year.

Thank you for the opportunity to comment. Questions at first instance may be directed to Vicky Kuek, Principal Policy Lawyer, on 9926 0354 or victoria.kuek@lawsociety.com.au.

Yours sincerely,



Cassandra Banks
President

³ Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Report, 15 July 2016), [119] <https://www.ag.gov.au/sites/default/files/2020-06/Moss%20Review.PDF>.