Law Council
OF AUSTRALIA

Office of the President

8 October 2025

Ms Sara Samios PSM
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Integrity and Criminal Law Division
Attorney-General's Department
3–5 National Circuit
BARTON ACT 2601

By email: PIDConsultations@ag.gov.au

Dear Ms Samios

PUBLIC SECTOR WHISTLEBLOWER REFORMS

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Attorney-General's Department (**Department**) in response to the consultation on proposed public sector whistleblower reforms.

2. The Law Council is particularly grateful for the opportunity to comment on the Exposure Draft of the Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill 2025 (Cth) (the **Draft Bill**).

3. We apologise for the delay providing this submission and hope that, nevertheless, it is of assistance to the Department.

4. The Law Council acknowledges the assistance of the Law Council's National Human Rights Committee and National Criminal Law Committee, the Law Society of New South Wales and the Law Institute of Victoria in developing this submission.

Introductory Comments

5. The substance of the Draft Bill primarily relates to two key elements:

   (a) Schedule 1—amendments to the *Ombudsman Act 1976* (Cth) to establish a Whistleblower Ombudsman within the Office of the Commonwealth Ombudsman; and

   (b) Schedule 2—significant repeal, replacement and restructuring of the contents of the *Public Interest Disclosure Act 2013* (**PID Act**).[1]

6. There is a strong public interest in ensuring appropriate protections are afforded to whistleblowers in the public sector. Effective whistleblower protection is critical in promoting integrity, accountability and trust in our institutions. However, as the Law Council has previously identified, the effectiveness of Australia's public sector whistleblowing system—both in encouraging and facilitating the making of public

[1] A number of consequential amendments and other necessary application, saving and transitional provisions are then outlined in Schedules 3 and 4.

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interest disclosures and in providing effective protection to those who make disclosures—has been hampered by the complexity of the legislative landscape and the significant obstacles that face whistleblowers seeking to access advice and support when coming forward with a disclosure.[2]

7. The reforms proposed in the Draft Bill are important steps in the right direction. The Law Council is broadly supportive of the reforms outlined in that Draft Bill which include a number of improvements to the federal public sector whistleblowing framework. We welcome the principles-based drafting approach, which addresses a number of areas of uncertainty and complexity under the current PID Act. We also welcome the establishment of the Whistleblower Ombudsman.

8. However, the Draft Bill does not address some of the priority areas for reform that would assist in further promoting the integrity and accountability of the federal public sector and ensuring that legal protections for whistleblowers are appropriately robust.

9. In addition, we note that the effectiveness of proposed reforms, such as the establishment of the Whistleblower Ombudsman, will depend on whether the Office of the Commonwealth Ombudsman is adequately resourced to undertake its new functions and whether adequate additional funding is provided for legal (and non-legal) support to be available to whistleblowers.

Schedule 1—Whistleblower Ombudsman

Establishment of the Whistleblower Ombudsman

10. The Law Council supports the establishment of a Whistleblower Ombudsman.

11. In February 2017, the Parliamentary Joint Committee on Corporations and Financial Services (**PJCCFS**) released its Report *Whistleblower Protections* and recommended the establishment of a Whistleblower Protection Authority (**WPA**).[3] Since the release of the PJCCFS Report, the Law Council has consistently expressed strong support for the establishment of a comprehensive whistleblower regime including broad support for the creation of a WPA.

12. The Law Council is of the view that it would be preferable, in the longer term, to establish an independent WPA with comprehensive jurisdiction in relation to all federal whistleblowing laws, including:

- the public sector framework under the PID Act; and
- private sector frameworks under, for example, the *Corporations Act 2001* (Cth), *Taxation Administration Act 1953* (Cth), *Fair Work (Registered Organisations) Act 2009* (Cth) and *Aged Care Act 2024* (Cth).

13. Limiting the jurisdiction of the Whistleblower Ombudsman to the public sector framework will mean that there is not oversight across the federal landscape and that private sector participants (including whistleblowers and organisations) will not have access to its functions (such as complaint and dispute resolution mechanisms).[4]

[2] See, eg, Law Council of Australia, Submission to the Attorney-General's Department, Public sector whistleblowing reforms: Stage 2 (22 December 2023).
[3] Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Whistleblower Protections (Report, September 2017) recommendation 12.1.
[4] The Law Council understands that the Treasury is currently in the process of reviewing the whistleblower protection framework under Part 9.4AAA of the *Corporations Act 2001* (Cth). This may provide an opportunity to consider how the functions proposed for the Whistleblower Ombudsman could be made available more broadly.

14. While the Draft Bill does not achieve these broader objectives, the Law Council is of the view that the establishment of the new Whistleblower Ombudsman within the Office of the Commonwealth Ombudsman, nonetheless, has the potential to strengthen the federal integrity framework.

Funding

15. The Law Council notes that the funding of the Whistleblower Ombudsman will be determined by the Australian Government as part of its usual Budget processes.

16. The success of the Whistleblower Ombudsman will be determined by whether the Commonwealth Ombudsman is provided the appropriate resources to undertake the role of Whistleblower Ombudsman. Adding a new role, without proportionate additional resourcing, would risk diverting resources from the other extensive oversight functions of the Commonwealth Ombudsman.

17. It will also be critical to ensure there is adequate funding, noting that timeliness is particularly important in cases where instances of wrongdoing may pose an ongoing risk of harm.

Functions of the Whistleblower Ombudsman

18. Proposed section 21AZP of the Ombudsman Act provides that the functions of Whistleblower Ombudsman include dealing with complaints and disclosures, conducting investigations and 'such other functions conferred on the Whistleblower Ombudsman by this Act or another Act, or a legislative instrument made under this Act or another Act'.

19. The Whistleblower Ombudsman would be empowered, under the proposed amendments to the Ombudsman Act, to handle complaints and disclosures in a range of ways, including through receiving and dealing directly with disclosures and complaints as well as the ability to refer them to the principal officer of an agency,[5] the ability to make inquiries and obtain information,[6] the use of alternative dispute resolution and restorative engagement processes,[7] and the ability to conduct investigations.[8]

20. The note to proposed section 21AZP specifically directs the reader to Division 2 of Part 5 of the amended PID Public Act, which would provide that the functions of the Whistleblower Ombudsman also include, among others:

- assisting various officers and public officials in relation to the operation of the PID Act;
- education and awareness;
- determining model procedures, standards and guidelines;
- overseeing investigations; and

[5] See Exposure Draft, Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill 2025 (Cth) ('**Draft Bill**') sch 1: see proposed Division 3 ('Complaints and disclosures') of new Part IIG of the *Ombudsman Act 1976* (Cth) ('**Ombudsman Act**').
[6] Ibid. See proposed s 21AZX of the Ombudsman Act.
[7] Ibid. See proposed pt IIG div 3 subdiv E of the Ombudsman Act ('Alternative dispute resolution'); and proposed pt IIG div 3 subdiv F of the Ombudsman Act ('Restorative engagement process').
[8] Ibid. See proposed pt IIG div 3 of the Ombudsman Act ('Investigations').

- developing reports about the operation of the PID Act.[9]

21. The Law Council considers each of the proposed functions of the Whistleblower Ombudsman to be appropriate, as a minimum.

Need for an improved support function

22. The Law Council's primary concern relating to the proposed functions of the Whistleblower Ombudsman is the lack of a substantive support or referral function.

23. The PID system can be highly difficult to navigate and can be a significant impediment to whistleblowers coming forward and assisting to uncover wrongdoing and unethical behaviour.

24. The Law Council notes that proposed section 88 of the PID Act preserves section 62 of the current PID Act and outlines that a function of the Whistleblower Ombudsman (or, currently, the Commonwealth Ombudsman) is to provide assistance to various officers and public officials in relation to the operation of the PID Act. The Law Council understands that the assistance referred to is restricted to fairly limited administrative advice.

25. In the Law Council's view this 'assistance' function should in fact be more akin to a 'clearinghouse' function whereby the Whistleblower Ombudsman is specifically empowered to direct public sector whistleblowers (current, former and prospective) to relevant information, advice and support. This could involve referrals to, and possibly funding for, legal advice and other support services.

26. Whether or not the Government determines to provide this function to the Whistleblower Ombudsman, the Law Council submits that dedicated and adequate funding must be provided as a priority to support whistleblowers to access legal assistance. Such funding could be provided directly to legal assistance sector organisations to provide additional services as this would be at arm's length.

Additional comments on the text of Schedule 1

Division 3, Subdivision A—Complaints

27. Proposed section 21AZQ sets out the types of complaints that may be made to the Whistleblower Ombudsman. Subsection (1) states that the complaint may be 'about action taken, or a failure to take action, by an agency, or any of the public officials belonging to an agency'. Subsection (2) clarifies that that subsection covers 'the taking of a reprisal against a person by an agency or any of the public officials belonging to an agency'.

28. Both of these subsections specify that the action (or failure to take action) be taken by a 'public official'. The meaning of public official is set out in Subdivision B of Division 5 of Part 2 of the updated PID Act and is reasonably broad. However, it may not capture others who may be involved in reprisal action (such as third parties or people acting on behalf of a public official). It is notable that proposed section 37 of the updated PID Act, which sets out what constitutes a reprisal, does not limit the reprisal to an agency or public official.

[9] We note that the powers to assist officers and public officials in relation to the operation of the PID Act and undertake education and awareness programs are already provided to the Commonwealth Ombudsman under section 62 of the current *Public Interest Disclosure Act 2013* ('**PID Act**').

29. Proposed section 21AZQ should be clarified to confirm that complaints may be made about relevant reprisals by other persons beyond public officials.

Alternative Dispute Resolution and restorative engagement process

30. Subdivision E provides for the Whistleblower Ombudsman to try to settle a complaint or disclosure using an alternative dispute resolution (**ADR**) method, while Subdivision F permits the Whistleblower Ombudsman to conduct a 'restorative engagement process'.[10]

31. The Law Council supports this flexible approach to the handling of disclosures and complaints, noting that alternatives to more formal processes may achieve a more efficient resolution of certain issues and be preferred by the whistleblower.

32. The Law Council notes and supports, proposed subsection 21AZZ(2) which provides that the engagement by a complainant or discloser in an ADR process is voluntary and that they cannot be directed to participate.

33. Proposed sections 21AZZB (in relation to ADR processes) and 21AZZD (in relation to restorative processes) provide that evidence of anything said, or any admission made, during participation in these processes is not admissible in any court, or in any other proceedings. These protections are strongly supported and will encourage open participation in these processes.

Division 6, Subdivision A—Information gathering powers

34. Proposed section 21AZZH of the Ombudsman Act would provide the Whistleblower Ombudsman with the powers to obtain information and make inquiries for the purposes of:

    - determining if the Whistleblower Ombudsman is authorised to deal with a complaint or a disclosure;
    - determining if the Whistleblower Ombudsman is authorised to conduct an investigation;
    - determining whether, and how, to deal with a complaint or a disclosure;
    - determining whether to conduct an investigation on its own initiative;
    - dealing with a complaint or a disclosure;
    - conducting an investigation;
    - considering whether a principal officer has taken adequate and appropriate steps in relation to recommendations made by the Whistleblower Ombudsman; and
    - any other matter under new Part IIG.

35. Proposed section 21AZZI would provide the Whistleblower Ombudsman with the power to give a written notice requiring a person to provide information, produce documents, or appear before the Whistleblower Ombudsman.

[10] The Law Council notes that the Commonwealth Ombudsman already facilitates restorative engagement processes as part of the functions of the Defence Force Ombudsman and the National Student Ombudsman.

Privileges against self-incrimination and self-exposure to a penalty

36. However, proposed section 21AZZI would abrogate the privileges against self-incrimination and self-exposure to a penalty as follows:

- under proposed subsection 21AZZI(6), an individual is not excused from giving information, producing a document or answering a question on the ground that doing so might tend to incriminate the individual in relation to an offence;
- under proposed subsection 21AZZI(7), it is clarified that:
  - the information given, document produced, or answer given;
  - the giving of the information, the production of the document or the answering of the question; and
  - any information, document or thing 'obtained as a direct or indirect consequence' of the giving of the information, production of the document or the answering of the question

  are not admissible in evidence against the individual in criminal proceedings (other than in limited circumstances);[11] and
- under proposed subsection 21AZZI(8), an individual is not excused from giving the information, producing the document or answering the question on the ground that it might expose them to a penalty (other than a criminal penalty).

37. The Law Council has consistently expressed the view that the privilege against self-incrimination may be justifiably abrogated only to the extent that both direct and derivative use immunity are provided.[12] The Law Council is pleased to note that such immunities have been provided under proposed subsection 21AZZI(7).

38. However, the Law Council has also previously advocated for including a requirement that any power to abrogate the privilege against self-incrimination be conditioned on requiring the investigative body to demonstrate that all other less coercive avenues to obtain information have been exhausted prior to compelling a person to give evidence in circumstances where the privilege is abrogated.[13] The Law Council recommends that amendments imposing such a requirement be included in proposed section 21AZZI.

Client legal privilege

39. Legal professional privilege (**LPP**), or, as the Law Council refers to it, client legal privilege protects confidential communications between a lawyer and client made for the dominant purpose of the lawyer providing legal advice or professional legal services or for use in current or anticipated litigation. It is a fundamental right that applies to court, administrative and investigative proceedings.

40. The Law Council notes that proposed section 21AZZI(9) would abrogate LPP by providing that a person is not excused from complying with a notice on the ground that

[11] That is, other than proceedings for an offence against section 137.1, 137.2 or 149.1 of the *Criminal Code* that relates to proposed section 21AZZI of the Ombudsman Act.
[12] See, eg, Law Council of Australia, Submission to Joint Select Committee on National Anti-Corruption Commission Legislation, Parliament of Australia, National Anti-Corruption Commission Bills 2022 14 October 2022) 35-38.
[13] Ibid 36. See also Law Council of Australia, Submission to the Attorney-General's Department, Commonwealth Integrity Commission Consultation Draft (18 February 2021) 26.

doing so would disclose legal advice given to any person or disclose a communication protected by LPP.

41. The Law Council has significant concerns with the proposed abrogation of LPP enabled by proposed section 21AZZI(9) and submits that this position should be reconsidered as a matter of priority.

42. The Law Council notes that under the current Ombudsman Act, when an officer discloses information or a communication, as part of an inquiry or investigation by the Commonwealth Ombudsman, which would otherwise be covered by LPP, the information or the production of the document or record is not admissible in evidence against the officer.[14] A similar protection should be provided in proposed section 21AZZI(9) if it is to be maintained.

43. Despite the strong preference of the Law Council above, should the proposed abrogation nevertheless be retained, an additional protection should be inserted into the Bill to explicitly provide that any investigation report prepared by the Whistleblower Ombudsman under proposed section 21AZZG, cannot refer to material that would otherwise have been subject to LPP.

44. The Law Council notes that proposed subsection 21AZZI(10) does, importantly, provide that subsection (9) does not otherwise affect an LPP claim that anyone may make in relation to that information or document.

Division 6, Subdivision C—Duties

45. The Law Council is pleased to note the inclusion of a duty on the Whistleblower Ombudsman, under proposed section 21AZZM, to accord procedural fairness in the exercise of its functions.

Schedule 2—Enhanced whistleblower protections and restructuring

46. Schedule 2 to the Draft Bill would repeal and significantly replace or restructure the contents of the PID Act from section 3 of the current Act onwards. Subject to the comments below, the Law Council generally considers the amendments to be an improvement on the current PID Act. In a number of instances, the amendments will simplify and improve the clarity of the Act. However, the amendments will not achieve a broad harmonisation of federal whistleblowing laws so that they are—to the greatest extent possible—uniform in structure and operation.[15]

Implementation of a 'no wrong doors' approach

47. The Law Council strongly supports establishing a so-called 'no wrong doors' approach within the PID Act which provides a discloser with multiple legitimate reporting pathways for making a disclosure, and ensures that whistleblowers are not penalised for failing to navigate the processes correctly.[16] The Law Council notes that a number of the proposed reforms to the PID Act, in particular Subdivision A relating to disclosures within government, goes some way towards implementing a no wrong doors approach.

[14] See Ombudsman Act ss 7A(1B) (preliminary inquiries) and 8(2B) (investigations).
[15] As previously recommended by the Law Council: see, eg, See, eg, Law Council of Australia, Submission to the Attorney-General's Department, Public sector whistleblowing reforms: Stage 2 (22 December 2023).
[16] For a description of the 'no wrong doors' approach, see: Hon Alan Wilson KC, Review of the Public Interest Disclosure Act 2010 (Report, 19 June 2023) 84.

Internal disclosures

48. Proposed section 14 sets out the definition of an 'internal disclosure'. As noted in the Explanatory Paper, this section largely reflects item 1 of the table at subsection 26(1) in the current Act. However, it also includes some important improvements which support the objective of encouraging and facilitating the making of public interest disclosures. Proposed section 14 allows a whistleblower to make a public interest disclosure not only to the discloser's supervisor or a senior officer in the agency to which the discloser belongs but also to the Whistleblower Ombudsman or other relevant investigative authorities in certain circumstances.

49. Proposed paragraph 14(1)(c) of the revised PID Act would permit whistleblowers who are current public officials to make an internal disclosure to their supervisor or a 'senior officer' belonging to their agency. 'Senior officer' is defined in proposed section 8 to include Senior Executive Service officers and their equivalents. The inclusion of senior officers will mean that prospective whistleblowers will have a broader set of persons within their organisation to whom they can make a disclosure.

50. In our 2023 submission, the Law Council noted that implementing a no wrong doors approach at the federal level would require the expansion of the number of integrity, oversight and investigative agencies that can receive internal disclosures.[17] Proposed subsection 14(4) would allow disclosure to be made to an 'investigative authority' where the discloser reasonably believes the authority has the power to investigate the conduct. A new definition of 'investigative authority' is included in proposed section 8 and lists an expanded set of investigative bodies. We support these amendments, which go to implementing recommendation 2 of the Moss Review.[18]

51. Proposed subsections 14(5)–(7) will permit a principal officer of an agency to make a determination that a disclosure that does not otherwise meet the requirements to be a public interest disclosure is nonetheless a public interest disclosure. This is an important safeguard to ensure that technically 'non-compliant' disclosures can be deemed to fall within the scope of the PID Act, engaging both the whistleblower protections under the Act and permitting investigation of conduct which 'raises a fundamental and serious concern relating to the integrity or accountability of the Commonwealth public sector'.

52. Overall, proposed section 14 will assist in the proper coordination and referral of disclosures within the various federal integrity bodies and ensure that whistleblowers are guided and supported in making a disclosure through the appropriate avenues.

Coverage—Persons employed or engaged under the Members of Parliament (Staff) Act 1984

53. The Law Council considers that persons employed under the *Members of Parliament (Staff) Act 1984* (Cth) should be able to receive the protections and remedies provided by the PID Act. These workers are very well placed to identify wrongdoing within the public sector and should be able to access the range of protections and remedies available to others in the public sector.

54. Proposed new paragraph 14(6)(e) of the PID Act would retain the existing exclusion of persons employed under the *Members of Parliament (Staff) Act 1984* (Cth) from the scope of the PID Act. We note that this is contrary to recommendation 23 in the *Set the*

[17] Law Council of Australia, Submission to the Attorney-General's Department, Public sector whistleblowing reforms: Stage 2 (22 December 2023) 12.
[18] Philip Moss, Review of the Public Interest Disclosure Act 2013 (Report, 15 July 2016) recommendation 2 ('**Moss Review**'). This recommendation stated that a number of additional officeholders should 'be prescribed as investigative agencies to simplify the PID Act's interaction with other investigative and complaint schemes and to strengthen the investigative capacity under the PID Act'.

Standard Report that the public interest disclosure protections be extended to parliamentary employees.[19] While this cohort is able to report 'corrupt conduct' under the *National Anti-Corruption Commission Act 2022* (Cth) and may also make a disclosure within the context of the *Parliamentary Workplace Support Service Act 2023* (Cth), we consider it appropriate that they can also avail themselves of the whistleblower protections under the PID Act in the interests of ensuring comprehensive avenues of disclosure of misconduct.

Third party disclosure provisions, including to legal practitioners

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

    - an Australian legal practitioner to obtain legal advice or professional assistance;
    - a medical practitioner or psychologist to obtain medical or psychiatric care or treatment; or
    - an employee of an employee organisation or professional association to obtain advice or assistance.

56. This amendment represents an improvement in the support available for whistleblowers as compared with the narrower 'legal practitioner disclosure' provisions provided for under the current section 26 of the PID Act. We welcome it.

Disclosing information to Australian legal practitioner

57. Given the complexity of the PID Act and Australia's whistleblower legislation framework generally, access to legal representation can be vital. Access to legal representation is consistent with the proper administration of justice, assists with the efficiency of matters, and is integral to assisting people to defend their rights and navigate complex systems.

58. However, we note that, under proposed new paragraph 31(1)(b), the individual is required to disclose 'no more information … than is reasonably necessary' to obtain legal assistance.[20] The Law Council recommends that the 'reasonably necessary' qualification should be omitted for the purpose of obtaining legal advice, considering that the discloser may not fully understand the legal relevance of the information they may hold, and that all Australian legal practitioners are subject to strict confidentiality rules. Further, the qualification may hamper the ability of persons seeking advice to speak frankly and openly with their legal adviser and, as a consequence, restrict the legal advisor's ability to give appropriately tailored advice.

59. If not removed, we suggest that the qualification should be amended to the effect that the individual discloses no more information than the individual 'reasonably considers is necessary'.

60. Under proposed paragraph 31(1)(c), for information that has a security classification of 'secret' or above, disclosure is limited to where the discloser is satisfied that the practitioner holds the appropriate level of security clearance. The Law Council opposes this restriction.

[19] Kate Jenkins, Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces (November 2021).
[20] A similar restriction is provided under proposed s 31(3)(d) in relation to disclosures to employee organisations or professional associations.

61. Recommendation 24 of the Moss Review suggested that the PID Act should be amended to permit individuals to disclose security-classified information (other than intelligence information) to *any* practising lawyer for the purposes of receiving legal advice about a public-interest disclosure.[21] In making this recommendation, Mr Moss cited the importance of lawyers as a source of advice for disclosers and that most potential whistleblowers would not choose to make a disclosure, particularly an external disclosure, without legal advice.[22]

62. Legal practitioners are already subject to stringent ethical and professional obligations and would potentially be subject to both criminal and disciplinary penalties were they to misuse information provided by whistleblowers. The Law Council considers such frameworks to be sufficient for the purpose of reasonably protecting security classified information (other than intelligence information).

63. Further, the restriction in proposed paragraph 31(1)(c) may create unnecessary practical difficulties for whistleblowers in obtaining legal support. It is currently highly difficult to identify solicitors and barristers with an appropriate security clearance.

64. The Law Council has previously recommended that the Department publish (or have available) a list of lawyers with a relevant security clearance. However, the Law Council notes recent comments by the Hon Tony Burke MP, Minister for Home Affairs, and Mike Burgess AM, Director-General of Security, outlining concerns about security clearance status being publicised.[23]

65. In the Law Council's view, the restriction in proposed paragraph 31(1)(c) should be removed so as 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 a security clearance.

66. If the restriction in proposed paragraph 31(1)(c) is maintained, the Law Council would welcome the opportunity to work with the Department to develop practical solutions to ensure that all potential whistleblowers are able to identify and engage legal practitioners with the required security clearance.

Legal practitioners' criminal liability under the PID Act

67. Under section 67 of the current PID Act, legal practitioners who provide legal advice to whistleblowers may themselves be held criminally liable if they use or disclose information concerning public-interest disclosures received from their clients unless that information is used for the provision of advice about a public-interest disclosure or has been lawfully published.

68. The Law Council has previously expressed concern that this provision may unnecessarily impede the provision of legal advice to whistleblowers, operates strictly and without regard to the circumstances and did not sufficiently recognise the concurrent operation of other offences or regulatory restrictions.[24]

[21] Moss Review, 56, recommendation 24.
[22] Ibid 55.
[23] Brittany Busch, 'Spy agency cracking down on 'reckless' boasts by people with top-secret clearance', *Sydney Morning Herald* (online), 1 August 2025; Matthew Knott, '"Spying at unprecedented levels": ASIO boss sounds alarm on espionage threat', *Sydney Morning Herald* (online), 31 July 2025.
[24] Law Council of Australia, Submission to the Attorney-General's Department, Public sector whistleblowing reforms: Stage 2 (22 December 2023) 16-17.

69. The Law Council is therefore pleased to see that the Draft Bill does not replicate current section 67.

Disclosing information to a medical practitioner, psychologist, union or professional association

70. Recommendation 25 of the Moss Review was that the PID Act 'be amended to protect disclosures for the purposes of seeking professional advice about using the [Act]'.[25] We support proposed subsections 31(2) and (3), which would broadly implement this recommendation.

Reverse burden of proof in civil proceedings

71. The Law Council supports proposed section 41 of PID Act, which would reverse the burden of proof in proceedings for remedies in relation to reprisal. The applicant would be required to establish a reasonable possibility that a reprisal has occurred, after which the respondent would bear the onus of proving that the claim is not made out. This is appropriate given the respondent will have knowledge of the conduct that constitutes the alleged reprisal. It also aligns with burden of proof provisions under other whistleblower protection frameworks.[26]

Duty to protect public officials against reprisals

72. Subsections 59(9) and 60(2) currently provide that principal officers and authorised officers, respectively, have a duty to take reasonable steps to protect public officials against reprisals. These duties are maintained in proposed subsection 99(8) and proposed section 100. While this is welcome, we note that these duties remain unenforceable, even where a person has suffered a detriment due to its breach. We suggest that it would be appropriate to introduce civil remedies in these circumstances as provided for under the *Public Interest Disclosures Act 2022* (NSW) and the Corporations Act.[27]

Immunity for preparatory acts and self-reported conduct

73. The South Australian Court of Appeal in *Boyle v Commonwealth Director of Public Prosecutions* (***Boyle***), held that immunity for the 'making' of a public interest disclosure under paragraph 10(1)(a) of the current PID Act is confined to the actual disclosing of the information, and does not extend to preparatory or anterior acts that reasonably form part of the process that resulted in the creation of the disclosure.[28]

74. The Draft Bill does not provide any immunity for preparatory acts or self-reported conduct that may attract civil, criminal or administrative penalties.

75. The Law Council has previously suggested that whistleblowers should be protected against liability for acquiring or accessing information that is the subject of their disclosure if: the conduct is no greater than is reasonably necessary to making a disclosure, the preparatory acts do not constitute a criminal offence, and the APS Code of Conduct has not been breached.[29] In considering this position following the decision

[25] Moss Review, 56-57 and recommendation 25.
[26] See, eg, *Corporations Act 2001* (Cth) s 1317AD(2B); *Public Interest Disclosures Act 2022* (NSW) s 32(4).
[27] *Public Interest Disclosures Act 2022* (NSW) s 62; *Corporations Act 2001* (Cth) s 1317AD(2A).
[28] [2024] SASCA 73 [80]-[94] (Lovell JA, Doyle and David JJA agreeing, with Doyle JA adding his own observations in relation to Ground 3 at [195]-[258]).
[29] Law Council of Australia, Submission to the Attorney-General's Department, Public sector whistleblowing reforms: Stage 2 (22 December 2023) 22-23.

in *Boyle*, the Law Council accepts that further room for discretion may be required in recognition of the practical realities of whistleblowing.

76. In his 2023 *Review of the Queensland Public Interest Disclosure Act 2010* (Qld), the Hon Alan Wilson KC, succinctly sets out a number of arguments in relation to the question: 'should a public official be permitted to engage in illegal conduct when preparing a PID—and, if so, where should the limits of that permission lie'.[30] As outlined by Mr Wilson, a careful balancing act is required between, on the one hand, not wanting to condone illegal activity or encourage 'amateur sleuthing' which may prevent or undermine the independent investigation and prosecution of that wrongdoing, and on the other hand, accounting for the 'nuances that effective whistleblowing may necessarily entail'.[31]

77. Mr Wilson ultimately found that an approach that reflects the 'realities of whistleblowing' is required, and recommended that a 'discretionary test' be articulated, either in the definition of a specific immunity in the Act, or through the introduction of a specific 'whistleblower defence' to criminal and civil proceedings.[32] Under the discretionary test approach, an individual would be entitled to immunity from liability for preparatory acts and self-reported wrongful conduct where they can satisfy a court that they should have a limited immunity for that conduct based on a non-exhaustive list of the following factors:

- *whether the conduct was reasonably necessary to make a PID, or to protect a discloser's other rights under the Act, such as to prove that a disclosure was a PID in a claim of reprisal;*
- *whether the preparatory acts attract criminal or civil liability, and the seriousness of the conduct;*
- *whether the preparatory acts created risks to a particular third party, and the proportionality of those risks, including whether they were more serious than the risks posed by the alleged wrongdoing;*
- *whether a person took steps to mitigate the risks created by the preparatory acts, or whether they behaved recklessly;*
- *whether the preparatory acts were likely to prejudice an investigation of the PID;*
- *whether the preparatory acts were to retain copies of information that the discloser became aware of in the ordinary course of their work, or extended beyond that to conducting an independent investigation;*
- *whether there was any delay between the preparatory acts and the making of a PID, and the length and reasons for that delay; and*
- *whether the person sought legal advice before undertaking the preparatory act.*[33]

[30] Hon Alan Wilson KC, Review of the Public Interest Disclosure Act 2010 (Report, 19 June 2023) 175-177.
[31] Ibid.
[32] Ibid.
[33] Ibid 179 (recommendation 72), 259.

78. In the Law Council's view, such an approach may guide potential whistleblowers, may discourage whistleblowers from excessive or unnecessary actions and would allow judicial consideration of the often-complex circumstances of each case.

79. The Law Council has had the opportunity to review the joint submission by the Human Rights Law Centre, Transparency International Australia and Griffith University's School of Government and International Relations. We note that these organisations have proposed an option for the discretionary test to be adopted in proposed section 29 of the updated PID Act which would deal with immunity for individuals making public interest disclosures. The Law Council has received some support for this proposal.

80. Alternatively, should a 'discretionary test' approach not be adopted, we suggest that a mechanism be established where, if the whistleblower has concerns that certain conduct (which may attract a civil or criminal penalty) is necessary to support a disclosure, they can refer these concerns to the Whistleblower Ombudsman to determine whether and how to pursue the matter.

Contact

81. The Law Council would welcome the opportunity to discuss the matters raised in this submission. In the first instance, please contact [redacted]

Yours sincerely



Juliana Warner
President