Public Interest Disclosure Amendment (Review) Bill 2022 (Cth)

Senate Standing Committee on Legal and Constitutional Affairs

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About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on federal, national and international issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its Constituent Bodies: 16 Australian State and Territory law societies and bar associations, and Law Firms Australia. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

Through this representation, the Law Council acts on behalf of more than 90,000 Australian lawyers.

The Law Council is governed by a Board of 23 Directors: one from each of the Constituent Bodies, and six elected Executive members. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President who normally serves a one-year term. The Board of Directors elects the Executive members.

The members of the Law Council Executive for 2023 are:

- Mr Luke Murphy, President
- Mr Greg McIntyre SC, President-elect
- Ms Juliana Warner, Treasurer
- Ms Elizabeth Carroll, Executive Member
- Ms Elizabeth Shearer, Executive Member
- Ms Tania Wolff, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple. The Secretariat serves the Law Council nationally and is based in Canberra.

The Law Council's website is www.lawcouncil.asn.au.

Acknowledgement

The Law Council is grateful to its National Human Rights Committee and National Security Law Working Group and to the Law Society of New South Wales for assistance in the preparation of this submission.

Executive summary

The Law Council of Australia welcomes the opportunity to provide a submission to the Senate Standing Committee on Legal and Constitutional Affairs (the **Standing Committee**) inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) (**PIDAR Bill**).

The Law Council generally supports the Australian Government's proposed amendments to the *Public Interest Disclosure Act 2013* (Cth) (**PIDA**) insofar as the PIDAR Bill seeks to implement, in part, recommendations made by Mr Philip Moss AM in 2016,[1] the Parliamentary Joint Committee on Corporations and Financial Services (**PJCCFS**) in 2017,[2] and the Parliamentary Joint Committee on Intelligence and Security (**PJCIS**) in 2020 for the improvement of federal whistleblower laws.[3]

The PIDAR Bill should, however, be seen in the context of a series of consultations relating to Australia's whistleblower laws planned for 2023, including:

- the second phase of the reform of the PIDA proposed by the Attorney-General;
- the Attorney-General's Department's review of Commonwealth secrecy laws; and,
- the Australian Government's recently announced roundtable discussion on press freedom reforms.

The Law Council has long advocated for measures that would promote open government, simplify the legislation governing public-interest disclosures, and enhance whistleblower protections, including:

- the consolidation of federal whistleblower laws into a single act that governs public-interest disclosures in both the public and private sector;
- the establishment of a 'Whistleblower Protection Authority' empowered to oversee the operation and implementation of a comprehensive whistleblowing regime; and,
- the amendment of Australia's secrecy laws in accordance with the recommendations made by the Australian Law Reform Commission in 2009.

On the understanding that the Australian Government intends to consider comprehensive changes to this country's whistleblower laws, the Law Council has confined itself in this submission to matters that arise directly from the modest reforms contained in the PIDAR Bill.

[1] P Moss AM, *Review of the Public Interest Disclosure Act 2013*, 15 July 2016, Canberra, Commonwealth of Australia (the **Moss Review**).
[2] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017, Canberra, Commonwealth of Australia (the **Whistleblower Report**).
[3] 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*, August 2020, Canberra, Commonwealth of Australia (the **Press Freedom Report**).

Recommendations

For the reasons given below, the Law Council recommends that:

- proposed section 82A of the PIDA be re-worded so as to require periodic reviews of the PIDA, with the first review to occur three years after the commencement of the review clause, with subsequent reviews to occur every five years thereafter;

- the PIDAR Bill include a provision that obliges the Australian Government to publish and to maintain a list of lawyers with security clearance to ensure that individuals who are contemplating making disclosures of secret information may more easily seek out appropriate legal counsel;

- in the alternative, consideration be given to promulgating a Public Interest Disclosure Rule under section 83 of the PIDA that requires the publication and maintenance of a list of security-cleared lawyers;

- as an alternative to the publication of a list of security-cleared lawyers:

    - the PIDAR Bill include a provision that implements recommendation 24 of the Moss Review and removes the requirement for a lawyer to have security clearance to advise individuals on the disclosure of 'national security' or 'other protective security classification' information; or

    - consideration be given to limiting the need for lawyers to hold security clearance to advise whistleblowers on situations involving material that is categorised as either 'secret' or 'top secret' under the Protective Security Policy Framework;

- if the requirement in paragraph 4(b) of the table in subsection 29(1) of the PIDA (the security-clearance requirement for lawyers) is not repealed, the following amendments should be made:

    - the terms 'has a national security or other protective security classification' should be removed from paragraph 4(c) in the table in s 29(1) of the PIDA and replaced with the phrase 'has a security classification'; and
    - a new definition clause should be inserted into section 8 of the PIDA ('Definitions'), to read as follows: 'security classification has the meaning given by section 90.5 of the *Criminal Code Act 1995* (Cth)';

- consideration be given to including within the PIDAR Bill a provision to grant the Inspector-General of Intelligence and Security (**IGIS**) powers to authorise a person to seek discrete legal advice on certain matters concerning 'intelligence information', subject, if necessary, to prescribed conditions being met;

- alternatively, consideration be given to the enactment of some other mechanism that would enable members of the Australian intelligence community to obtain independent legal advice in circumstances involving 'intelligence information';

- section 67 of the PIDA be amended to limit that offence provision to the misuse or wrongful disclosure by legal practitioners of:

    - 'security classified' information for the purposes of section 90.5 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**); or
    - information that may cause significant harm to national security;

- the PIDA be amended to permit disclosures for the purposes of seeking professional advice about the PIDA;

- concerns raised in the Moss Review about the 'secrecy' offence may be better addressed by amending the existing section 65 of the PIDA rather than removing the protection altogether;

- the following amendments to existing section 65 of the PIDA be considered:

    - renaming the section 'prohibited disclosure or use';
    - adding a public-interest exception in subsection 65(2) of the PIDA; and
    - adding any other specific exceptions that are reasonably necessary to ensure that a protected disclosure can be investigated by the most appropriate agency or agencies;

- a provision be inserted into section 52 of the PIDA that, in the absence of a good reason for extending the 90-day period to investigate disclosures, an extension of time will not be granted;

- there be a statutory requirement for the discloser, first, to be notified by the principal officer of any application for, or consideration of, an extension of the investigative time limit; and, second, to be given the opportunity to make representations (if necessary pseudonymised or anonymised) concerning the extension of the time limit;

- a non-exhaustive list of considerations relevant to time-extension applications be inserted into section 52 of the PIDA to ensure consistent decision-making with any such list to include, at a minimum, the following factors:

    - the reasons for the delay in completing the investigation;
    - the nature and complexity of the investigation;
    - the number of witnesses identified and their availability;
    - action already taken by the agency;
    - what further action is necessary to complete the investigation and the likely timeframe in which future investigative action will be completed;
    - the number of extensions previously granted and the reasons why extensions were sought and granted on those occasions;
    - any representations made by the discloser; and
    - any other matter the decision-maker considers relevant;

- as an alternative to the proposed amendment of the time-extension provisions, the following sub-paragraph (or equivalent provision with the same effect) be inserted into paragraph (c) of item 2 in the table in subsection 26(1) of the PIDA:

  > *(vi) more than 90 days have passed since the disclosure investigation relating to the internal disclosure being conducted under Part 3 commenced and:*
  >
  > *1. an extension of the 90-day investigation period has been granted under section 52; and,*
  >
  > *2. the discloser believes on reasonable grounds that the investigative action taken has been inadequate*;

- paragraph (c) of item 2 in the table in subsection 26(1) of the PIDA 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, within 28 days of making the disclosure, been provided with a notice confirming that an allocation decision has been made in accordance with subsections 44(4) or 44A(3) of the PIDA;

- paragraph 48(1)(c) of the PIDA be repealed as a superfluous provision following the removal of forms of disclosable wrongdoing that are not 'serious' from the scope of the PIDA; and

- employees under the *Members of Parliament (Staff) Act 1984* (Cth) remain as 'public officials' for the purposes of the PIDA.

A two-stage reform process

1. The Attorney-General has confirmed that the PIDAR Bill represents the first of a two-stage process of reform of the Commonwealth's public-sector whistleblowing regime.[4]

2. The second phase of reform is intended to resolve 'the underlying complexity of the scheme and [to] provide effective and accessible protections to public sector whistleblowers', and will also involve consideration as to whether there is 'a need to establish a whistleblower protection authority or commissioner'.[5]

3. That comprehensive reform of the PIDA is necessary is indisputable. The legislation has been described as 'technical, obtuse and intractable', and its 'complex interlocking substantive provisions' are 'largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy'.[6]

4. Moreover, the PIDA is but one of at least six different whistleblower regimes at the federal level that have developed (sometimes disharmoniously) alongside State and Territory systems.[7] Those outside the public sector who are not engaged in activities relating, for instance, to corporate entities, taxation, the aged care sector, the National Disability Insurance Scheme, unions and employment associations are also not currently protected under federal whistleblower laws.[8]

5. The Law Council has long advocated for measures that would promote open government, simplify the legislation and enhance whistleblower protections, including:

    - the consolidation of federal whistleblower laws into a single act that governs public-interest disclosures in both the public and private sector,[9] a reform that was also raised by the PJCCFS in 2017;[10]

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[4] Commonwealth, *Parliamentary Debates*, House of Representatives, 30 November 2022, 3926 (Mark Dreyfus, Attorney-General).
[5] *Ibid*.
[6] *Applicant ACD13/2019 v Stefanic* [2019] FCA 548, [17]-[18].
[7] Commonwealth laws concerning whistleblowing are contained within the PIDA; *Aged Care Act 1997* (Cth), ss 54-4 to 54-9; *Corporations Act 2001* (Cth), Pt 9.4AAA (which, after amendments in 2019, consolidated various federal whistleblowing following the repeal of separate protections within the *Banking Act 1959* (Cth), *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth)); *Fair Work (Registered Organisations) Act 2009* (Cth), Pt 4A, Div 1; *National Disability Insurance Scheme Act* (Cth), Pt 3A, Div 7; *Taxation Administration Act 1953* (Cth), Pt IVD. State and Territory public-sector whistleblower laws include the *Public Interest Disclosure Act 2012* (ACT), *Public Interest Disclosure Act 2022* (NSW), *Independent Commissioner against Corruption Act 2017* (NT), *Public Interest Disclosure Act 2010* (Qld), *Public Interest Disclosure Act 2018* (SA), *Public Interest Disclosures Act 2002* (Tas), *Public Interest Disclosures Act 2012* (Vic) and *Public Interest Disclosure Act 2003* (WA). Legislation concerning official corruption also provides protection to individuals engaged in whistleblowing activities: see, for instance, *Independent Commission Against Corruption Act 1988* (NSW), s 50.
[8] See Brown, A J, and Pender, K, *Protecting Australia's Whistleblowers: The Federal Roadmap* (2022), Griffith University, Human Rights Law Centre and Transparency International Australia: Brisbane and Melbourne, p 9. It is acknowledged that there may be constitutional limitations on the areas of whistleblowing that federal law may cover.
[9] Public Interest Disclosure Act 2013 (Cth) Review, *Submission*, 28 April 2016, [5.b], [8]-[12]; Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press, *Submission*, 7 August 2019, [118].
[10] Whistleblower Report, recommendation 3.1.

- the establishment of a 'Whistleblower Protection Authority' empowered to oversee the operation and implementation of a comprehensive whistleblowing regime,[11] as recommended by the PJCCFS in 2017;[12] and
- the amendment of Australia's secrecy laws in accordance with the recommendations made by the Australian Law Reform Commission (**ALRC**) in 2009.[13]

6. The Law Council has, however, confined itself in this submission to matters that arise directly from the PIDAR Bill's provisions on the understanding that an opportunity to consider the wider policy, legal and operational questions raised by Australia's whistleblower laws will be provided by:

   - the second phase of the reform of the PIDA proposed by the Attorney-General;
   - the Attorney-General's Department's current review of the 11 general secrecy offences, 487 specific secrecy offences and the over 200 non-disclosure duties under Commonwealth law (the **secrecy law review**);[14] and
   - the Australian Government's recently announced roundtable discussion on press freedom reforms following the release of the Press Freedom Report and the Senate Standing Committee on Environment and Communications *Freedom of the Press* report (May 2021) (the **press freedom roundtable**).[15]

7. Implementation of the Law Council's below recommendations regarding the PIDAR Bill would not pre-empt, or require the completion of, the second-phase public consultation on the PIDA and wider reforms to Australia's whistleblower laws, the secrecy law review or the press freedom roundtable.

Periodic reviews of the PIDA

8. Proposed new section 82A of the PIDA stipulates that the Act must be reviewed as soon as practicable after the end of five years following the provision's commencement.[16]

9. The review clause purportedly implements recommendation 1 of the Moss Review. That recommendation was, however, for the PIDA to be reviewed '*every* three to five years to enable its operation to be assessed [emphasis added]'.

10. Periodic reviews of the PIDA should be undertaken, first, to ensure the legislation's policy objectives remain valid and its terms remain appropriate for securing those aims; and, second, to measure the Act against comparable international, State and Territory whistleblower laws. Valuable insights on the effective working of the PIDA and on the experience of individual cases would likely be obtained as a result of periodic reviews of the legislation at three- to five-year intervals.

11. The Law Council, therefore, recommends that proposed section 82A be re-worded so as to require periodic reviews of the PIDA, with the first review to occur three years

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[11] Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press, *Submission*, 7 August 2019, [119].
[12] Whistleblower Report, recommendation 12.1.
[13] Inquiry into the Impact of the Exercise of Law Enforcement and Intelligence Powers on the Freedom of the Press, *Submission*, 7 August 2019, [5]. See ALRC, *Secrecy Laws and Open Government in Australia*, ALRC Report 112, December 2009 (the **Secrecy Laws Report**).
[14] Attorney-General's Department, Review of Secrecy Provisions, *Terms of Reference*, 22 December 2022.
[15] Attorney-General, Media Release, *Attorney-General to hold media roundtable,* January 19, 2023.
[16] PIDAR Bill, sch 2[21].

after the commencement of the review clause, with subsequent reviews to occur every five years thereafter.

Whistleblower access to legal advice

12. Individuals are allowed, under the PIDA, to divulge information pertaining to a public-interest disclosure to *any* Australian legal practitioner for the purpose of obtaining legal advice or professional assistance in relation to that disclosure save for in the following circumstances:

    (a) where the whistleblower knew or ought to have known that the information had 'a national security or other protective security classification',[17] in which case legal advice and assistance may only be sought from a lawyer who holds the appropriate level of security clearance; and

    (b) where the information consists of, or includes, 'intelligence information',[18] in which case no disclosure can be made for the purposes of receiving legal advice or assistance, even to a security-cleared lawyer.[19]

13. Proposed subsection 20(4) of the PIDA would, if enacted, implement recommendation 18 of the Moss Review by confirming that the offence of using or disclosing information likely to identify a whistleblower does not apply to a lawyer who uses or discloses that 'identifying information'[20] for the purpose of providing legal advice to that person.[21]

14. This modest amendment would 'not create any new exceptions' to the identifying-information offence in section 20 of the PIDA and merely 'promote[s] clarity'.[22]

15. It is noted that the government does not take the opportunity in the PIDAR Bill to make more substantive amendments to the PIDA: first, to ensure that whistleblowers are better able to access legal advice from counsel of their choice; and, second, to regulate in a measured way lawyers who advise clients on public-interest disclosure issues.

16. In particular, the Law Council notes that the PIDAR Bill is silent on the following matters.

A list of security-cleared lawyers

17. In December 2020, the Australian Government indicated, when responding to the Moss Review, 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'.[23]

18. No such list of security-cleared lawyers appears to have been published in the two years since the Australian Government responded to the Moss Review.

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[17] Item 4(b) in the table in s 26(1) of the PIDA.
[18] Item 4(c) in the table in s 26(1) of the PIDA.
[19] See item 4 in the table in s 26(1) of the PIDA.
[20] PIDA, s 20(1)(b).
[21] PIDAR Bill, sch 1[50]. See also PIDA, s 67(2)(a) and item 4 of the table at s 26(1).
[22] PIDAR Bill, Explanatory Memorandum, [3.77].
[23] 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.

19. Public officials who disclose information of a 'national security' or other 'protective security classification' to a lawyer who does not hold security clearance, ultimately, expose themselves to a risk of incurring criminal sanctions.[24] Fairness would dictate that public officials seeking legal advice in such circumstances should be assisted to obtain the services of solicitors and barristers with the appropriate security clearance.

20. The Law Council, therefore, recommends that the PIDAR Bill include a provision that obliges the Australian Government to publish and to maintain a list of lawyers with security clearance to ensure that individuals who are contemplating making disclosures of secret information may more easily seek out appropriate legal counsel.

21. In the alternative, the Law Council recommends that consideration be given to promulgating a Public Interest Disclosure Rule under section 83 of the PIDA that requires the publication and maintenance of a list of security-cleared lawyers.

Removing or limiting the need to obtain advice from a security-cleared lawyer

22. Recommendation 24 of the Moss Review was for the PIDA to 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.

23. In its response to recommendation 24, the Australian Government has not addressed the removal of the need for lawyers to hold security clearance. No clear policy justification has been provided for the ongoing requirement for lawyers, who would be subject to both criminal and disciplinary penalties were they to misuse information provided by whistleblowers,[25] to hold security clearance in order to advise those who propose to make, or have made, a public-interest disclosure concerning security-classified information.

24. As an alternative to the publication of a list of security-cleared lawyers, the Law Council recommends either that:

    - the PIDAR Bill include a provision that implements recommendation 24 of the Moss Review and removes the requirement for a lawyer to have security clearance to advise individuals on the disclosure of 'national security' or 'other protective security classification' information; or
    - consideration be given to limiting the need for lawyers to hold security clearance to advise whistleblowers on situations involving material that is categorised as either 'secret' or 'top secret' under the Protective Security Policy Framework.[26]

25. Currently, the PIDA does not provide a clear definition of 'national security and protected security classification'[27] and at no point refers to the Protective Security Policy Framework. The phrase 'security classification' is, however, defined in section 90.5 of the Criminal Code and refers to 'secret or top secret' material categorised 'in accordance with the policy framework developed by the Commonwealth [at present, the Protective Security Policy Framework]'.

[24] See Pt 5.6 of the Criminal Code , the provisions of which are discussed in greater detail below.
[25] See PIDA, s 67; Criminal Code, Pt 5.6. For disciplinary proceedings against lawyers, see, for example, s 88 of the *Legal Profession Uniform Law* (NSW).
[26] See <https://www.protectivesecurity.gov.au/system/files/2022-03/pspf-policy-08-sensitive-and-classified-information.pdf>.
[27] An expression that also appears in the s 20 of the *Inspector-General of Intelligence and Security Act 1986 (Cth)*, where it is also undefined.

26. The Law Council recommends that, if the requirement in paragraph 4(b) of the table in subsection 29(1) of the PIDA (the security-clearance requirement for lawyers) is not repealed, the following amendments should be made:

- the terms 'has a national security or other protective security classification' should be removed from paragraph 4(c) in the table in subsection 29(1) of the PIDA and replaced with the phrase 'has a security classification'; and
- a new definition clause should be inserted into section 8 of the PIDA ('Definitions'), to read as follows: '**security classification** has the meaning given by section 90.5 of the *Criminal Code Act 1995*'.

27. The Law Council's recommended amendments concerning 'security classification' would, first, ensure consistency in the federal law's treatment of secret information; second, close a definitional lacuna in the PIDA; and, third, allow whistleblowers to obtain the assistance of legal representatives more easily by limiting the need to obtain advice from a security-cleared lawyer to situations involving 'secret' or 'top secret' information.

Access to legal advice concerning disclosure of 'intelligence information'

28. Members of the Australian Intelligence Community (**AIC**) are the least protected group of public officials under the PIDA because of the special status accorded to 'intelligence information'.[28]

29. Defined widely to include 'information that originated with, or has been received from, an intelligence agency',[29] 'intelligence information' may in no circumstances be the subject of an 'external disclosure' by a whistleblower. Such information may only be disclosed by a member of the AIC internally to his or her supervisor or to an 'authorised person' or to the IGIS. Even legally privileged and confidential disclosures of intelligence information to security-vetted legal counsel are prohibited.

30. The strict prohibition on members of the AIC seeking assistance from lawyers on the limited disclosures of 'intelligence information' permitted under the PIDA does not, however, strike the right balance between the principles of accountable government, the rights of individuals to seek legal advice and the need to protect national interests.

31. Since the PIDA's commencement on 15 January 2014, a total of 60 public-interest disclosures have been made by members of the AIC to the IGIS.[30] An inference that may reasonably be drawn from the low number of disclosures received by the IGIS is that members of the AIC are inhibited from raising concerns about matters that may give rise to the release of 'intelligence information', in part, because they are unable to seek legal advice on the matter.

32. The Law Council is concerned that the inability of members of the AIC to seek legal advice on potential disclosures about intelligence information may undermine the effectiveness of the public-interest disclosure system in an area of vital importance.[31]

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[28] See PIDA, s 41.
[29] PIDA, s 41(1)(a).
[30] 2021/22: 10 (IGIS, *2021-2022 Annual Report*, (2022) p 103); 2020/21: 16 (IGIS, *2020-2021 Annual Report*, (2021) p 61); 2019/20: 2 (IGIS, *2019-2020 Annual Report*, (2020) p 62); 2018/19: 5 (IGIS, *2018-2019 Annual Report*, (2019) pp 53 and 60); 2017/18: 7 (IGIS, *2017-2018 Annual Report*, (2018) p 51); 2016/17: 11 (IGIS, *2016-2017 Annual Report*, (2017) p 40); 2015/16: 4 (IGIS, *2015-2016 Annual Report*, (2016) p 40); 2014/15: 4; (IGIS, *2014-2015 Annual Report*, (2015) p 16); 2013/14: 1 (IGIS, *2013-2014 Annual Report*, (2014) p 14).
[31] A point previously raised by the Law Council in its submission to the Moss Review: see *Submission*, [20]-[26].

33. While national security must be maintained, it is submitted that members of the AIC should not be barred in all circumstances from obtaining legal advice about public-interest disclosures that may concern 'intelligence information'.

34. The Law Council, therefore, recommends that consideration be given to including within the PIDAR Bill a provision to grant the IGIS powers to authorise a person to seek discrete legal advice on certain matters concerning 'intelligence information', subject, if necessary, to prescribed conditions being met.

35. Alternatively, the Law Council recommends that consideration be given to the enactment of some other mechanism that would enable members of the AIC to obtain independent legal advice in circumstances involving 'intelligence information'.

Legal practitioners' criminal liability under the PIDA

36. Under section 67 of the PIDA, 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. Offences contrary to section 67 of the PIDA are punishable by up to two years' imprisonment or a fine of $33,000,[32] or both.

37. The Law Council is concerned that the operation of section 67 of the PIDA:

- may unnecessarily impede the provision of legal advice to whistleblowers concerning matters ancillary to public-interest disclosures;
- operates strictly and without regard to:
  - the type of information used or disclosed;
  - whether any adverse consequences did, or were likely to, arise because of the secondary use or onward disclosure of information;
- does not sufficiently recognise:
  - the concurrent operation of secrecy offences in Part 5.6 of the Criminal Code that already penalise the misuse of 'security classified' information; and
  - the regulatory consequences that could flow from a legal practitioner's misuse of material divulged by a whistleblower.

38. The Law Council, therefore, recommends that section 67 of the PIDA be amended:

- to limit the offence provision to the misuse or wrongful disclosure by legal practitioners of:
  - 'security classified' information for the purposes of section 90.5 of the Criminal Code; or
  - information that may cause significant harm to national security.

[32] 120 penalty units at $275.00 per unit: see s 4AA(1) of the *Crimes Act 1914* (Cth) as amended by the *Crimes Amendment (Penalty Unit) Act 2022* (Cth).

Further issues for consideration

Professional advice

39. Recommendation 25 of the Moss Review was that the PIDA 'be amended to protect disclosures for the purposes of seeking professional advice about using the [Act]'.

40. The 'professional advice' envisaged in the Moss Review would be provided by unions, employee assistance programmes and professional associations.[33]

41. Allowing public officials to obtain advice on proposed disclosures from bodies such as unions and employee and professional associations (**EPAs**) would assist the operation of the PIDA by ensuring that:

    - those contemplating making a disclosure are able to seek advice on the impropriety (or otherwise) of others' conduct and their own actions as whistleblowers from agencies such as the Australian Public Service Commission's Ethics Advisory Service that may offer views on integrity matters related to the kinds of misconduct that may be 'disclosable' under the PIDA;[34] and
    - public-sector whistleblowers have access to adequate support from, for instance, EPAs, which provide mental health and counselling services to their members,[35] services of particular importance as individuals who have made public-interest disclosures report 'long-term health and career effects because they reported [others'] wrongdoing'.[36]

42. The Law Council, therefore, recommends that the PIDA be amended to permit disclosures for the purposes of seeking professional advice about the PIDA.

43. If deemed necessary, those receiving disclosures under a professional-advice exception could be made subject to obligations not to use or disclose information provided by a whistleblower that are similar in form to the secrecy duties that currently apply to legal practitioners.[37]

The repeal of the 'secrecy' offence

44. The PIDAR Bill proposes the repeal of the general 'secrecy' offence under section 65 of the PIDA and its substitution with a provision that will permit the sharing of information concerning disclosures between government agencies.[38]

45. Section 65 of the PIDA prohibits the secondary disclosure or use of 'protected information'[39] unless at least one of five exceptions applies, ranging from the release of information to another in connection with exercising powers under the Act through to divulging data that have already been lawfully published. The purpose of the offence under section 65 of the PIDA is to preserve the integrity of investigations of disclosures and to ensure that material disclosed is not misused, a matter that may

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[33] Moss Review, [145].
[34] See, <https://www.apsc.gov.au/working-aps/integrity/ethics-advisory-service>.
[35] Moss Review, [145].
[36] Moss Review, [20].
[37] See PIDA, s 67.
[38] PIDAR, sch 1[63] (new s 65 of the PIDA).
[39] Namely, any information obtained as a result of investigations into public-interest disclosures or when performing functions or exercising powers under the Act: PIDA, s 65(1).

be of particular concern to whistleblowers who may be the target of detrimental actions in response to disclosures.

46. The government's proposed repeal of section 65 of the PIDA purports to implement recommendation 4 of the Moss Review that 'the Commonwealth Ombudsman share information about the handling of or response to a [public interest disclosure] with relevant investigative agencies'.

47. The Law Council has concerns about the proposed repeal of section 65 of the PIDA and its replacement with the proposed information-sharing provision. Repeal of section 65 of the PIDA may adversely affect trust and confidence in the protections provided to whistleblowers, thereby undermining one of the objects of the Act, namely, 'to encourage and facilitate the making of public interest disclosures by public officials'.[40] The proposed replacement of the general 'secrecy' offence may also increase the risk of breaches of confidentiality and the misuse of disclosed information.

48. The repeal of section 65 of the PIDA purportedly implements recommendation 16 of the Moss Review, the rationale for which was that the current offence hampers agencies' ability to use and share protected information to respond to disclosures, to guide their management decisions, to brief ministers, or to answer media enquiries because of a fear of prosecution, a fear that was exacerbated by an overly cautious approach taken by legal advisers.[41] It may be that the description of section 65 as creating a 'secrecy offence' may have contributed to concerns about the provision's operation.

49. The Law Council submits that, if the legislation works as intended, the most appropriate agency or agencies will be the one(s) investigating disclosed matters, managing disclosures and responding to alleged wrongdoing. They are authorised, to the extent consistent with the objects and other provisions of the PIDA, to use disclosed information to assess the relevant agency's performance and carry out related actions including briefing ministers. The need for further disclosure to other agencies or media is not clear.

50. While disclosure of identifying information would continue to be prohibited under section 20 of the PIDA, this may not be sufficient to ensure that further disclosure of disclosed information (currently defined as 'protected information') would not, ultimately, even if inadvertently, identify a whistleblower or be otherwise misused.

51. The Law Council, therefore, **recommends** that the concerns raised in the Moss Review may be better addressed by amending the existing section 65 of the PIDA, rather than removing the protection altogether. The Law Council further recommends that the following amendments to the PIDA be considered:

- renaming the section 'prohibited disclosure or use';
- adding a public-interest exception in subsection 65(2) of the PIDA; and
- adding any other specific exceptions that are reasonably necessary to ensure that a protected disclosure can be investigated by the most appropriate agency or agencies.

[40] PIDA, s 6(b).
[41] Moss Review, [119].

Extensions of the 90-day timeframe for investigations

52. The PIDA imposes a 90-day timeframe on investigations.[42] That time limit may be extended by the Commonwealth Ombudsman or IGIS (if the disclosure concerns intelligence-related matters) where it is appropriate to do so.[43] There are no statutory limits on the number of occasions on which the time limit to complete an investigation may be extended.

53. The 90-day timeframe is not an arbitrary or merely bureaucratic 'best practice' guideline. The statutory time limit prevents investigations from becoming stale, avoids prolonging the pressure on disclosers and witnesses, and reduces the risk of reprisals being taken against whistleblowers. A failure by an agency to investigate a disclosure within the 90-day time limit ultimately undermines the effectiveness of the PIDA, the purpose of which is to ensure matters of public importance are examined promptly so that individual and systemic misconduct can be addressed quickly.

54. The Law Council observes with concern that investigations under the PIDA are routinely taking longer than the 90-day period envisaged in the Act, and that extensions of time to investigate matters are routinely granted by the Commonwealth Ombudsman.

<table>
<tr><th colspan="8">Public-interest disclosures: investigations</th></tr>
<tr><th rowspan="2">Reporting year[44]</th><th rowspan="2">Number of completed PID investigations</th><th colspan="3">Extension application</th><th colspan="3">Investigation period</th></tr>
<tr><th>Number of extension applications</th><th>Number of extensions granted</th><th>Percentage granted</th><th>≤ 90 days</th><th>91–180 days</th><th>> 180 da ys</th></tr>
<tr><td rowspan="2">2021/22</td><td rowspan="2">176</td><td rowspan="2">169</td><td rowspan="2">167</td><td rowspan="2">99%</td><td rowspan="2">50%</td><td>27%</td><td>23%</td></tr>
<tr><td colspan="2">50%</td></tr>
<tr><td rowspan="2">2020/21</td><td rowspan="2">190</td><td rowspan="2">186</td><td rowspan="2">178</td><td rowspan="2">96%</td><td rowspan="2">55%</td><td>26%</td><td>19%</td></tr>
<tr><td colspan="2">45%</td></tr>
<tr><td rowspan="2">2019/20</td><td rowspan="2">228</td><td rowspan="2">171</td><td rowspan="2">164</td><td rowspan="2">96%</td><td rowspan="2">61%</td><td>25%</td><td>14%</td></tr>
<tr><td colspan="2">39%</td></tr>
<tr><td rowspan="2">2018/19</td><td rowspan="2">289</td><td rowspan="2">171</td><td rowspan="2">161</td><td rowspan="2">94%</td><td rowspan="2">65%</td><td>21%</td><td>14%</td></tr>
<tr><td colspan="2">35%</td></tr>
<tr><td rowspan="2">2017/18</td><td rowspan="2">313</td><td rowspan="2">125</td><td rowspan="2">119</td><td rowspan="2">95%</td><td rowspan="2">65%</td><td>24%</td><td>10%</td></tr>
<tr><td colspan="2">34%</td></tr>
<tr><td>2016/17</td><td>365</td><td>156</td><td>148</td><td>95%</td><td>/</td><td>/</td><td>/</td></tr>
<tr><td>2015/16</td><td>391</td><td>121</td><td>112[45]</td><td>93%</td><td>/</td><td>/</td><td>/</td></tr>
<tr><td>2014/15</td><td>386</td><td>51</td><td>/</td><td>/</td><td>/</td><td>/</td><td>/</td></tr>
<tr><td>2013/14[46]</td><td>/[47]</td><td>6</td><td>/</td><td>/</td><td>/</td><td>/</td><td>/</td></tr>
</table>

55. Investigations of public-interest disclosures routinely take significantly longer than the period envisaged in the PIDA. In 2021/22 alone, half of all investigations took longer

[42] PIDA, s 52(1).
[43] PIDA, s 52(3) and (4).
[44] Commonwealth Ombudsman, *2021/22 Annual Report*, pp 38 and 41; Commonwealth Ombudsman, *2020/21 Annual Report*, pp 35 and 38; Commonwealth Ombudsman, *2019/20 Annual Report*, pp 27 and 30; Commonwealth Ombudsman, *2018/19 Annual Report*, pp 113 and 115; Commonwealth Ombudsman, *2017/18 Annual Report*, pp 64 and 69; Commonwealth Ombudsman, *2016/17 Annual Report*, p 107; Commonwealth Ombudsman, *2015/16 Annual Report*, pp 75 and 79; Commonwealth Ombudsman, *2014/15 Annual Report*, pp 71 and 84; Commonwealth Ombudsman, *2013/14 Annual Report*, pp 73 and 83.
[45] Five applications were refused; four applications were withdrawn.
[46] The PIDA commenced on 15 January 2014.
[47] No clear figures on completed investigations were provided for 2013/14.

than 90 days to complete. Around a quarter of investigations took longer than twice the expected 90-day timeframe.[48]

56. Significantly, the percentage of investigations that exceed the initial 90 days allowed by the PIDA has increased from 34 per cent in 2017/18 to 50 per cent in 2021/22. Extensions of time applications have gone from 51 in the PIDA's first full year of operation (2014/15) to 186 in 2020/21. Moreover, while the number of applications for extensions of time has increased, the number of investigations completed per year has decreased. For instance, in 2015/16, 391 investigations were finalised by principal officers, while 121 extension applications were made. In 2021/22, the number of completed investigations almost equalled the number of applications for extensions, 176 and 169, respectively.

57. Over time, institutional practices appear to have led principal officers to rely on extensions of time limits too readily and investigations have become increasingly protracted. The Standing Committee may, therefore, wish as part of its inquiry:

    (a) to request that the Australian Government and Commonwealth Ombudsman provide evidence as to reasons for why investigations routinely exceed the 90-day statutory time limit; and

    (b) to ascertain whether greater resources need to be allocated to agencies to comply with their obligations under the PIDA.

58. To ensure that extensions of investigative deadlines are granted only where there are good reasons to do so rather than where it is merely 'appropriate' to do so, the Law Council recommends that:

    - a provision be inserted into section 52 of the PIDA that, in the absence of a good reason for extending the 90-day period to investigate disclosures, an extension of time will not be granted;
    - there be a statutory requirement for the discloser, first, to be notified by the principal officer of any application for, or consideration of, an extension of the investigative time limit and, second, to be given the opportunity to make representations (if necessary pseudonymised or anonymised) concerning the extension of the time limit;[49]
    - a non-exhaustive list of considerations relevant to time-extension applications be inserted into section 52 of the PIDA to ensure consistent decision-making with any such list to include, at a minimum, the following factors:
        - the reasons for the delay in completing the investigation;
        - the nature and complexity of the investigation;
        - the number of witnesses identified and their availability;
        - action already taken by the agency;

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[48] Significantly, the Commonwealth Ombudsman's annual reports only record that an investigation exceeded 180 days and thus provide no indication as to the how long some agencies' investigations have taken to complete. It is unknown how long the 23 per cent of investigations that exceeded 180 days in 2021/22 eventually took to be finalised by principal officers.

[49] At present, principal officers are only required to notify disclosers of the estimated length of the investigation upon confirming that the investigation will be undertaken: PIDA, s 50(1A). When an extension of time is granted, the Commonwealth Ombudsman or IGIS must inform the discloser of the fact of the extension of time and the reasons for that extension, while the principal officer is under a duty, as soon as reasonably practicable after the extension or further extension had been granted, to inform the discloser of the progress of the investigation: PIDA, s 52(5); see also the Public Interest Disclosure Standard 2013 (Cth) (issued under PIDA, s 74).

- what further action is necessary to complete the investigation and the likely timeframe in which future investigative action will be completed;
- the number of extensions previously granted and the reasons why extensions were sought and granted on those occasions;
- any representations made by the discloser; and
- any other matter the decision-maker considers relevant.

59. For the avoidance of doubt, an investigation should expressly not be rendered invalid if it continues after the 90-day time limit has expired without extension. Expiration of the deadline would satisfy one of the criteria for a whistleblower to make an external disclosure[50] but would not, in itself, permit an external disclosure to be lawfully made.[51]

Grounds for external disclosures: prolonged investigations

60. The Law Council additionally notes that the *Corporations Act 2001* (Cth) (**Corporations Act**) permits public-interest disclosures to be made where a report (a 'previous disclosure') has been made by a whistleblower to ASIC or APRA and:

- at least 90 days have passed since the previous disclosure was made;
- the discloser does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the previous disclosure related;
- the discloser has reasonable grounds to believe that making a further disclosure of the information would be in the public interest;
- after the end of 90 days, the discloser gave the body to which the previous disclosure was made a written notification that:
  - includes sufficient information to identify the previous disclosure;
  - states that the discloser intends to make a public-interest disclosure;
- the public-interest disclosure is made to:
  - a member of the Parliament of the Commonwealth, the Parliament of a State or the legislature of a Territory; or
  - a journalist; and
- the extent of the information disclosed in the public-interest disclosure is no greater than is necessary to inform the recipient member of parliament or journalist of the misconduct, improper state of affairs, circumstances, or conduct, as the case may be.[52]

61. It is further noted that the Corporations Act makes no provision to allow for the extension of the 90-day investigation period (though investigations conducted after the expiration of that period would not be invalid).

62. To harmonise the private-sector and public-sector whistleblowing provisions, and to provide an impetus for public agencies to investigate disclosures expeditiously, the Law Council recommends, as an alternative to the proposed amendment of the time-extension provisions (see above), that the following sub-paragraph (or equivalent

[50] See subparagraph iii of paragraph c of item 2 in the table in subsection 26(1) of the PIDA.
[51] The other requirements in item 2 in the table in subsection 26(1) of the PIDA would still need to be satisfied.
[52] Corporations Act, s 1317AAD(1).

provision that is worded so as to have the same effect) be inserted into paragraph (c) of item 2 in the table in subsection 26(1) of the PIDA:[53]

> *(iv) more than 90 days have passed since the disclosure investigation relating to the internal disclosure being conducted under Part 3 commenced and:*
>
> > *1. an extension of the 90-day investigation period has been granted under s 52; and,*
> > *2. the discloser believes on reasonable grounds that the investigative action taken has been inadequate.*

63. It should be noted that, were the above-recommended sub-paragraph to be inserted into the PIDA, a public official would still need to meet the requirements in sub-paragraphs (a) to (b) and (d) to (i) of item 2 in the table in subsection 26(1) of the PIDA before making an external disclosure.

Grounds for external disclosures: failures to allocate disclosures

64. A proposal within recommendation 9 of the Moss Review was for the PIDA to be amended to include situations where an authorised officer has failed to allocate an internal disclosure as grounds for making an external disclosure.

65. The rationale behind recommendation 9 was that failures to allocate disclosures represented a 'threat to the integrity of the [PIDA] scheme and, by extension, the effectiveness of the Commonwealth public sector's integrity and accountability'.[54] A failure to allocate a disclosure will forestall any investigation of alleged misconduct under the PIDA while preventing the whistleblower himself or herself from making an external disclosure. The risk for abuse of the allocation system is clear.

66. The Australian Government indicated that it agreed in principle with recommendation 9 when responding to the Moss Review in December 2020.[55]

67. Following the Standing Committee's publication of a series of stakeholder submissions on the PIDAR Bill, the Law Council has had the advantage of considering the views of the Australian Human Rights Commission (**AHRC**).

68. For the reasons provided by the AHRC in its submission to the Standing Committee's inquiry,[56] the Law Council recommends that paragraph (c) of item 2 in the table in subsection 26(1) of the PIDA 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, within 28 days of making the disclosure, been provided with a notice confirming that an allocation decision has been made in accordance with subsections 44(4) or 44A(3) of the PIDA.

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[53] The table in subsection 26(1) of the PIDA lists the circumstances in which, amongst other matters, external disclosures may be made.
[54] Moss Review, p 38.
[55] 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.
[56] See AHRC, *Submission Nº 5*, 20 January 2023, [109]-[120].

Discretion not to investigate disclosable conduct that is not 'serious'

69. A significant matter addressed by the Moss Review was the need for the 'scope of disclosable conduct' to be redefined so that investigations under the PIDA were 'focus[ed] on fraud, serious misconduct and corrupt conduct'.[57]

70. 'Disclosable conduct' is currently defined to include 'conduct engaged in by a public official that could, if proved, give *reasonable grounds for disciplinary action* against the public official [emphasis added]'.[58]

71. If enacted, the PIDAR Bill would limit this form of 'disclosable conduct' to 'conduct engaged in by a public official that could, if proved, give reasonable grounds for *disciplinary action resulting in the termination of the official's engagement or appointment* [emphasis added]'.[59]

72. Disclosures concerning 'personal work-related conduct'[60] would also fall outside the investigative duties of principal officers unless the conduct constituted a 'reprisal', was significant enough to undermine public confidence in an agency, or had other significant implications for an agency.[61]

73. At present, principal officers may, under paragraph 48(1)(c) of the PIDA, decline to investigate disclosures made by public officials or their supervisors that do not concern '*serious* disclosable conduct [emphasis added]'.

74. If enacted, the PIDAR Bill would, however, remove from the PIDA all 'non-serious' forms of disclosable conduct. Any action that, if proven, would provide reasonable grounds to end an official's engagement or appointment; amounts to a reprisal (and hence, prima facie, a criminal act);[62] or represents systemic misconduct clearly crosses the threshold of 'seriousness'. Other defined forms of 'disclosable conduct' listed in the PIDA are, likewise, inherently 'serious'.[63]

75. The discretionary power to refuse to investigate matters deemed not to be 'serious' may have 'had some utility when the overall definition of disclosable conduct was cast too wide' and there was need 'for a mechanism for filtering out' allegations of misconduct that did not 'warrant the application of the [PIDA]'.[64]

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[57] Moss Review, [69]. The Law Council in its submission to the Moss Review agreed that the 'breadth of disclosable conduct caught under the PIDA is too broad' and 'appears to go beyond the intent of the legislation': *Submission*, 26 April 2016, [28].
[58] PIDA, s 29(2)(b).
[59] PIDAR Bill, sch 1[2]. These amendments implementing recommendation 7 of the Moss Review.
[60] Defined in new s 29A of the PIDA (see sch 1[4] to the PIDAR Bill).
[61] PIDAR Bill, sch 1[3] (new subs 2A in s 29 of the PIDA). These amendments would implement recommendations 5 and 6 of the Moss Review.
[62] PIDA, s 19.
[63] Other forms of disclosable conduct include: illegal conduct (under Commonwealth, State, Territory or foreign law); perverting the course of justice; maladministration; fabrications, falsifications, plagiarisms and deceptions relating to scientific research and other forms of misconduct concerning scientific analysis, evaluation or advice; wastage of public money and property; actions that unreasonably result in a danger to, or increased risk of a danger to, the health or safety of at least one person; conduct that unreasonably results in a danger to, or an increased risk of danger to, the environment; and actions involving, or for the purpose of, abusing one's public office: see PIDA, s 29(1) and (2)(a). No additional forms of '*disclosable conduct*' have been specified in the Public Interest Disclosure Rules 2019 (Cth), as is permitted under s 29(1) of the PIDA.
[64] Prof A J Brown of the Centre for Governance and Public Policy, Griffiths University: Statutory Review of the Public Interest Disclosure Act 2013 (Cth), *Submission*, 6 May 2016, pp 2-3.

76. However, following the passage of the PIDAR Bill, the 'filter' that allows principal officers to refuse to investigate matters that do not concern 'serious disclosable conduct' will become otiose, particularly because:

- principal officers will still be able to decline to investigate disclosures that are 'frivolous or vexatious';[65] and,
- where an authorised officer determines not to allocate or to investigate a disclosure because it could be more appropriately investigated under another law or power, that officer would be obliged to refer the alleged misconduct to another agency.[66]

77. The Law Council, therefore, recommends the repeal of paragraph 48(1)(c) of the PIDA as a superfluous provision following the removal of forms of disclosable wrongdoing that are not 'serious' from the scope of the PIDA.

Parliamentary staff

78. If enacted, the PIDAR Bill will omit from the definition of 'public officials' persons employed under the *Members of Parliament (Staff) Act 1984* (Cth) (**MPS Act**).[67] In doing so, the PIDAR Bill will bring parliamentary staff outside the protections of the PIDA.

79. According to the PIDAR Bill's Explanatory Memorandum, parliamentary staff will be adequately protected by the *National Anti-Corruption Commission Act 2022* (Cth) (**NACC Act**), which upon its commencement will shield employees under the MPS Act from being identified, incurring liabilities or experiencing reprisals when making disclosures concerning 'corrupt conduct'.[68]

80. The exclusion of parliamentary staff from the PIDA is, therefore, predicated—in part—on the assumption that the NACC Act covers all relevant disclosures that merit protection. The scope of the NACC Act is, however, not contiguous with that of the PIDA. 'Corrupt conduct', as defined under the NACC Act, encompasses a narrower range of misfeasance than 'disclosable conduct' does under the PIDA.

81. 'Corrupt conduct' is defined in the NACC Act as follows:

> *(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;*

[65] PIDA, s 48(1)(d).
[66] PIDAR Bill, sch 1[11] and [25] (new ss 43(4) and 50AA(2) of the PIDA).
[67] PIDAR Bill, sch 1[88] (new subs 4 of s 69 of the PIDA).
[68] NACC Act, ss 24, 29 to 30, 227 to 228.

(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.*[69]

82. Such 'corrupt conduct' would likely fall within 'disclosable conduct' under the PIDA.[70] However, 'disclosable conduct', as defined in the PIDA, also includes:

- maladministration that is unreasonable, unjust or oppressive;
- maladministration that is negligent;
- deception in relation to the reporting of the results of scientific research;
- wastage of public funds and public property;
- actions that unreasonably endangers, or increases the risk of dangers to, health and safety; and,
- conduct that unreasonably endangers, or increases the risk of dangers to, the environment.[71]

83. By removing parliamentary staff from the PIDA's aegis, the PIDAR Bill may result in misconduct that had hitherto been disclosable no longer being protected by any federal provisions.

84. The Law Council notes that the recently enacted *Public Interest Disclosure Act 2022* (NSW) (**NSW PIDA**) includes those employed under the *Members of Parliament Staff Act 2013* (NSW), notwithstanding the concurrent operation of the *Independent Commission Against Corruption Act 1988* (NSW) (**ICAC Act**). While the NSW PIDA concerns 'serious wrongdoing' (which includes 'corrupt conduct', 'government information contraventions', 'serious maladministration', 'privacy contraventions'),[72] the ICAC Act covers 'corrupt conduct'[73] alone.[74] The PIDAR Bill may, consequently, place the Commonwealth's protection of parliamentary staff significantly at odds with equivalent protections in other Australian jurisdictions, which shield parliamentary staff under both whistleblower and anti-corruption legislation.

85. For the above reasons, the Law Council recommends that employees under the MPS Act remain as 'public officials' for the purposes of the PIDA.

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[69] NACC Act, s 8(1).
[70] See items 1 and 2 (conduct that contravenes a Commonwealth, State or Territory law or, where applicable, a foreign law), item 3 (perverting the course of justice and corruption), item 4(a) (maladministration for improper motives) and item 5 (abuse of public trust) of the table in s 29(1) of the PIDA. See also s 29(2) of the PIDA (abuse of position as a public official).
[71] See, respectively, items 4(b) and (c), 6(a)(iii), 7, 8 and 9 of the table in s 29(1) of the PIDA.
[72] NSW PIDA, s 13.
[73] ICAC Act, s 8.
[74] It should be noted that there was an awareness in New South Wales at the time the Public Interest Disclosure Bill 2021 (NSW) was being considered that the position in that State would depart from the recommendation 26 of the Moss Review: '[t]he Bill reflects the NSW approach, which is to allow for voluntary [public-interest disclosures] about alleged wrongdoing by MPs and their staff. The definition of a "public official" (cl 14) includes a member of Parliament (including a Minister), and a person employed under the Members of Parliamentary Staff Act 2013': Ombudsman New South Wales, *Special report by the NSW Ombudsman on the Public Interest Disclosures Bill 2021*, 19 October 2021, p 54.