

IBAC Submissions to Committee on the Public Interest Disclosure Amendment (Review) Bill

Overview

The Public Interest Disclosure Amendment (Review) Bill (the Bill) primarily implements the recommendations of the 2016 *Review of the Public Interest Disclosure Act 2013* by Mr Philip Moss AM (**Moss Review**) as well as other important recommendations.¹

The IBAC notes the effect of this Bill expands the protections afforded to Disclosers; allows for greater flexibility in the handling of disclosures; and assures agencies they may address particularly adverse claims in circumstances where the Discloser has acted inconsistent with their identity being kept confidential.

These changes are commendable and ought to serve to create a more robust public interest disclosure scheme. However, in light of these proposed amendments, the IBAC makes two submissions for the Committee's consideration.

The removal of Members of Parliament and their staff from the definition of 'Public Official'

The PID Bill proposes to explicitly remove members of parliament (**Members**) and persons employed or engaged under the *Members of Parliament (Staff) Act 1984 (MoP Staff)* from the definition of 'public official'.

Importantly, it is noted that the *Public Interest Disclosure Act 2013 (Cth)* largely applies to persons that fit within the definition of a public official.² The effect of removing Members and MoP Staff from the definition means they will need to make disclosures under the *National Anti-Corruption Commission Act 2022 (NACC Act)* to be protected against any civil, criminal, or administrative liability.³

The Explanatory Memorandum to the Bill provides the reason for this explicit removal of Members and MoP Staff from the scheme was because it was not Parliament's intention that they be captured under the *Public Interest Disclosure Act 2013 (PID Act)*.⁴ Indeed, the Moss Review considered wrongdoings by Members and MoP Staff should be scrutinised by Parliament itself, not agencies within the Executive.⁵

¹ Explanatory Memorandum, Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), pg. 2.

² *Public Interest Disclosure Act 2013* (Cth), s 26(1)(a).

³ *National Anti-Corruption Commission Act 2022* (Cth), Part 4.

⁴ Explanatory Memorandum, Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), pg. 62; also see Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022, 75 (Mark Dreyfus, Commonwealth Attorney General), pg. 75.

⁵ Philip Moss AM, 2016 Review of the *Public Interest Disclosure Act 2013*, pg. 62 [158].

In removing Members and MoP Staff from the purview of protections under the PID Act, it was said that the NACC Act will have sufficiently robust protections against reprisal or detriment for those individuals.⁶

IBAC observes this is true if the Member or MoP Staff is the Discloser. But this is not necessarily true if they assist in the provision of information about a ‘corruption issue’ (a requirement under the NACC Act).⁷ This is because the PID Bill affords ‘witness immunity’, whilst the NACC Act does not.

The PID Bill proposes to insert s 12A to the PID Act which protects an individual who provides assistance in relation to a ‘public interest disclosure’ (i.e. witness immunity).⁸ In contrast, the provisions within the NACC Act protecting against reprisals and detrimental action only apply to persons who make a ‘NACC disclosure’⁹ – that is, persons who refer or provide other information about a corruption issue. It is not immediately clear whether these NACC protections provide the same level of witness immunity as the proposed s 12A of the PID Act would.

Furthermore, the definitions of disclosable conduct for the purposes of making a public interest disclosure and corrupt conduct for the purposes of making a NACC disclosure are such that a broader scope of conduct can be disclosed under the PID Act. In addition to this, disclosures under the PID Act can be made where the discloser believes on reasonable grounds that the conduct may be disclosable conduct, whereas the NACC Act is silent on when a person may make a NACC disclosure, suggesting the civil standard of proof—on the balance of probabilities.

This is to say, Members and MoP Staff appear now to have a narrower scope of conduct to disclose, and a higher standard of proof to be satisfied of before making a disclosure. Consequently, the availability of protections against reprisals and detrimental actions for Members and MoP Staff will be similarly constrained when compared to their original position under the PID Act.

For the above reasons, IBAC notes that the protections under the NACC Act for Members and MoP Staff may not be as robust in all the circumstances as compared to the protections available under the PID Act (both in its current form, and its proposed amended form).

IBAC therefore recommends the Senate Committee explore options for enhancing the protections available for Members and MoP Staff.

No option to opt out of the PID scheme

The PID Bill (and the PID Act (Cth)) does not allow a Discloser to opt out of the PID scheme. Once a Discloser has made a public interest disclosure, they are afforded the protections under PID Act (Cth) and their identity is protected in most cases.

⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022, 75 (Mark Dreyfus, Commonwealth Attorney General), pg. 75.

⁷ *National Anti-Corruption Commission* (Cth), s 23.

⁸ Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), Item 40.

⁹ *National Anti-Corruption Commission* (Cth), s 23 and Part 4.

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On its face, the inability to opt out of the Commonwealth PID scheme may not present the same problems as the limited opt out clause contained within the *Public Interest Disclosure Act 2012* (Vic) (**PID Act (Vic)**), as the PID Bill (and the PID Act (Cth)) does not impose the same strict confidentiality obligations on the Discloser as the PID Act (Vic).

Nevertheless, the inability to opt out of the PID scheme means the protections have effect in perpetuity. In contrast, the PID Act (Vic) allows a Discloser to make a conscious effort to opt out of the protections within 28 days of making the disclosure, in specific circumstances.¹⁰

In IBAC's experience, a Discloser may have a myriad of reasons for wanting to opt out of a PID scheme. Many times, these reasons do not become apparent to a Discloser until long after the 28-day timeframe mandated by the PID Act (Vic). Given this, a potential discloser may be more likely to make a public interest disclosure if assured they could opt out of the PID scheme in the future.

IBAC recommends the Senate Committee explore options to include a mechanism allowing a Discloser to opt out of the PID scheme and, if such a mechanism is to be introduced, that it not be time limited.

¹⁰ *Public Interest Disclosure Act 2012* (Vic), s 19.