



Australian  
Human Rights  
Commission

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# Public Interest Disclosure Amendment (Review) Bill 2022

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Submission to the Senate Legal and Constitutional Affairs  
Legislation Committee

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ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
National Information Service 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

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# 1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) (Bill).

# 2 Summary

2. Australia has had a whistleblowing regime for the public sector since 2014. The *Public Interest Disclosure Act 2013* (Cth) (PID Act) was an important step towards a more transparent and accountable public service.
3. A statutory review of the PID Act was undertaken in 2016. At that time, agencies reported that a small number of disclosures of significant wrongdoing had been made, along with a larger number of disclosures of personal employment-related grievances.<sup>1</sup> In the six years since then, there has been an average of around 375 disclosures each year that have met the threshold for a public interest disclosure.<sup>2</sup>
4. The statutory review identified several issues of concern with the regime. Whistleblowers reported that they did not feel supported, that their concerns were not properly responded to and that they had experienced reprisals as a result of bringing forward their concerns. Agencies found the regime complex and difficult to apply, and considered the definition of ‘disclosable conduct’ to be too broad, particularly in picking up personal employment-related grievances.<sup>3</sup>
5. The present Bill seeks to implement a number of recommendations from that statutory review as well as recommendations from two other parliamentary reviews. In general terms, the Bill would:
  - narrow the scope of disclosable conduct, so that it no longer applies to personal work-related conduct
  - increase the discretion available to agencies to refer disclosures to other, more appropriate investigatory mechanisms
  - improve protections against reprisals, and provide witnesses assisting an inquiry with the same protections as whistleblowers
  - enhance the assistance and support provided by agencies to whistleblowers

- increase oversight of the regime by the Ombudsman and the Inspector General of Intelligence and Security (IGIS), including by empowering them to review and making recommendations in relation to agency investigation reports
  - increase the ability of agencies to share information about a disclosure where necessary, in order to improve internal investigations into disclosures.
6. The Commission supports these aspects of the Bill.
  7. In introducing the Bill, the Government announced that it intends to introduce further reforms to address the underlying complexity of the scheme. It also intends to publicly consult on whether there is a need to establish a whistleblower protection authority or Commissioner. Subsequently, the Attorney-General asked his department to conduct a review of Commonwealth secrecy provisions. The Commission looks forward to engaging with these processes.
  8. The Commission's first recommendation is that the continued reform to the public sector whistleblowing regime needs to take into account the range and complexity of secrecy laws that apply to the public service. There are a number of recommendations from the Australian Law Reform Commission's review into secrecy laws that remain unaddressed. Secrecy and public interest disclosure are intimately linked, and a simplification of the secrecy laws that apply to public servants would assist significantly in ensuring that necessary disclosures about public sector wrongdoing can be made. The further reforms to the PID Act should include public consultation about secrecy offences, and take into account the results of the current review by the Attorney-General's Department.
  9. The Commission's other recommendations are limited to the PID Act and take the structure of the Act as it currently is.
  10. Five recommendations are designed to make it easier for public servants to get advice and help both before and after making a disclosure. The Commission recommends that a list of security cleared lawyers be created and published to permit potential and actual whistleblowers to access to such lawyers where necessary. The Commission also recommends that recourse to security cleared lawyers only be required when it is necessary to discuss information with a protective security classification of 'secret' or 'top secret'. This would permit whistleblowers to obtain legal advice more easily in

relation to information the disclosure of which carries lower risks. The Commission recommends that staff in the Australian Intelligence Community should also have access to legal advice prior to making internal disclosures to an intelligence agency or the IGIS about 'intelligence information'.

11. The Commission recommends that the offence attaching to disclosures by lawyers advising a whistleblower be narrowed (while continuing to protect against the disclosure of any secret, top secret or intelligence information).
12. Finally, in relation to improving access to advice and help, the Commission recommends that whistleblowers be permitted to speak with other relevant advisers, including a union or a person providing an employee assistance program, for the purpose of obtaining advice and assistance in relation to making a disclosure. Those disclosures would also need to be covered by appropriate secrecy provisions.
13. The Commission supports the amendments in the Bill to exclude personal work-related conduct and to permit referrals where the conduct disclosed is more appropriately dealt with under a different mechanism. In light of those changes, the Commission submits that the existing discretion afforded to the principal officer of an agency to which the disclosure relates *not* to investigate on the ground that the conduct is not 'serious' be removed from the Act. This would avoid the need for agencies to engage in a value judgement that has the potential to impact on both the perceived and actual integrity of the regime.
14. For the reasons given in the *Set the Standard* report into Commonwealth parliamentary workplaces, the Commission does not support the proposal in the Bill to clarify that the PID Act does not apply to parliamentary staff. The Commission agrees with the comments made in the report of the 2009 parliamentary inquiry that led to the PID Act that parliamentary staff may have insider access to information, be in a position to observe serious conduct contrary to the public interest and face risks of reprisal for speaking out. They should be supported to do so and provided with the protections afforded by the PID Act. The Commission recommends that parliamentary staff should be included as 'public officials' in the PID Act.
15. Finally, the Commission makes two recommendations designed to permit a public disclosure of information where agencies have failed to

comply with their obligations attaching to internal investigations. First, an external disclosure should be permitted where there has been a failure by an authorised officer to make a timely decision about the allocation of a disclosure for investigation. This was one of the recommendations of the 2016 statutory review. Secondly, an external disclosure should be permitted where an internal investigation has not been completed within 90 days, and the other requirements for an external disclosure are met. This would provide greater certainty about when an external disclosure may be made, encourage prompt processing of internal investigations, and increase consistency with the whistleblowing regime that applies to the private sector under the *Corporations Act 2001* (Cth).

### 3 Recommendations

16. The Commission makes the following recommendations.

#### **Recommendation 1**

The Commission recommends that the next stage of reform of public interest disclosure laws include public consultation in relation to the breadth and appropriateness of Commonwealth secrecy offences, and have regard to the findings of the Attorney-General's Department's current review of secrecy provisions.

#### **Recommendation 2**

The Commission recommends that a list of security cleared lawyers be created and published in places where potential whistleblowers can easily find it, such as the websites of the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, and the Attorney-General's Department.

#### **Recommendation 3**

The Commission recommends that item 4 in the table in s 26(1) of the PID Act be amended so that a legal practitioner disclosure is only required to be made to a lawyer with a relevant security clearance if the whistleblower knew, or ought reasonably to have known, that any of the information had a protective security classification of 'secret' or 'top secret'.

#### **Recommendation 4**

The Commission recommends that the Government consider an appropriate mechanism to ensure that staff within the Australian Intelligence Community can access legal advice about the potential to make an internal disclosure under the PID Act that includes intelligence information.

#### **Recommendation 5**

The Commission recommends that the offence provision in s 67 of the PID Act applying to legal practitioners be amended so that it is limited to a disclosure or use of information that caused, or was likely or intended to cause, harm to an identified essential public interest, or disclosure of narrow categories of information where harm to an essential public interest is implicit.

#### **Recommendation 6**

The Commission recommends that item 4 in the table in s 26(1) of the PID Act be amended to permit a whistleblower to make a disclosure to other relevant advisers, including a union or a person providing an employee assistance program, for the purpose of obtaining advice and assistance in relation to making or having made a public interest disclosure.

#### **Recommendation 7**

The Commission recommends that s 48(1)(c) of the PID Act be repealed.

#### **Recommendation 8**

The Commission recommends that people employed under the *Members of Parliament (Staff) Act 1984* (Cth) be included within the definition of 'public officials' in the PID Act.

#### **Recommendation 9**

The Commission recommends that paragraph (c) in column 3 of item 2 in the table in s 26(1) of the PID Act be amended to provide that an external disclosure may be made if a whistleblower:

- has provided their name and contact details in connection with making the disclosure; and
- has not been provided with a notice under sections 44(4) or 44A(3) of the PID Act within 28 days of making the disclosure, confirming

that a decision about the allocation of their disclosure has been made.

### **Recommendation 10**

The Commission recommends that paragraph (c) in column 3 of item 2 in the table in s 26(1) of the PID Act be amended to provide that a whistleblower may make an external disclosure if an internal investigation has not been completed within 90 days.

## **4 Relevant human rights**

17. Public servants, in common with all members of the community, enjoy the right to freedom of expression. This right is recognised in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 19(3) provides that the right carries special duties and responsibilities and therefore may be subject to certain restrictions that are provided for by law, and are necessary in order to respect the rights and reputations of others, or to protect national security, public order, or public health or morals.
18. The free speech of public servants needs to accommodate their common law duty of trust and fidelity to the government of the day, as well as obligations contained in the APS Code of Conduct. This means that some restrictions on political speech are permissible.<sup>4</sup> Further, some work by public servants is properly regulated by secrecy provisions. The Australian Law Reform Commission published a report in 2009, *Secrecy Laws and Open Government in Australia* (ALRC Secrecy Report), which provided a comprehensive review of Commonwealth secrecy laws.<sup>5</sup> The ALRC noted that while secrecy was necessary in some circumstances, it needed to be properly circumscribed in order to achieve the aim of open and accountable government.
19. Public sector whistleblowing legislation such as the PID Act is designed to facilitate speech (including, in some instances, public speech) by public servants, particularly those subject to secrecy provisions that would otherwise limit their speech, by providing them with legal protections for disclosing serious misconduct such as fraud, corruption or maladministration. This kind of speech promotes the rule of law and democratic accountability that underpins the protection and fulfilment of a range of other important rights.



20. Whistleblowing can come at great personal cost to individuals who are prepared to disclose wrongdoing. As a result, it is important that the privacy of whistleblowers is also protected, reflecting the general right to privacy outlined in article 17 of the ICCPR. The PID Act seeks to do this by including offences designed to protect the identity of whistleblowers and by including civil and criminal provisions prohibiting reprisals. The provisions prohibiting reprisals also assist in protecting the right to work and the right to just and favourable conditions of work in articles 6(1) and 7 of the *International Covenant on Economic, Social and Cultural Rights*.
21. Australia has ratified the United Nations Convention against Corruption.<sup>6</sup> Article 33 of that instrument provides:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.
22. The recommendations made by the Commission in this submission in relation to the proposed amendments to the PID Act are designed to ensure that whistleblowers are properly informed about their rights, that they are well protected in making disclosures, that these protections extend to all relevant Commonwealth public servants, that disclosures are properly investigated, and that there is greater protection for appropriate public disclosures. In doing so, the Commission is guided by the importance of protecting the human rights identified above.

## **5 Background**

### **5.1 Operation of the PID Act**

23. The PID Act provides protections for current and former public officials and public contractors who seek to disclose wrongdoing in the public sector (whistleblowers). The policy aim is to encourage such disclosures so that they can be properly investigated and reduce the incidence of such wrongdoing.
24. Whistleblowers are provided with immunity from civil, criminal or administrative liability for the making of the disclosure (including any

liability for defamation or breach of contract).<sup>7</sup> However, whistleblowers who report about their own wrongdoing are not provided with immunity in relation to the conduct that is the subject of the disclosure.<sup>8</sup> There are both civil and criminal prohibitions against taking reprisal action against whistleblowers.<sup>9</sup>

25. The PID Act only protects disclosures by whistleblowers in relation to certain kinds of conduct (disclosable conduct) that are made in the way provided for by the PID Act.
26. 'Disclosable conduct', in general terms, is conduct that is unlawful, corrupt, perverts the course of justice, constitutes maladministration, is an abuse of public trust, involves misconduct in relation to scientific research or analysis, results in the wastage of public money or property, unreasonably results in a danger to health or safety or results in a danger to the environment.<sup>10</sup>
27. Certain conduct is excluded from the definition of disclosable conduct, including:
  - conduct by judicial officers
  - conduct related only to action by a Minister, the Speaker of the House of Representatives or the President of the Senate with which a person disagrees
  - conduct related only to policies or proposed policies of the Australian Government with which a person disagrees
  - conduct related only to expenditure on government polices or the actions of Ministers, the Speaker or the President.<sup>11</sup>
28. Four kinds of disclosure are permitted:
  - (a) The primary form of disclosure is an 'internal disclosure' within government. In most cases, this may be made to the whistleblower's supervisor, to an authorised officer of the whistleblower's agency or the agency to which the conduct relates, or to the Ombudsman. In the case of conduct that relates to an intelligence agency, the disclosure may be made to that intelligence agency or to the IGIS.
  - (b) An 'external disclosure' outside of government may only be made in limited circumstances. Unless it is an emergency (see (c) below), the whistleblower must first make an internal disclosure. An external disclosure is permitted if:

- an investigation was conducted and the whistleblower believes on reasonable grounds that the investigation was inadequate
- an investigation was conducted and the whistleblower believes on reasonable grounds that the response to the investigation was inadequate
- an investigation has not been completed within the time limit prescribed by s 52 – this issue is considered further in section 7.6 below.

Provided that one of these criteria is satisfied, an external disclosure may be made, but only if all of the following criteria are also met:

- The disclosure is not, on balance, contrary to the public interest.
  - No more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct.
  - The information does not include intelligence information.
  - None of the conduct with which the disclosure is concerned relates to an intelligence agency.
- (c) An ‘emergency disclosure’ can be made publicly if the whistleblower believes on reasonable grounds that the information concerns a ‘substantial and imminent danger to the health or safety of one or more persons or to the environment’. In addition, there must be ‘exceptional circumstances’ justifying not making an internal disclosure or waiting for an internal investigation to be completed. As with a standard external disclosure, an emergency disclosure must be limited to the minimum necessary – in this case, to alert the recipient to the substantial and imminent danger. Even in emergency situations, the information must not include intelligence information of any kind.
- (d) A potential or actual whistleblower may make a ‘legal practitioner disclosure’ to a lawyer for the purpose of obtaining legal advice or professional assistance. If the person making the disclosure knew, or ought reasonably to have known, that any of the information has a national security classification, the whistleblower must ensure that the lawyer holds the appropriate level of security clearance. As with other disclosures, intelligence information may not be disclosed.

29. The PID Act provides for the investigation of internal disclosures, either by the agency to which the disclosure relates, the Ombudsman or the IGIS.<sup>12</sup> There are a range of circumstances in which an officer of the relevant agency has a discretion not to investigate – this issue is considered in more detail in section 7.4 below.<sup>13</sup> There is an initial time limit for the investigation of 90 days, but this can be extended indefinitely by the Ombudsman or the IGIS.<sup>14</sup> At the conclusion of the investigation, the agency must prepare a report including details of any findings and action to be taken as a result, and provide a copy of the report to the whistleblower.<sup>15</sup> The principal officer of the agency must ensure that appropriate action is taken in response to the report and its recommendations.<sup>16</sup>
30. This submission is focused on proposed amendments to the PID Act that deal with public sector whistleblowing. It also makes reference to the regime for whistleblower protections in the *Corporations Act 2001* (Cth) which, since 2019, covers the corporate, financial and credit sectors.<sup>17</sup> A separate regime also applies under the *Taxation Administration Act 1953* (Cth).<sup>18</sup>

## 5.2 Review of the PID Act

31. The PID Act commenced on 15 January 2014. Section 82A provided that the Minister must cause a review of the operation of the Act to be undertaken, to start 2 years after commencement and to be completed within 6 months.
32. The review was undertaken by Mr Philip Moss AM (Moss Review) and the report of the review was provided to the Minister Assisting the Prime Minister for the Public Service on 15 July 2016.<sup>19</sup> Mr Moss was the Integrity Commissioner and head of the Australian Commission for Law Enforcement Integrity between 2007 and 2014. The then Australian Government released its response to the Moss Review on 16 December 2020.<sup>20</sup>
33. The Moss Review made 33 recommendations. The present Bill is primarily aimed at the implementation of 21 of those recommendations. It also seeks to implement certain recommendations from the reports of two other parliamentary inquiries:
  - the 2017 Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Whistleblower protections in the*

*corporate, public and not-for-profit sectors* (PJCCFS Whistleblower Report)

- the 2020 Parliamentary Joint Committee on Intelligence and Security *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (PJCIS Press Freedom Report).

## 6 Main amendments proposed in the Bill

34. In general, the Commission welcomes the amendments proposed by the Bill. This submission does not deal in detail with all of the proposed amendments. The main amendments are summarised in this section. Section 7 below discusses further amendments to the PID Act, and further broader reforms, that the Commission considers are warranted.
35. Schedule 1 of the Bill contains what are described as the ‘main amendments’. The schedule is in seven parts. Each of those parts are referred to below.
36. Part 1 of Schedule 1 of the Bill narrows the definition of ‘disclosable conduct’ so that it does not include ‘personal work-related conduct’. This Part implements recommendations 5, 6 and 7 of the Moss Review and is designed to ensure that the PID Act has a stronger focus on significant wrongdoing. The Moss Review observed that during the first two years of operation of the PID Act, the overwhelming majority of disclosures concerned issues ‘like workplace bullying and harassment, forms of disrespect from colleagues or managers, or minor allegations of wrongdoing’.<sup>21</sup> The Moss Review recommended that the scope of disclosable conduct be narrowed to focus on fraud, serious misconduct and corrupt conduct. Workplace grievances were more appropriately handled through other frameworks – including those dealing with alleged breaches of the APS Code of Conduct. At the same time, it was important that whistleblowers continued to be protected from reprisal actions in their workplace for disclosing such conduct. The changes in Part 1 would bring the PID Act into line with equivalent provisions in the private sector whistleblower scheme in the *Corporations Act 2001* (Cth).<sup>22</sup>
37. Part 2 of Schedule 1 deals with the allocation of investigations and disclosures. This Part implements recommendations 3, 14, 31, 32 and

33 of the Moss Review and recommendation 10 of the PJCIS Press Freedom Review. It would permit agencies (and particularly smaller agencies) to allocate the investigation of an internal disclosure to another agency such as the agency's portfolio department. It would also permit agencies *not* to allocate a disclosure for investigation, or *not* to investigate or further investigate a disclosure, if the conduct disclosed would be more appropriately investigated under another law or power. In those circumstances, the relevant officer would have an obligation to refer the conduct for investigation by the relevant authority under that other law or power. Where conduct was investigated under the PID Act, investigation reports would have to be provided, not only to the whistleblower, but also to the Ombudsman or the IGIS. Further, the Ombudsman and the IGIS would be given expanded powers to review the handling of disclosures and make recommendations to the investigating agency. This would improve the oversight of the regime.

38. Part 3 of Schedule 1 provides additional protections to whistleblowers and witnesses. It implements recommendations 18, 19, 20, 21, 22, 23 and 28 of the Moss Review and recommendation 6.3 of the PJCCFS Whistleblower Report. Importantly, witnesses providing assistance in relation to a disclosure would receive the same immunity from civil, criminal and administrative action, and the same protections against reprisals, as whistleblowers. Supervisors would have an obligation to explain the PID Act process to whistleblowers that they supervise. Principal officers of investigating agencies would have a positive obligation to support whistleblowers and witnesses, to protect their staff against reprisals, to assist other public officials performing functions under the PID Act, and to provide ongoing training and education to their staff.
39. Part 4 of Schedule 1 aims to increase the ability for agencies to share information about disclosures to assist in their investigation, and to provide for more regular reporting by the Ombudsman (every six months). It implements recommendations 4 and 16 of the Moss Review and recommendation 11 of the PJCIS Press Freedom Review. The general secrecy offence in relation to publishing information that is the subject of a disclosure would be repealed (other substantive secrecy offences in other legislation would remain in force). The Moss review identified the secrecy offence in s 65 of the PID Act as impeding the ability of agencies to appropriately share information about a

disclosure to assist in its investigation.<sup>23</sup> In the place of the offence provision, a new s 65 would provide for an explicit authorisation for agencies to share information in particular circumstances. Importantly, the other secrecy offence in s 20 aimed at protecting the identity of whistleblowers would be retained (with some amendments, including to implement recommendation 19 of the Moss Review).

40. Part 5 of Schedule 1 describes the kinds of complaints that may be made to the Ombudsman and the IGIS about the handling of a disclosure and compliance with the PID Act. This provides useful clarity for people who have a grievance about the operation of the Act.
41. Part 6 of Schedule 1 includes provisions to provide for the continuity of investigations into disclosures despite machinery of government changes.
42. Part 7 of Schedule 1 amends the definitions of ‘agency’, ‘public official’ and ‘principal officer’. This implements recommendations 26 and 29 of the Moss Review, but not recommendation 27. The failure (at least at this stage) to implement recommendation 27, dealing with the extension of the regime to parliamentary staff, is considered in more detail in section 7.5 below. Part 7 would also clarify that former officials can make a disclosure, implementing recommendation 6.1 of the PJCCFS Whistleblower Report.
43. Other amendments to the PID Act include the replacement of s 82A, to provide for a further review of the Act in 5 years (recommendation 1 of the Moss Review).

## **7 Recommended further reforms**

### **7.1 Secrecy provisions**

44. It is impossible to fully evaluate the operation of a public interest disclosure regime that applies in the public sector, without also considering the suite of Commonwealth secrecy laws. In some cases, the breadth of those secrecy laws is an impediment to disclosures that may otherwise be in the public interest.
45. Secrecy laws engage the right to freedom of expression under article 19 of the ICCPR. The right to freedom of expression can be legitimately limited if the limitation is rationally connected to a

legitimate purpose and the scope of the limitation is proportionate to achieving that purpose.

46. The Human Rights Committee has said that it is not a permissible limitation on the right to freedom of expression:

to invoke such [secrecy] laws to suppress or withhold from the public information of legitimate public interest that does not harm national security or to prosecute journalists, researchers, environmental activists, human rights defenders, or others, for having disseminated such information.<sup>24</sup>
47. As noted above, in 2009 the ALRC Secrecy Report was published in response to terms of reference issued by then Attorney-General, the Hon Robert McClelland MP. One aspect of the terms of reference was ‘the importance of balancing the need to protect Commonwealth information and the public interest in an open and accountable system of government’.<sup>25</sup> The ALRC Secrecy Report identified 506 secrecy provisions in 176 pieces of legislation, including 358 distinct criminal offences.<sup>26</sup> It made a number of recommendations in relation to both ‘general’ and ‘specific’ secrecy offences.
48. In 2018, the general secrecy offences in ss 70 and 79(3) of the *Crimes Act 1914* (Cth) were repealed and new general secrecy offences were inserted into Part 5.6 of the *Criminal Code* (Cth).<sup>27</sup> Those amendments went some way to implementing some recommendations from the ALRC Secrecy Report, including by more tightly tying some offences to actual or anticipated harm to Australia’s interests;<sup>28</sup> and by including a defence for public interest disclosures by journalists.<sup>29</sup> Further amendments were made to the Bill that introduced Part 5.6 to address a number of human rights concerns identified as part of the scrutiny process, however, in its final report on the Bill, the Parliamentary Joint Committee on Human Rights identified a number of outstanding concerns that remained.<sup>30</sup>
49. A review of Part 5.6 of the Criminal Code by the Independent National Security Legislation Monitor (INSLM) is currently due.<sup>31</sup> According to the Attorney-General’s Department, this review has been commenced but the INSLM is not expected to report until 2024.<sup>32</sup>
50. In introducing the present Bill on 30 November 2022, the Attorney-General, the Hon Mark Dreyfus KC MP, emphasised that it was ‘only the first stage of reform’ to public interest disclosure laws. He indicated that the second stage of reform would include public consultation on:



- (a) further reforms to address the underlying complexity of the scheme and provide effective and accessible protections to public sector whistleblowers;
- (b) a discussion paper on whether there is a need to establish a whistleblower protection authority or commissioner.<sup>33</sup>
51. On 22 December 2022, the Attorney-General announced that his department would also conduct a review of Commonwealth secrecy offences.<sup>34</sup> The terms of reference require the department to conduct an inquiry and report on:
- any specific secrecy offences in Commonwealth legislation that are no longer required in light of the introduction of the general secrecy offences introduced in 2018
  - the suitability and appropriate framing of the general and specific secrecy offences in Commonwealth legislation, having particular regard to:
    - the principles outlined in the ALRC's report *Secrecy Laws and Open Government in Australia*
    - other relevant principles, including but not limited to those set out in the Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers
  - any amendments to general and specific secrecy offences in Commonwealth legislation that are necessary to adequately protect individuals who provide information to Royal Commissions (balanced against other essential public interests)
  - any amendments that are necessary to adequately protect public interest journalism (balanced against other essential public interests).<sup>35</sup>
52. The department is required to consult with Commonwealth departments and agencies, civil society (including media organisations and legal experts) and current royal commissions. It is due to report by 30 June 2023.
53. Given the importance of the scope of secrecy offences to the PID Act regime, the Commission considers that the anticipated further reform of the PID Act should also include public discussion about whether existing secrecy offences strike the right balance between the need to protect Commonwealth information and the public interest in an open

and accountable system of government, and have regard to any recommendations of the Attorney-General's Department in relation to secrecy laws.

### **Recommendation 1**

The Commission recommends that the next stage of reform of public interest disclosure laws include public consultation in relation to the breadth and appropriateness of Commonwealth secrecy offences, and have regard to the findings of the Attorney-General's Department's current review of secrecy provisions.

## **7.2 Whistleblower protection authority**

54. The establishment of a 'one-stop shop' whistleblower protection authority to cover both the public and private sectors was a key recommendation of the PJCCFS Whistleblower Report.<sup>36</sup> The Commission notes the Government's intention to prepare a discussion paper in relation to the establishment of such a body.
55. It may be that the establishment of a whistleblower protection authority could assist in achieving the aim of recommendation 2 of the Moss Report, but in a different way. Recommendation 2 was that a range of existing agencies with inquiry functions be designated as 'investigative agencies' under the PID Act in order to support a 'no wrong doors' approach to reporting.<sup>37</sup> The PID Act provides that the Ombudsman and the IGIS are 'investigative agencies', along with any other agency prescribed in the Public Interest Disclosure Rules made by the Minister under s 83.<sup>38</sup> In its response to the Moss Review in December 2020, the then Government said that it agreed in principle with recommendation 2, including the list of agencies to be prescribed and that it intended to liaise with each of them about this issue.<sup>39</sup> However, no other agencies are currently prescribed as investigative agencies.<sup>40</sup> The Commission is not aware of any statement by the current Government that it intends to prescribe further investigative agencies.
56. The establishment of a single whistleblower protection authority could raise the profile of whistleblower protections and make it clear where a prospective whistleblower would go to make a disclosure.

57. The Commission does not make any specific recommendations about a whistleblower protection authority at this time, noting the intention for further public consultation about this issue.

### **7.3 Making it easier for whistleblowers to get advice and help**

58. It is important for potential whistleblowers to be able to access advice and assistance prior to and after making a disclosure.
59. As noted in paragraph 28(d) above, the PID Act permits disclosures for the purpose of obtaining legal advice and professional assistance, but such disclosures are limited in two key ways. First, the disclosure may only be made to an Australian legal practitioner. Secondly, if the whistleblower knew or ought to have known that the information has a national security or other protective security classification, the onus is on the whistleblower to ensure that the lawyer to whom the disclosure is made holds the appropriate level of security clearance.<sup>41</sup>
60. The Moss Review made two recommendations directed to making it easier for whistleblowers to make a disclosure for the purpose of obtaining advice, which have not been adopted in the Bill.

#### *(a) Seeking advice from a security cleared lawyer*

61. Recommendation 24 of the Moss Review was that the PID Act be amended to permit disclosures of security classified information (other than intelligence information) to a lawyer for the purpose of seeking legal advice about a public interest disclosure, without requiring the lawyer to hold the requisite security clearance.
62. The Moss Review noted that several survey respondents said that they would never choose to make a disclosure, particularly an external disclosure, without legal advice. However, it was difficult for people to find a security cleared lawyer, and many people may prefer to seek advice from their own trusted lawyer.<sup>42</sup>
63. In December 2020, the then Government said that it agreed with this recommendation in part and that it was considering options for creating a list of security cleared lawyers that may be used by public officials who wish to seek legal advice in relation to information that has a national security or other protective security classification.<sup>43</sup> The Commission supports this proposal. The Commission is not aware that any such list has been made publicly available. To the extent that this

proposal has not already been acted upon, the Commission recommends the creation of such a list and the publication of the list in appropriate places, for example on the websites of the Ombudsman, the IGIS and the Attorney-General's Department.

## **Recommendation 2**

The Commission recommends that a list of security cleared lawyers be created and published in places where potential whistleblowers can easily find it, such as the websites of the Commonwealth Ombudsman, the Inspector General of Intelligence and Security and the Attorney-General's Department.

64. The Commission considers that the requirement to seek out a security cleared lawyer should be limited to situations where the information is particularly sensitive.
65. The Australian Government currently uses three security classifications: 'protected', 'secret' and 'top secret'. All other information from business operations and services is 'official' or 'official: sensitive'.<sup>44</sup>
66. When the then Government was considering new 'general' secrecy offences in 2017, it initially proposed that the disclosure of any information with a protective security classification was inherently harmful and should be subject to criminal sanctions. This issue was considered by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Parliamentary Joint Committee on Human Rights. Submitters to the PJCIS noted a number of problems with a broad security classification being the basis for criminal sanctions, including:
  - evidence that documents are routinely 'over-classified' or classified incorrectly
  - evidence that classification decisions are not routinely re-evaluated over time
  - the approach of basing liability on the label attaching to a document did not necessarily reflect the harm that would be caused by its release
  - there was no mechanism to test the appropriateness of document classifications.<sup>45</sup>

67. Following consultation with the public and civil society, the then Attorney-General, the Hon Christian Porter MP proposed amendments to the Bill to limit these offences to the disclosure of material that was either secret or top secret.<sup>46</sup> This was reflected in the definition of 'security classification' in s 90.5 of the Criminal Code.
68. Similar issues arise when limiting a whistleblower's ability to access legal advice on the basis of a broad protective security classification. Adopting a broad approach to security classification will mean that recourse to a security cleared lawyer, rather than a lawyer of the whistleblower's own choosing, will be required far more regularly and in circumstances that may not be warranted. This additional obstacle to obtaining what, for many, is essential preliminary advice, may discourage whistleblowers from making important public interest disclosures.
69. Those issues are amplified by the secrecy provision in s 67 of the PID Act that imposes criminal sanctions on the disclosure or use by a legal practitioner of information that was the subject of a legal practitioner disclosure. That secrecy provision includes no harm requirement and is significantly broader than the general secrecy offence in s 122.4A of the Criminal Code as inserted in 2018.
70. In the circumstances, the Commission recommends that the requirement in s 26 for a legal practitioner disclosure to be limited to a security cleared lawyer should only apply if the information had a protective security classification of 'secret' or 'top secret'.

### **Recommendation 3**

The Commission recommends that item 4 in the table in s 26(1) of the PID Act be amended so that a legal practitioner disclosure is only required to be made to a lawyer with a relevant security clearance if the whistleblower knew, or ought reasonably to have known, that any of the information had a protective security classification of 'secret' or 'top secret'.

71. The Commission also considers that it is important for staff in the Australian Intelligence Community (AIC) to be able to access legal assistance in relation to the making of a public interest disclosure. At present, obtaining legal advice about the substance of the proposed disclosure may be effectively stymied in some cases because of the broad definition of 'intelligence information' and the exclusion of

intelligence information from the information that may be the subject of a legal practitioner disclosure.

72. 'Intelligence information' is defined in s 41 of the PID Act and includes 'information that originated with, or has been received from, an intelligence agency'. This is a particularly broad definition that focuses on the source of the information rather than the harm that may be caused if it were to be released. It is consistent with secrecy provisions that apply to staff of the AIC. The ALRC Secrecy Report concluded that these kinds of secrecy provisions were justified by the sensitive nature of the information and the special duties and responsibilities of officers and others who work in and with such agencies.<sup>47</sup> An important factor in reaching that conclusion was the oversight provided by the IGIS and the then proposed whistleblower laws.<sup>48</sup>
73. Under the PID Act, intelligence information may only be disclosed as part of an internal disclosure to the relevant intelligence agency or to the IGIS. Few such reports are made, but those that are made have the potential to be particularly important. In 2021–22 the IGIS reported that it had received 10 disclosures relating to intelligence agencies. Four of those were allocated to intelligence agencies for investigation and three of the remaining six were investigated by the IGIS either under the PID Act or under the *Inspector-General of Intelligence and Security Act 1986* (Cth).<sup>49</sup>
74. In its submission to the Moss Review, the IGIS recognised that in some cases a disclosure by an AIC agency 'necessarily involves the communication of intelligence information'.<sup>50</sup> In those circumstances, the restrictions in the PID Act mean that the officer would not be able to obtain legal advice in relation to the substance of the disclosure, regardless of the security clearance of any lawyer. The Commission considers that this is undesirable and has the potential to limit the willingness of AIC staff to make a disclosure. It may be that in responding to recommendation 2 above, the Government can also identify a subset of lawyers who are able to provide legal advice to AIC staff about a potential internal disclosure that includes intelligence information.

#### **Recommendation 4**

The Commission recommends that the Government consider an appropriate mechanism to ensure that staff within the Australian Intelligence Community can access legal advice about the potential to

make an internal disclosure under the PID Act that includes intelligence information.

(b) *Secrecy offence applicable to lawyers*

75. As noted above, s 67 of the PID Act provides that if a lawyer has received a legal practitioner disclosure and the person discloses the information to another person or uses the information, the lawyer commits an offence punishable by up to 2 years imprisonment or a penalty of up to \$33,000 or both. This provision is significantly broader than the general secrecy provision in s 122.4A of the Criminal Code, for people who are not Commonwealth officers, in that it applies regardless of any harm that might be caused by disclosure. As a result, s 67 is contrary to the recommendations made by the ALRC Secrecy Report.<sup>51</sup> By contrast, s 122.4A prohibits further communication or dealing with information received from a Commonwealth officer (unless a defence in s 122.5 applies) if:
- the information has a security classification of ‘secret’ or ‘top secret’
  - the communication of, or dealing with, the information:
    - damages the security or defence of Australia
    - interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth
    - harms or prejudices the health or safety of the Australian public or a section of the Australian public.
76. It may be that the specific secrecy offence in s 67 of the PID Act is required to be broader than the general secrecy offence in s 122.5 of the Criminal Code because a legal practitioner disclosure *may* include information the communication of which would otherwise be prohibited by another secrecy provision applying to the whistleblower. This means that the lawyer may receive information that, under ordinary circumstances, the whistleblower would not be authorised to disclose. However, in prohibiting the further disclosure or use of *any* information disclosed to the lawyer, s 67 goes further than is necessary to protect legitimately confidential information.
77. The Commission considers that s 67 should be amended in a way that is consistent with recommendation 8-2 of the ALRC Secrecy Report

(including, if necessary, a prohibition on the further disclosure of intelligence information).

### **Recommendation 5**

The Commission recommends that the offence provision in s 67 of the PID Act applying to legal practitioners be amended so that it is limited to a disclosure or use of information that caused, or was likely or intended to cause, harm to an identified essential public interest, or disclosure of narrow categories of information where harm to an essential public interest is implicit.

#### *(c) Obtaining advice from other professionals*

78. Recommendation 25 of the Moss Review was that the class of people to whom disclosures could be made should be expanded to allow a whistleblower to seek 'professional advice' about using the PID Act. The Moss Review had in mind disclosures to unions, employee assistance programs and professional associations.<sup>52</sup> According to submissions and survey responses to the Moss Review, people who made a public interest disclosure reported long-term health and career effects because they reported wrongdoing.<sup>53</sup> These are the kinds of impacts that an individual may legitimately seek to mitigate through expert advice and assistance.
79. In December 2020, the then Government said that it agreed with this recommendation in part, but considered that obtaining assistance from a lawyer, the Commonwealth Ombudsman or the IGIS was sufficient.<sup>54</sup>
80. The Commission considers that there is merit in expanding the range of assistance available to potential and actual whistleblowers, given the different types of professional expertise and assistance that can usefully be offered by people who are not lawyers. For example, the Moss Review noted the important role played by unions in advising workers on work, health and safety matters (recognised in the *Work Health and Safety Act 2011* (Cth)).<sup>55</sup> Similarly, employee assistance programs typically provide free, confidential and professional counselling services for public sector employees, and are an important aspect of addressing mental health concerns in the workplace.
81. In addition to any confidentiality requirements that apply to those advisory relationships, the information contained in a disclosure to



such advisers would continue to be protected by the general secrecy provision in s 122.4A of the Criminal Code referred to above.

82. If there is a need to retain a specific secrecy offence in s 67 in relation to lawyers (bearing in mind recommendation 5 above), then that secrecy offence could also be extended to those professionals providing additional assistance to whistleblowers.

### **Recommendation 6**

The Commission recommends that item 4 in the table in s 26(1) of the PID Act be amended to permit a whistleblower to make a disclosure to other relevant advisers, including a union or a person providing an employee assistance program, for the purpose of obtaining advice and assistance in relation to making or having made a public interest disclosure.

## **7.4 Limiting discretion not to investigate**

83. In accordance with recommendations of the Moss Review, the Bill proposes to make a series of amendments designed to provide a stronger focus on disclosures relating to significant wrongdoing. This includes excluding personal employment related conduct from the definition of ‘disclosable conduct’,<sup>56</sup> and permitting a relevant officer not to allocate a disclosure for investigation, or not to investigate or further investigate a disclosure, if the conduct disclosed would be more appropriately investigated under another law or power (see [36]–[37] above).<sup>57</sup>
84. This new ground for deciding not to investigate under the PID Act comes with safeguards to ensure, to the extent possible, that the disclosure is appropriately investigated elsewhere. If an officer decides not to allocate or not to investigate a disclosure because it could be more appropriately investigated under another law or power, the relevant officer would have an obligation to refer the conduct for investigation under that other law or power.<sup>58</sup>
85. This narrowing of the scheme to focus on more significant conduct, and the ability to refer disclosures to other complaint handling mechanisms, raises the question of whether s 48(1)(c) of the PID Act should now be repealed.
86. Section 48(1)(c) currently provides the principal officer of an agency to which a disclosure has been allocated with a discretion *not* to

investigate the disclosure, if ‘the information does not, to any extent, concern *serious* disclosable conduct’ (emphasis added). In the Commission’s view, this ground should be repealed.

87. By the time that the principal officer of an agency comes to exercise the discretion in s 48 of the PID Act, the disclosure must already have been allocated to the agency under s 43. As a result, an authorised officer will already have been satisfied that the criterion for an internal disclosure in s 26 has been met. That is, the officer will be satisfied that the information tends to show, or the whistleblower believes on reasonable grounds that the information tends to show, one or more instances of disclosable conduct. Further, some or all of the disclosable conduct must relate to the agency to which it is allocated.<sup>59</sup>
88. The discretion given to the principal officer under s 48(1)(c) is therefore to decline to investigate disclosable conduct because of a view formed by that officer (the principal officer of the agency in respect of which the disclosable conduct relates) that the conduct is not sufficiently serious to warrant investigation. In the Commission’s view, such a provision is problematic, because it invites the officer to engage in a value judgement about whether or not a public interest disclosure is worthy of investigation. The merits of such judgements are not further reviewable. In addition, unlike a decision made under the new s 48(1)(ga), if a decision is made under s 48(1)(c), there is no obligation on the agency to refer the disclosure for consideration under a different process. The whistleblower, having made a disclosure that meets the initial criteria for internal investigation, could be left with nowhere to go.
89. This issue was addressed in a submission to the Moss Review by Professor AJ Brown, who said:

This discretion [under s 48(1)(c)] had some utility when the overall definition of disclosable conduct was cast too wide, as above – and there was justification for a mechanism for filtering out disclosures about APS Code breaches that were not sufficiently serious to warrant the application of the PID Act. Apart from that purpose, however, paragraph (c) has the potential to defeat the purpose of the Act, especially as it allows for qualifications to be placed on which disclosures will be dealt with (‘serious’) which is not present or defined anywhere else in the Act.<sup>60</sup>
90. The Moss Review considered this submission but did not make a recommendation for change, noting that over the first two years of

operation of the PID Act there was no evidence that the power had been misused by agencies. It suggested that the operation of this provision be considered in future reviews.<sup>61</sup>

91. The annual reports by the Ombudsman indicate that s 48(1)(c) is now regularly one of the most common grounds for declining to investigate a disclosure. Between 2014–15 and 2020–21, 25% to 50% of disclosures that agencies declined to investigate were declined on this ground. By contrast, agencies have rarely used the existing ground in s 48(1)(d): that the disclosure was frivolous or vexatious. The highest reported figure for frivolous or vexatious disclosures was in 2016–17 when 6% of disclosures were declined on this ground. The ground has not been used at all in the past three years.
92. Following the amendments in the Bill, it can be expected that there will be fewer disclosures that require the application of the discretion in s 48 at all, and that of those cases that remain, there will be an increase in referrals to other mechanisms if it appears that the scheme under the PID Act is not the appropriate way to deal with the disclosure. Further, s 48(1)(d) of the PID Act provides a backstop for complaints that are truly unmeritorious.
93. The Commission agrees with the submission of Professor Brown. In light of the other amendments in the Bill, s 48(1)(c) is now no longer necessary and has the potential to undermine an important aspect of the PID Act, and public perceptions of the regime, by allowing agencies to hold that complaints about their own conduct are not sufficiently serious to justify investigation.

#### **Recommendation 7**

The Commission recommends that s 48(1)(c) of the PID Act be repealed.

### **7.5 Application of PID Act to parliamentary staff**

94. The House of Representatives Committee that proposed the whistleblower protection scheme for the public sector in 2009 recommended that it include disclosures by parliamentary staff.<sup>62</sup> However, this recommendation was not accepted by the then Government and did not form part of the PID Act when it was first passed.<sup>63</sup>

95. A disclosure by parliamentary staff need not relate to conduct by a parliamentarian and could relate to conduct by any agency in the public service. As noted in the House of Representatives report in 2009, staff employed under the *Members of Parliament (Staff) Act 1984* (Cth) (MoP(S) Act) 'may have "insider" access to information, be in a position to observe serious conduct contrary to the public interest and face risks of reprisal for speaking out'.<sup>64</sup>
96. In November 2021, the Commission provided the then Attorney-General, Senator the Hon Michaelia Cash, with a report of its review into Commonwealth Parliamentary Workplaces, *Set the Standard*.<sup>65</sup> One of the recommendations of the *Set the Standard* report was that parliamentary staff employed under the (MoP(S) Act) should be included as 'public officials' in s 69 of the PID Act and be permitted to make public interest disclosures. This recommendation reflected recommendation 27 of the Moss Review.
97. Recommendation 26 of the Moss Review was that the PID Act be amended 'to clarify that its provisions do not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them'. The Bill would implement this recommendation. However, it is important to understand the context in which both this recommendation and recommendation 27 were made. The Moss Review considered that wrongdoing by or about members of Parliament or their staff should be scrutinised by Parliament itself.<sup>66</sup> It noted the absence of 'an independent body outside or within the Parliament' responsible for investigating the conduct of parliamentarians and their staff and was concerned about requiring politicians to investigate disclosures.<sup>67</sup>
98. Significantly, the Moss Review concluded:

If an independent body is created with the power to scrutinise alleged wrongdoing by members of Parliament or their staff, such as a comprehensive federal integrity body, the Review recommends that consideration be given to extending the application of the PID Act to these groups.
99. The recommendation by the Commission in *Set the Standard* was made in the context of also recommending the establishment of an Independent Parliamentary Standards Commission (IPSC). The report considered how such a body could be integrated into the regime in the PID Act:

The IPSC (and, in the future, any Commonwealth Integrity Commission which may be established) should be made authorised recipients of disclosures by parliamentarians' staff.<sup>68</sup>

100. The recommendation of the Commission in *Set the Standard* took into account and reflected the conditions precedent identified by the Moss Review for making MoP(S) Act staff subject to the PID Act. The present Bill contains schedules of amendments that are contingent on the coming into effect of the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) and the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022* (Cth) (together, the NACC legislation). It would clearly be possible to tie coverage of MoP(S) Act staff under the PID Act to the commencement of the NACC legislation.
101. The Explanatory Memorandum for the present Bill notes that MoP(S) Act staff will have access to protections against reprisal and detriment for making a disclosure of corruption issues to the NACC. It also notes that the Government will consider further protections for MoP(s) Act staff who report misconduct in the context of implementing the recommendations of the *Set the Standard* report and the establishment of the IPSC.<sup>69</sup> This point was also emphasised by the Attorney-General in his second reading speech.<sup>70</sup>
102. The Commission welcomed the NACC legislation, including the protections afforded to people who make relevant disclosures about corruption issues.<sup>71</sup> It appears that there are significant similarities with the protections under the PID Act (as amended by the present Bill) and the NACC Act (as amended by the present Bill) as set out in the following table.

Provision	PID Act	NACC Act
Protection for whistleblowers against civil, criminal or administrative liability (including defamation) and contractual remedies for making the disclosure	s 10	s 24
Protection for witnesses against civil, criminal or administrative liability (including defamation) and contractual remedies for providing assistance in relation to the disclosure	s 12A	s 24

Civil liability for taking reprisals against whistleblowers or witnesses	ss 13–18 and 19A	N/A
Criminal offence to take reprisals against whistleblowers or witnesses	ss 13 and 19	ss 29–30
Protection of the identity of whistleblowers	ss 20–21	ss 227–228

103. However, the scope of protected disclosures that may be made under the PID Act is broader than protected disclosures that may be made under the NACC Act. The NACC Act is focused on ‘corrupt conduct’, which is defined in s 8 to mean:
- (a) any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly:
    - (i) the honest or impartial exercise of any public official’s powers as a public official; or
    - (ii) the honest or impartial performance of any public official’s functions or duties as a public official;
  - (b) any conduct of a public official that constitutes or involves a breach of public trust;
  - (c) any conduct of a public official that constitutes, involves or is engaged in for the purpose of abuse of the person’s office as a public official;
  - (d) any conduct of a public official, or former public official, that constitutes or involves the misuse of information or documents acquired in the person’s capacity as a public official.
104. These elements of corrupt conduct are likely to overlap with some items of disclosable conduct in the table in s 29(1) of the PID Act, including unlawful conduct (items 1 and 2), conduct that involves corruption or perverting the course of justice (item 3), conduct that constitutes intentional maladministration (item 4(a)) and conduct that is an abuse of public trust (item 5). However, other elements of disclosable conduct in s 29 of the PID Act would not or would be unlikely to come within the definition of corrupt conduct. These include negligent maladministration (item 4(c)), conduct that results in the wastage of public money or property (item 7), conduct that

unreasonably results in a danger to the health and safety of one or more persons (item 8) and conduct that results in a danger to the environment (item 9).

105. The inclusion of MoP(S) Act staff within the scheme of the PID Act would ensure that they would be protected in relation to disclosures about these issues. Significantly, there are already provisions in the PID Act that would prevent parliamentary staff from making disclosures only in relation to political decisions that they may disagree with. Conduct that relates only to a Commonwealth policy, or action by a Minister, or money expended for either purpose, with which the person disagrees, is not disclosable conduct.<sup>72</sup>
106. There do not appear to be any compelling legal reasons why MoP(S) Act staff could not be included within the scheme of the PID Act. The Commission notes the submission from the Clerk of the Senate to the PJCCFS Whistleblower inquiry that: 'there is no obstacle to including, in a properly-designed scheme, mechanisms for disclosures about, by or to members (or their staff), provided the distinction between privilege and the whistleblower protection regime is maintained'.<sup>73</sup>
107. The Commission maintains that now that there is at least one independent body with the power to scrutinise members of Parliament or their staff, it is appropriate for MoP(S) Act staff to have the protection of the PID Act. Further, the unique position of MoP(S) Act staff means that they should also have the protection of the PID Act for making disclosures in relation to conduct in other parts of the public service.

### **Recommendation 8**

The Commission recommends that people employed under the *Members of Parliament (Staff) Act 1984* (Cth) be included within the definition of 'public officials' in the PID Act.

## **7.6 Improving the ability to make public disclosures**

108. As noted in paragraph 28(b) above, there are limited circumstances in which an external disclosure is permitted. In this submission, the Commission suggests two additional instances where an external disclosure should be permitted, to improve the transparency of the system and encourage prompt investigation of complaints.

(a) *Failures during an internal investigation*

109. Recommendation 9 of the Moss Review was that an external disclosure be permitted if an authorised officer failed to allocate an internal disclosure or a supervisor failed to report information they received about disclosable conduct to an authorised officer. The Moss Review considered that the failure by an agency or supervisor to comply with these process requirements of the PID Act would be a threat to the integrity of the scheme.<sup>74</sup> It considered that the approach of permitting an external disclosure in these circumstances (provided the other requirements of an external disclosure were met) would be consistent with the existing grounds permitting an external disclosure based on agencies' failure to conduct an adequate or timely investigation, or to adequately respond to the findings of an investigation.<sup>75</sup>
110. In December 2020, the then Government agreed with this recommendation in principle and said that the issue would be considered as part of a review of the effectiveness of the external disclosure provisions.<sup>76</sup>
111. Supervisors and authorised officers have different responsibilities under the PID Act. A disclosure may be made either to a supervisor or to an authorised officer of an agency.
112. Under amendments proposed in the Bill, if a supervisor receives a disclosure, they have an obligation to explain certain matters to the whistleblower about the operation of the PID Act, and to give the information disclosed to an authorised officer 'as soon as reasonably practicable' after the disclosure is made.<sup>77</sup>
113. Under amendments proposed in the Bill, an authorised officer must either allocate the disclosure to an agency or decide not to allocate the disclosure to an agency.<sup>78</sup> The authorised officer must use their best endeavours to make a decision about allocation within 14 days of the day the disclosure is given to the authorised officer, or of the day a recommendation is received from the Ombudsman or the IGIS about reallocation of the disclosure.<sup>79</sup>
114. In the Commission's view, there are some aspects of the scheme that mean that it may be inappropriate to permit an external disclosure merely because of a failure by a supervisor to refer a disclosure to an authorised officer. In particular:



- a public interest disclosure may be made without the whistleblower asserting that the disclosure is made for the purposes of the PID Act<sup>80</sup>
  - many agencies receive few or no disclosures a year and so staff have little direct experience with the operation of the PID Act, including identifying disclosures<sup>81</sup>
  - agencies told the Moss Review that during the first two years of the operation of the PID Act, supervisors often did not understand or comply with the obligation to refer matters to an authorised officer.<sup>82</sup>
115. Ultimately, if a whistleblower was dissatisfied with a supervisor's failure to give the information disclosed to an authorised officer, it would be open to the whistleblower to give the information to an authorised officer directly.
116. However, the situation is different in relation to the obligations of an authorised officer. Authorised officers are appointed in writing to a position that carries with it specific duties.<sup>83</sup> Under amendments contained in the Bill, principal officers of an agency must ensure that their staff are aware of the identity of each authorised officer,<sup>84</sup> and must provide appropriate training to authorised officers.<sup>85</sup> It is not open to a whistleblower to allocate their own complaint to an agency for investigation. The failure by an authorised officer to do so has the real potential to delay or frustrate the conduct of an investigation.
117. While a whistleblower could make a disclosure directly to the Ombudsman,<sup>86</sup> the Ombudsman discourages this. On its website, the Ombudsman says:
- It is best to make a disclosure with the relevant Australian Government agency.
- If you believe that it is not appropriate for an agency to handle a disclosure, we can receive a PID.
- Where we do accept a PID, we will work with the discloser and the agency to give that matter back to the agency for investigation.<sup>87</sup>
118. The Commission considers that a refusal or failure by an authorised officer to either allocate an internal disclosure or decide not to allocate an internal disclosure under proposed ss 43(3) and (11) should give rise to an ability on the part of the whistleblower to make an external

disclosure, provided that the other criteria for making an external disclosure are also met.

119. This would provide an additional incentive for those responsible for administering the PID Act, and who have had specific training in relation to these responsibilities, to make a decision in relation to allocation promptly.
120. The Commission notes that the 14 day deadline in proposed s 43(11) is a 'best endeavours' deadline. Further, proposed ss 44(4) and 44A(3) provide an obligation on the authorised officer to (if reasonably practicable) give a written notice to the whistleblower about the decision to allocate or not allocate the disclosure as soon as reasonably practicable after that decision is made. In light of these various obligations (and the obligation on supervisors to refer complaints to an authorised officer 'as soon as reasonably practicable'), the Commission considers that it would be reasonable to permit a whistleblower to make an external disclosure if:
- they have provided their name and contact details in connection with making the disclosure; and
  - they have not been provided with a notice under proposed ss 44(4) or 44A(3) within 28 days of making the disclosure.

### **Recommendation 9**

The Commission recommends that paragraph (c) in column 3 of item 2 in the table in s 26(1) of the PID Act be amended to provide that an external disclosure may be made if a whistleblower:

- has provided their name and contact details in connection with making the disclosure; and
- has not been provided with a notice under sections 44(4) or 44A(3) of the PID Act within 28 days of making the disclosure, confirming that a decision about the allocation of their disclosure has been made.

#### *(b) Delay in investigation*

121. The PID Act currently provides that an external disclosure may be made if:
- an internal investigation has been completed, and the whistleblower believes on reasonable grounds that either the

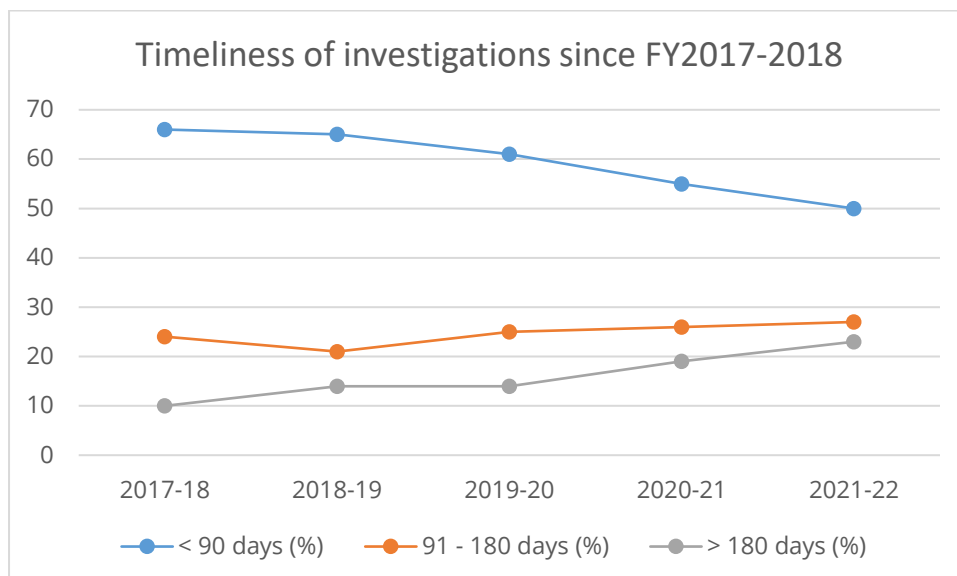
investigation or the response to the investigation was inadequate;  
 or

- the investigation has not been completed within the time limit under s 52.

122. However, the time limit under s 52 is not a fixed limit. The section provides that an investigation must be completed within 90 days, but then also provides for the 90 day period to be extended by either the Ombudsman or the IGIS (as appropriate). There is no limit to the number of extensions that may be granted and there is no limit to the length of any individual extension.

123. In practice, it appears that extensions are regularly granted. The annual reports of the Ombudsman since 2015–16 include data about the number of extensions of time granted under the PID Act. Since that time, there have been 1,099 requests for an extension, of which 1,049 were granted and 50 were either refused or withdrawn prior to a decision being made. The proportion of extension requests granted is greater than 95%.

124. The annual reports of the Ombudsman show that in the 2015–16 and 2016–17 years, the proportion of investigations completed within 90 days was 82% and 85% respectively. Since then, that figure has steadily declined each year. From the 2017–18 annual report, the Ombudsman has reported on the proportion of investigations completed within 90 days, between 91 and 180 days, and in more than 180 days. These figures are set out in the following table.



Source: Ombudsman annual reports.

125. Now, only half of all investigations are completed within the initial 90 day period prescribed by the PID Act. In its 2021–22 annual report, the Ombudsman recorded that 23% of investigations took longer than 180 days to complete. The report does not indicate how long the longest investigations took to resolve.
126. Amendments proposed in the Bill will provide some additional transparency around the length of time taken for investigations by allowing for a comparison of timeliness between agencies. In its annual reports, the Ombudsman will be required to report on the number of disclosures allocated to each agency during the financial year, and the time taken to conduct those disclosure investigations.<sup>88</sup>
127. The provisions in the PID Act relating to external disclosure stand in contrast to the equivalent provision in the *Corporations Act 2001* (Cth), which permits a whistleblower in the private sector to make a public interest disclosure if at least 90 days have passed since the original disclosure and the whistleblower does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the disclosure related.<sup>89</sup>
128. The Commission is concerned that there are no real effective time limits for investigation under the PID Act and that, in practice, an external disclosure would not be permitted until an investigation, including any extensions sought by an agency, is completed. Consistently with recommendation 8 of the Moss Review, the Commission considers that setting effective time limits, after which an external disclosure may be made, would be likely to lead to improved efficiency in the internal investigation process.
129. The Commission considers that this would also be consistent with recommendation 3.1 of the PJCCFS Whistleblower Report and recommendation 9 of the PJCIS Press Freedom Report, each of which encouraged the Government to examine options for ensuring ongoing alignment between the public and private sector whistleblower protections. The Commission has also had regard to recommendation 8.5 of the PJCCFS Whistleblower Report which called for a simplification of the existing whistleblower protections for external disclosures under the PID Act, including a more objective test.

### **Recommendation 10**

The Commission recommends that paragraph (c) in column 3 of item 2 in the table in s 26(1) of the PID Act be amended to provide that a

whistleblower may make an external disclosure if an internal investigation has not been completed within 90 days.

## Endnotes

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- <sup>1</sup> Moss Review, at [33].
- <sup>2</sup> Ombudsman Annual Reports from 2016–17 to 2021–22.
- <sup>3</sup> Moss Review, at [5]–[6], [22]–[23], [30].
- <sup>4</sup> *Comcare v Banerji* (2019) 267 CLR 373 at [34].
- <sup>5</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009).
- <sup>6</sup> *United Nations Convention against Corruption*, opened for signature 31 October 2003, UN Doc A/RES/58/4 (entered into force 14 December 2005).
- <sup>7</sup> PID Act, s 10.
- <sup>8</sup> PID Act, s 12.
- <sup>9</sup> PID Act, ss 13–19A.
- <sup>10</sup> PID Act, s 29.
- <sup>11</sup> PID Act, ss 31–32.
- <sup>12</sup> PID Act, s 43.
- <sup>13</sup> PID Act, s 48.
- <sup>14</sup> PID Act, s 52.
- <sup>15</sup> PID Act, s 51.
- <sup>16</sup> PID Act, s 59(4).
- <sup>17</sup> *Corporations Act 2001* (Cth), Part 9.4AAA, substantially amended by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). This amendment consolidated previous regimes found in the *Banking Act 1959* (Cth), *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth) and *Superannuation Industry (Supervision) Act 1993* (Cth).
- <sup>18</sup> *Taxation Administration Act 1953* (Cth), Part IVD.
- <sup>19</sup> Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (15 July 2016).
- <sup>20</sup> Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020.
- <sup>21</sup> Moss Review, at [67].
- <sup>22</sup> *Corporations Act 2001* (Cth), s 1317AADA.
- <sup>23</sup> Moss Review, at [119].
- <sup>24</sup> UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34, (12 September 2011) [30].
- <sup>25</sup> ALRC Secrecy Report, p 5.
- <sup>26</sup> ALRC Secrecy Report, p 22.
- <sup>27</sup> *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth).
- <sup>28</sup> Criminal Code (Cth), s 122.2.
- <sup>29</sup> Criminal Code (Cth), s 122.5(6).
- <sup>30</sup> Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report*, Report 3 of 2018, pp 213–236.
- <sup>31</sup> *Independent National Security Legislation Monitor Act 2010* (Cth), s 6(1B)(c). The review of Part 5.6 was to commence as soon as practicable after 29 June 2021.
- <sup>32</sup> Attorney-General's Department, *Terms of Reference – Review of Secrecy Provisions*, at <https://www.ag.gov.au/crime/publications/terms-reference-review-secrecy-provisions>.

- <sup>33</sup> Australia, *Parliamentary Debates*, House of Representatives, 30 November 2022, p 76 (Attorney-General and Cabinet Secretary, the Hon Mark Dreyfus MP).
- <sup>34</sup> The Hon Mark Dreyfus KC MP, 'Review of Commonwealth secrecy offences', *Media release*, 22 December 2022, at <https://ministers.ag.gov.au/media-centre/review-commonwealth-secrecy-offences-22-12-2022>.
- <sup>35</sup> Attorney-General's Department, *Terms of Reference – Review of Secrecy Provisions*, at <https://www.ag.gov.au/crime/publications/terms-reference-review-secrecy-provisions>.
- <sup>36</sup> PJCCFS Whistleblower Report, chapter 12.
- <sup>37</sup> Moss Report, at [47]–[53].
- <sup>38</sup> PID Act, s 8 (definition of 'investigative agency').
- <sup>39</sup> Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, p 6.
- <sup>40</sup> Public Interest Disclosure Rules 2019 (Cth).
- <sup>41</sup> PID Act, s 26(1), item 4 of the table dealing with a 'legal practitioner disclosure'.
- <sup>42</sup> Moss Review, at [142].
- <sup>43</sup> Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, p 16.
- <sup>44</sup> Attorney-General's Department, *Protective Security and Policy Framework, Policy 8: Sensitive and classified information*, at <https://www.protectivesecurity.gov.au/publications-library/policy-8-sensitive-and-classified-information>.
- <sup>45</sup> PJCIS, Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, (2018) at [3.110]ff. See also ALRC Secrecy Report at [8.51] and reports cited in that paragraph.
- <sup>46</sup> Letter from the Attorney-General the Hon Christian Porter MP to the Chair of the Parliamentary Joint Committee on Intelligence and Security Mr Andrew Hastie MP (undated), at <https://www.aph.gov.au/DocumentStore.ashx?id=0efb0f22-249e-44c2-9638-734eecd8c0a&subId=564119>.
- <sup>47</sup> ALRC Secrecy Report, at [8.33]–[8.72], [8.144].
- <sup>48</sup> ALRC Secrecy Report, at [8.67]–[8.68].
- <sup>49</sup> Inspector General of Intelligence and Security, *Annual Report 2021-22*, p 105.
- <sup>50</sup> Inspector General of Intelligence and Security, *Submission to the Moss Review of the PID Act*, March 2016, p 4, at <https://webarchive.nla.gov.au/awa/20160615184146/https://www.dpmc.gov.au/government/legislation-review/statutory-review-public-interest-disclosure-act-2013>.
- <sup>51</sup> ALRC Secrecy Report, recommendations 5-1 and 8-2.
- <sup>52</sup> Moss Review, at [145].
- <sup>53</sup> Moss Review, at [22].
- <sup>54</sup> Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, pp 16–17.
- <sup>55</sup> *Work Health and Safety Act 2011* (Cth), s 121.
- <sup>56</sup> Bill, Schedule 1, Part 1.
- <sup>57</sup> Bill, Schedule 1, Part 2.
- <sup>58</sup> Bill, Schedule 1, Part 2, item 25, proposed s 50AA.
- <sup>59</sup> PID Act, s 43(3)(a)(i); see also Bill, Schedule 1, Part 2, item 11, proposed s 43(5)(a)(i).

- <sup>60</sup> Submission (number 10) of Prof AJ Brown to the Moss Review, dated 6 May 2016, pp 2–3, at <https://webarchive.nla.gov.au/awa/20160615184146/https://www.dpmc.gov.au/government/legislation-review/statutory-review-public-interest-disclosure-act-2013>.
- <sup>61</sup> Moss Review, at [173].
- <sup>62</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* (2009), pp 45–48, at [https://www.aph.gov.au/Parliamentary\\_Business/Committees/House\\_of\\_Representatives\\_Committees?url=laca/whistleblowing/report/fullreport.pdf](https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/whistleblowing/report/fullreport.pdf).
- <sup>63</sup> Government Response, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* (2010), p 5.
- <sup>64</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* (2009), p 45.
- <sup>65</sup> Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (2021).
- <sup>66</sup> Moss Review, at [158].
- <sup>67</sup> Moss Review, at [161].
- <sup>68</sup> Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (2021), p 246.
- <sup>69</sup> Explanatory Memorandum, Public Interest Disclosure Amendment (Review) Bill 2022, p 12.
- <sup>70</sup> Australia, *Parliamentary Debates*, House of Representatives, 30 November 2022, p 75 (Attorney-General and Cabinet Secretary, the Hon Mark Dreyfus MP).
- <sup>71</sup> Australian Human Rights Commission, Submission to the Joint Select Committee on National Anti-Corruption Commission Legislation, 14 October 2022.
- <sup>72</sup> PID Act, s 31.
- <sup>73</sup> Letter from Mr Richard Pye, Clerk of the Senate, to Dr Patrick Hodder, Secretary of the Parliamentary Joint Committee on Corporation and Financial Services dated 21 June 2017, at <https://www.aph.gov.au/DocumentStore.ashx?id=bc814359-4016-4bec-9aa0-d290e9bd4853&subId=512273>.
- <sup>74</sup> Moss Review, at [90].
- <sup>75</sup> Moss Review, at [91].
- <sup>76</sup> Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, p 10.
- <sup>77</sup> Bill, Schedule 1, Part 3, item 59, proposed s 60A.
- <sup>78</sup> Bill, Schedule 1, Part 2, item 11, proposed s 43(3).
- <sup>79</sup> Bill, Schedule 1, Part 2, item 11, proposed s 43(11).
- <sup>80</sup> PID Act, s 28(3).
- <sup>81</sup> Moss Review, at [29].
- <sup>82</sup> Moss Review, at [30].
- <sup>83</sup> PID Act, s 36.
- <sup>84</sup> Bill, Schedule 1, Part 3, item 54, proposed s 59(1)(b).
- <sup>85</sup> Bill, Schedule 1, Part 3, item 54, proposed s 59(8).
- <sup>86</sup> PID Act, s 34, table, item 1, column 2, paragraph (c).



<sup>87</sup> Commonwealth Ombudsman, *Information for Disclosers*, at <https://www.ombudsman.gov.au/Our-responsibilities/making-a-disclosure/information-for-disclosers>.

<sup>88</sup> Bill, Schedule 1, Part 4, items 66 and 67, proposed ss 76(2)(a)(iia) and (iiaa).

<sup>89</sup> *Corporations Act 2001* (Cth), s 1317AAD.