

Public Interest Disclosure Amendment (Review) Bill 2022

Submission to the Senate Legal and Constitutional Affairs
Legislation Committee

19 January 2023

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal peoples of the Eora Nation.

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee') inquiry on the Public Interest Disclosure Amendment (Review) Bill 2022 ('the/this Bill').
2. The ALA strongly believes that the protection of whistleblowers is essential for promoting integrity, accountability and trust in both public and non-public institutions. Public sector whistleblowers perform an important function for the community, ensuring that public officials can truly be held to account if they are not operating within the confines of the law. Private sector and not-for-profit sector whistleblowers perform similarly significant functions in those respective domains.
3. Despite that, the victimisation of whistleblowers – including but not limited to the termination of their employment, reputational damage and even prosecution – too often follow the disclosures those whistleblowers have made.
4. Comprehensive protections for whistleblowers are thus essential to support whistleblowers, keep them safe, and honour their right to freedom of expression, as enshrined in international law through both the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*.²
5. However, the ALA contends that the current whistleblower protections framework, including the *Public Interest Disclosure Act 2013* (Cth) ('the PID Act'), is largely insecure and inconsistent. As a result, whistleblowers are not adequately protected and the Australian public's interest in having misconduct revealed is not being met.
6. The ALA welcomes many of the reforms proposed in this Bill as important first steps in reforming whistleblowing protections in Australia, something for which the ALA has long advocated. As the Federal Government has articulated, though, there is more work to do

² See: *Universal Declaration of Human Rights*, article 19; *International Covenant on Civil and Political Rights*, article 19(2).

in this space once the provisions in this Bill are addressed as priority in the lead up to the mid-2023 commencement of the National Anti-Corruption Commission (NACC).³

7. The ALA's submission will focus on:

- reforms detailed in this Bill to further support and protect whistleblowers, which could be greatly enhanced by the creation of a Whistleblower Protection Authority or Commissioner;
- the proposed amendment to exclude those employed under the *Members of Parliament (Staff) Act 1984* (Cth) from accessing whistleblower protections under the PID Act;
- the proposed amendment to remove personal work-related conduct from the scope of 'disclosable conduct'; and
- the urgent need to resolve inconsistencies within the broader whistleblower protections framework.

Supporting and protecting whistleblowers

8. The ALA contends that providing ample support and protections to whistleblowers must remain priority when reforming the relevant framework of laws and regulations, including the PID Act. This framework should provide whistleblowers with assistance, clarity and confidence.
9. However, as Philip Moss AM noted in his 2016 *Review of the Public Interest Disclosure Act 2013*:⁴

[F]ew respondents reported feeling well-supported or confident in their PIDs. Individuals who made a PID reported long-term health and career effects because they reported wrongdoing. In the submissions and online survey results, individuals who had made PID Act disclosure reported that, despite the protections in the legislation, they experienced reprisal and did not feel that they had their agencies' backing after making their disclosures. These personal stories were reflected in

³ Mark Dreyfus KC MP, Attorney-General, 'Public Interest Disclosure Reform' (Media Release, 30 November 2022) <<https://www.markdreyfus.com/media/media-releases/public-interest-disclosure-reform-mark-dreyfus-kc-mp>>.

⁴ Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Report, 15 July 2016) 17.

agencies' submissions that described similar effects on the disclosers. Often, these submissions questioned whether the PID Act's processes caused trauma for individual disclosers.

10. Legislative and regulatory reform, as well as a cultural shift in attitudes towards whistleblowers within federal agencies and institutions, are clearly needed to provide the intended support and protection to whistleblowers.
11. The ALA thus welcomes reforms to the PID Act proposed in this Bill to clarify access to legal advice by whistleblowers, as well as to facilitate an essential shift in the attitudes towards and the treatment of whistleblowers.
12. The ALA also supports further reform through the establishment of a Whistleblower Protection Authority or Commissioner.

Access to legal advice

13. The ALA welcomes the proposed addition of subsection (4) to section 20 of the PID Act, which is designed "to clarify instances in which using or disclosing identifying information is 'for the purpose' of the PID Act".⁵ The Bill makes it clear that this includes the provision of legal advice,⁶ to enable whistleblowers to seek legal advice in relation to a disclosure.⁷
14. Whistleblowers and their legal representatives should never have to contend with the possibility of being prosecuted and imprisoned – or face any other negative consequences – for seeking or providing legal advice relating to whistleblower public interest disclosures.
15. The ALA thus supports this amendment to the PID Act.

⁵ Explanatory Memorandum, Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) 9.

⁶ See: Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), proposed s 20(4)(b).

⁷ Explanatory Memorandum, Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) 10, 41.

Facilitating a shift in attitudes towards and treatment of whistleblowers

16. The ALA also welcomes reforms proposed in this Bill to create a positive duty on principal officers and supervisors to support whistleblowers through the disclosure process,⁸ as well as to create a requirement that principal officers provide ongoing training and education to public officials (including supervisors) about the PID Act and the functions and duties of those public officials detailed therein.⁹
17. The ALA believes these reforms are important steps in bringing about a change in what has all too often been identified as a hostile culture toward whistleblowers within some federal agencies and institutions. Whistleblowers perform a significant function within Australia's democracy and deserve to be properly supported and treated with respect, not derided or subject to retaliations.
18. Creating a positive duty to support whistleblowers, and also ensuring that public officials are well-versed and up-to-date on whistleblower protections and processes, are vital steps towards realising a tangible shift in attitudes towards and the treatment of whistleblowers across federal agencies and institutions.

Establishing a Whistleblower Protection Authority or Commissioner

19. When internal processes within federal agencies and institutions fail to protect whistleblowers, or when whistleblowers fall through the cracks of the insecure whistleblower protections framework, there is currently no independent source to whom whistleblowers can turn for support and protection.
20. The ALA thus supports calls for the establishment of a Whistleblower Protection Authority or a Whistleblower Protection Commissioner.
21. The merits of establishing a Whistleblower Protection Authority have been discussed at parliamentary inquiries since the 1990s.¹⁰ That includes in 2017, when the Parliamentary

⁸ See: Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), proposed ss 59(2) and 60A.

⁹ *Ibid*, proposed s 59(7).

¹⁰ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, 14 September 2017) 141.

Joint Committee on Corporations and Financial Services made several recommendations regarding the establishment of a Whistleblower Protection Authority to cover both public and non-public arenas.¹¹ More recently, a Whistleblower Protection Commissioner has been proposed.¹²

22. The ALA contends that additional reform to establish a Whistleblower Protection Authority or Commissioner also has the potential to significantly bolster transparency and accountability within federal institutions, aiding the restoration of Australians' trust in those institutions.

23. We note that in announcing the introduction of this Bill, the Federal Government has committed to "consult widely on whether there is a need to establish a Whistleblower Protection Authority or Commissioner".¹³ The ALA welcomes this commitment from the Federal Government and contends this must be treated as a priority matter.

24. The ALA urges the Committee to recommend that the Federal Government consult on and propose reforms for a Whistleblower Protection Authority or Commissioner in the first half of this year.

Excluding those employed under the *Members of Parliament (Staff) Act 1984 (Cth)*

25. The ALA is concerned by the proposed amendment to section 69(4) of the PID Act to exclude people employed under the *Members of Parliament (Staff) Act 1984 (Cth)* ('MoP(s) Act') from accessing whistleblower protections under the PID Act.¹⁴

¹¹ Ibid 158–163.

¹² Australian Federal Integrity Commission Bill 2021 (Cth) div 2, cl 17.

¹³ Mark Dreyfus KC MP, Attorney-General, 'Public Interest Disclosure Reform' (Media Release, 30 November 2022).

¹⁴ See: Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), sch 1 item 88.

26. This would mean that a significant cohort of government employees, namely parliamentarians and their staff members, would not be able to access protections under the PID Act, including protection from reprisal actions.

27. The justifications offered for this amendment are that:¹⁵

- the PID Act is not suitable for application to parliamentarians and their staff members, “as it would not be clear upon whom the obligation to investigate disclosures would be bestowed, and it would impose a bureaucratic process upon political roles”;
- instead, Parliament should scrutinise any wrongdoing, and MoP(S) Act staff will be protected through the National Anti-Corruption Commission regarding corruption disclosures; and
- the Federal Government “will consider further protections for MoP(S) Act staff who report misconduct”, including the establishment of the Independent Parliamentary Standards Commission.

28. The ALA acknowledges concerns about the suitability of applying the PID Act, including the investigative and bureaucratic processes enshrined therein, to parliamentarians and their staff members.

29. However, removing MoP(S) Act staff entirely from the purview of the PID Act should not be actioned until there is a comprehensive, alternative process in place – within the PID Act or elsewhere – for protecting MoP(S) Act staff whistleblowers. These whistleblowers deserve access to adequate support and PID Act protections as an important (albeit limited) safety net in the meantime.

30. Further, relying on protections being afforded to parliamentarians and their staff members through the NACC will be effective only to the extent that disclosures are focused on matters of corruption. Whistleblowers who make disclosures on other matters will be left without adequate or accessible protections.

¹⁵ Explanatory Memorandum, Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) 12.

31. The ALA, therefore, recommends that the Federal Government urgently establishes alternative processes or structures that afford protection to whistleblowers who are classified as MoP(S) Act staff *before* those parliamentarians and their staff members are denied access to any and all protections under the PID Act as per this proposed amendment.

Removing personal work-related conduct from the scope of disclosable conduct

32. The Bill proposes amendments to remove personal work-related conduct from the scope of disclosable conduct in the PID Act.¹⁶

33. The ALA agrees that disclosures through the PID Act, and the processes that those disclosures trigger, should not be used to air certain personal workplace grievances.

34. However, the examples of “personal work-related conduct” provided in the Bill in the proposed section 29A include illegal conduct like harassment.¹⁷ Such conduct is explicitly considered ‘disclosable conduct’ under the PID Act in its current form,¹⁸ which this amendment risks confusing.

35. The ALA contends that such serious and illegal misconduct should unequivocally remain disclosable conduct for the purposes of the PID Act, so that whistleblowers can benefit from the PID Act processes and protections.

36. As such, the ALA recommends that this provision be reviewed to ensure the amendment is clear about the nature of personal work-related conduct, especially illegal conduct like harassment, and what effect that has on what is classified as disclosable conduct for PID Act purposes.

¹⁶ Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) sch 1 part 1.

¹⁷ Ibid.

¹⁸ *Public Interest Disclosure Act 2013* (Cth) s 25.

Resolving inconsistencies within the whistleblower protections framework

37. The ALA welcomes proposed changes outlined in this Bill which resolve some inconsistencies between the PID Act and other pieces of legislation, including the *National Anti-Corruption Commission Act 2022* (Cth) and the *Corporations Act 2001* (Cth).
38. However, issues remain with the limited and patchy protections afforded to non-public sector whistleblowers – namely, private sector whistleblowers and not-for-profit sector whistleblowers – in the broader whistleblower protections framework.
39. There is currently no comprehensive scheme for supporting and protecting non-public sector whistleblowers. Some protections come from the *Corporations Act 2001* (Cth), while other additional legislative instruments provide limited and inconsistent protections to some (but not all) non-public sector whistleblowers.¹⁹
40. In 2017, the aforementioned Parliamentary Joint Committee on Corporations and Financial Services recommended that a single Act be created to cover non-public sector whistleblowers.²⁰
41. The ALA strongly supports the consolidation and enhancement of protections non-public sector whistleblowers in one piece of legislation.
42. The ALA contends it is essential that inconsistencies regarding non-public sector whistleblower protections are resolved before the NACC commences in mid-2023. After all, the investigative scope of the NACC will cover corrupt conduct by “any person that adversely affects the honest or impartial exercise of a public official’s functions or duties”.²¹ That would include individuals or companies from private and not-for-profit sectors contracted to provide services for the Federal Government.

¹⁹ See, eg: A J Brown and Kieran Pender, *Protecting Australia’s Whistleblowers: The Federal Roadmap* (Report, 2022) 9 <<https://www.hrlc.org.au/news/2022/11/23/whistleblower-roadmap>>.

²⁰ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, September 2017) 41.

²¹ Attorney-General’s Department, Australian Government, ‘Overview of the NACC’, *NACC publications* (Web Page, 19 December 2022) <<https://www.ag.gov.au/integrity/publications/nacc-publications>>. See also: *National Anti-Corruption Commission Act 2022* (Cth) ss 8 and 10.

Conclusion

43. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Senate Legal and Constitutional Affairs Legislation Committee's inquiry on the Public Interest Disclosure Amendment (Review) Bill 2022.

44. The ALA is available to provide further assistance to the Committee, and we also refer the Committee to a number of additional reform opportunities detailed in A J Brown and Kieran Pender's 2022 report entitled *Protecting Australia's Whistleblowers: The Federal Roadmap*.²²

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²² A J Brown and Kieran Pender, *Protecting Australia's Whistleblowers: The Federal Roadmap* (Report, 2022) <<https://www.hrlc.org.au/news/2022/11/23/whistleblower-roadmap>>.