



THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr. James Popple
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Law Council of Australia
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By email: john.farrell@lawcouncil.au

Dear Dr Popple,

PUBLIC SECTOR WHISTLEBLOWER REFORMS

Thank you for the opportunity to contribute to the Law Council's submission to the Attorney General's Department regarding the exposure draft of the Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill 2025 (**Draft Bill**). The Law Society's Public Law Committee contributed to this submission. We have also had the benefit of reading a draft briefing note prepared by the Human Rights Law Centre's Whistleblower Project, Transparency International Australia and Griffith University.

The Draft Bill contains some improvements to the Commonwealth public sector whistleblowing framework. We welcome the principles-based drafting approach, which addresses areas of uncertainty and complexity under the current *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), including clarifying the definitions of 'public interest disclosure' and 'disclosable conduct' and simplifying the processes for receiving, dealing with and investigating disclosures. We also welcome the provisions in the Draft Bill aimed at achieving greater alignment between the PID Act and the *National Anti-Corruption Commission Act 2022* (Cth) (**NACC Act**).

In our view, however, the Draft Bill does not address some of the priority areas for reform that would assist in further promoting the integrity and accountability of the Commonwealth public sector and ensuring that legal protections for whistleblowers are appropriately robust. In addition, we note that the effectiveness of proposed reforms such as the establishment of the Whistleblower Ombudsman will depend on whether the Office of the Commonwealth Ombudsman is adequately resourced to undertake its new functions.

We make the following comments in relation to the Draft Bill:

Establishment of the Whistleblower Ombudsman

The Law Society's position is that it would be preferable to establish a whistleblower protection authority with jurisdiction over both public and private sector whistleblowers.¹ While the Draft Bill does not achieve this aim,

¹ Law Society of NSW, Letter to the Law Council of Australia regarding 'Public sector whistleblowing stage 2 reforms' (18 December 2024).

we consider the establishment of the new Whistleblower Ombudsman within the Office of the Commonwealth Ombudsman nevertheless has the potential to strengthen the federal integrity framework.

We note that the Whistleblower Ombudsman would be empowered under the *Ombudsman Act 1976* (Cth) to handle disclosures and complaints relating to the PID Act in a range of ways, including through receiving and dealing directly with disclosures and complaints as well as the ability to refer them to the principal officer of an agency, the ability to make inquiries and obtain information, the use of alternative dispute resolution and restorative engagement processes and the ability to conduct investigations.² We support this flexible approach to the handling of disclosures and complaints, noting that alternatives to formal investigations may achieve a more efficient resolution of certain issues and be preferred by the whistleblower, particularly in the case of alleged reprisals. We are also pleased by the inclusion of a duty on the Whistleblower Ombudsman to accord procedural fairness in the exercise of its functions.³

It will be critical to ensure there is adequate funding for the Office of the Commonwealth Ombudsman to undertake the new role, noting that timeliness is particularly important in cases where instances of wrongdoing may pose an ongoing risk of harm. It is important that resourcing is also adequate to cover the role to be performed by the Whistleblower Ombudsman in relation to improving awareness and understanding of the operation of the PID Act and on issues of integrity more broadly across the Commonwealth public sector.

Introduction of a ‘no wrong doors’ approach

We are pleased that the Draft Bill goes some way to establishing a so-called ‘no wrong doors’ approach to disclosures. Section 14 of the new PID provisions allows a whistleblower to make a public interest disclosure not only to the discloser’s supervisor or a senior officer in the agency to which the discloser belongs but also to the Whistleblower Ombudsman or other relevant investigative authorities in certain circumstances.⁴

In our view, this provision will assist in the proper coordination and referral of disclosures within the various federal integrity bodies and ensure that whistleblowers are guided and supported in making a disclosure through the appropriate avenues.

Reverse burden of proof in civil proceedings

We support proposed s 41 of the proposed new PID Act provisions, which reverses the burden of proof in proceedings for remedies in relation to reprisal. The applicant would be required to establish a reasonable possibility that a reprisal has occurred, after which the respondent would bear the onus of proving that the claim is not made out. This is appropriate given the respondent will have knowledge of the conduct which constitutes the alleged reprisal. It also aligns with burden of proof provisions under s 32(4) of the *Public Interest Disclosures Act 2022* (NSW) (**NSW Act**) and s 1317AD(2B) of the *Corporations Act 2001* (Cth) (**Corporations Act**).

² Proposed Division 3, ‘Complaints and disclosures’ (ss 21AZQ to 21AZZD) and Division 4, ‘Investigations’ (ss 21AZZE to 21AZZF) of new Part IIG of the *Ombudsman Act 1976* (Cth).

³ See proposed new s 21AZZM of the *Ombudsman Act 1976* (Cth).

⁴ See PID Act, proposed new s 14(4).

Third party disclosure provisions, including to legal practitioners

Proposed s 31 of the new PID Act provisions confers immunities on a current or former public official for disclosing information to the following third parties for the purpose of obtaining assistance in connection with the operation of the PID Act:

- An Australian legal practitioner to obtain legal advice or professional assistance
- A medical practitioner or psychologist to obtain medical or psychiatric care, treatment or
- A union or professional association to obtain advice or assistance

This amendment represents an improvement in the supports available for whistleblowers as compared with the narrower 'legal practitioner disclosure' provisions provided for under the current s 26 of the PID Act.

We note, however, that under proposed new s 31, the individual is required to disclose 'no more information...than is reasonably necessary' to obtain assistance. We suggest that the 'reasonably necessary' qualification should be omitted for the purpose of obtaining legal advice, considering that the discloser may not fully understand the legal relevance of the information they may hold, and that all Australian legal practitioners are subject to strict confidentiality rules. Further, the qualification may hamper the ability of persons seeking advice to speak frankly and openly with their legal advisor and, as a consequence, the legal advisor's ability to give appropriately tailored advice. If not removed, we suggest that the qualification should be amended to the effect that the individual discloses no more information than the individual 'reasonably considers is necessary'.

Further, there may still be practical difficulties experienced by whistleblowers in obtaining support arising from these provisions. For example, for information that has a security classification of 'secret' or above, disclosure is limited to where the discloser is satisfied that the practitioner holds the appropriate level of security clearance. This limitation is contrary to the recommendation in the independent statutory review of the PID Act conducted by Mr Philip Moss AM that disclosures of security classified information (other than intelligence information) for the purpose of obtaining legal advice should be permitted.⁵

We are pleased the Draft Bill does not replicate current s 67 under the PID Act, which makes legal practitioners criminally liable if they disclose certain information received from their clients concerning public interest disclosures.

Coverage of the Act

Proposed new s 14(6)(e) of the PID Act would retain the existing exclusion of persons employed under the *Members of Parliament (Staff) Act 1984* (Cth) from the scope of the PID Act. We note that this is contrary to the recommendations in the Set the Standard Review, which recommended that the public interest disclosure protections be extended to parliamentary employees.⁶ While this cohort is able to report corrupt conduct under the NACC Act and may also make a disclosure within the context of the *Parliamentary Workplace Support Service Act 2023* (Cth), we consider it appropriate that they can avail themselves of the whistleblower

⁵ Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Report, 15 July 2016), Recommendation 24: <https://www.ag.gov.au/about-us/publications/review-public-interest-disclosure-act-2013>.

⁶ Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*, (30 November, 2021): <https://humanrights.gov.au/set-standard-2021>.

protections under the PID Act in the interests of ensuring comprehensive avenues of disclosure of misconduct for this cohort.

Availabilities of remedies for whistleblowers

The Draft Bill retains the duty to protect public officials against reprisals by requiring principal officers to take reasonable steps to mitigate such risks. However, the duty remains unenforceable, even where a person has suffered a detriment due to its breach. We suggest that it would be appropriate to introduce civil remedies in these circumstances as provided for under the NSW Act⁷ and the Corporations Act⁸.

Immunity for preparatory acts and self-reported conduct

The South Australian Court of Appeal in *Boyle v Commonwealth Director of Public Prosecutions* [2024] SASCA 73 held that immunity for the 'making' of a public interest disclosure under s 10(1)(a) of the PID Act is confined to the actual disclosing of the information, and does not extend to preparatory or anterior acts that reasonably form part of the process which resulted in the creation of the disclosure.⁹

The Draft Bill does not provide any immunity for preparatory acts or self-reported conduct which may attract civil, criminal or administrative penalties. In light of this, we suggest that it may be desirable to provide a mechanism where, if the whistleblower has concerns that certain conduct, which may attract a civil or criminal penalty, is necessary to support a disclosure, there exists an alternative pathway whereby they can refer these concerns to the Whistleblower Ombudsman to determine whether and how to pursue the matter.

Thank you for the opportunity to comment. Questions at first instance may be directed to Sophie Bathurst, Senior Policy Lawyer, at (02) 9926 0285 or Sophie.Bathurst@lawsociety.com.au.

Yours sincerely,



Jennifer Ball
President

⁷ *Public Interest Disclosures Act 2022* (NSW), s 62.

⁸ *Corporation Act 2001* (Cth), s 1317AD(2B).

⁹ *Boyle v Commonwealth Director of Public Prosecutions* [2024] SASCA 73 per Lovell JA at [80]-[94] (Doyle and David JJA agreeing, with Doyle JA adding his own observations in relation to Ground 3 at [195]-[258]).