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*Public Interest Disclosure Act  
2013 (Cth) Review*

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**Department of Prime Minister and Cabinet**

**28 April 2016**

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## Acknowledgement

The Law Council acknowledges the assistance of its Business Law Section’s Privacy Law Committee and National Criminal Law Committee in the preparation of this submission.

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## Executive Summary

1. Thank you for the opportunity to provide this submission on the statutory review of the *Public Interest Disclosure Act 2013* (Cth) (the PID Act) as required under section 82A of the PID Act.
2. The PID Act is intended to encourage and facilitate the making of public interest disclosures by public officials and, in some circumstances, provides public officials with protection from liability under secrecy laws. The PID Act often operates in conjunction, therefore, with other Commonwealth legislation.<sup>1</sup>
3. Questions arise as to whether existing whistleblower arrangements, including under the PID Act, are adequate to offer protection for individuals in both the private and public sectors. Further, the PID Act may operate with secrecy provisions to prevent a disclosure where the disclosure would, on balance, be in the public interest.
4. There are also some practical difficulties in applying the provisions of the PID Act in a situation where an employee of a Commonwealth contracted service provider makes a disclosure. A key problematic aspect of the legislation is the difficult question of whether/when a workplace grievance or conflict is a PID.
5. In this regard, this submission makes five key recommendations for further steps Australia could take to strengthen the legal framework for disclosures of wrongdoing in the public interest:
  - a) Secrecy laws should be amended in accordance with recommendations of the Australian Law Reform Commission's (ALRC) 2009 *Secrecy Laws and Open Government Report*;
  - b) Consideration be given to whether the PID Act's jurisdiction should be expanded to include the private sector in-and-of-itself, and not simply Commonwealth Government contractors;
  - c) The Independent Reviewer recommend that the Commonwealth Parliament (through a Joint Standing Committee) conduct an inquiry into whether existing whistleblower arrangements for Ministers, parliamentarians, their staff or members of the judiciary are operating effectively;
  - d) Consideration be given to granting the Inspector-General of Intelligence and Security (IGIS) powers to authorise a person to seek discrete legal advice on certain matters and subject to certain conditions being met. Alternatively, the Independent Reviewer may wish to consider some other mechanism which would enable an Australian Intelligence Community (AIC) employee to obtain independent legal advice; and
  - e) Employment grievances should be expressly removed from the scope of the PID Act. Alternatively, a whistleblower's disclosure that relates to an employment-related grievance should at least partially be in the public interest.

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<sup>1</sup> For example, the *Australian Security Intelligence Organisation Act 1979* (Cth), the *Australian Border Force Act 2015* (Cth), the *Inspector-General of Intelligence and Security Act 1986* (Cth), the *Ombudsman Act 1976* (Cth), the *Fair Work Act 2009* (Cth), the *Parliamentary Service Act 1999* (Cth), and the *Public Service Act 1999* (Cth).

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## Secrecy Provisions

6. In circumstances where the PID Act operates in conjunction with secrecy provisions, there should be a public interest disclosure exception to the secrecy provisions where the disclosure would, on balance, be in the public interest.<sup>2</sup> The ALRC in its 2009 *Secrecy Laws and Open Government Report*<sup>3</sup> has also made such a recommendation, taking the view that such an approach would aid transparency. The Law Council agrees with the ALRC's assessment.
7. Secrecy offences should include an express requirement that, for an offence to be committed, the unauthorised disclosure caused, or was likely or intended to cause, harm to an identified essential public interest.<sup>4</sup> Such an element may prevent capturing disclosures that are already in the public domain or is otherwise innocuous.<sup>5</sup> Where no harm is likely, the ALRC considers that other responses to the unauthorised disclosure of Commonwealth information are appropriate — including the imposition of administrative sanctions or the pursuit of contractual or general law remedies.<sup>6</sup>

**Recommendation:**

- **Secrecy laws should be amended in accordance with recommendations of the Australian Law Reform Commission's 2009 *Secrecy Laws and Open Government Report*.**

## Scope – Private Sector

8. A question arises as to whether the PID Act, which only covers disclosures by public sector employees, should be expanded to include disclosures by private sector employees, including business and civil society organisations engaged by public entities.<sup>7</sup>
9. Currently, protections for whistleblowers in the private sector may be found in the *Corporations Act 2001* (Cth), *Banking Act 1959* (Cth), *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth) and the *Superannuation Industry (Supervision) Act 1993* (Cth).
10. The Australian Securities and Investments Commission (ASIC) is responsible for enforcing the Corporations Act whistleblower provisions. ASIC has established an Office of the Whistleblower, which monitors the handling of all whistleblower reports, manages staff development and training, and handles the relationship with whistleblowers on more complex matters. The Australian Prudential Regulation Authority has responsibility for enforcing the whistleblower protections under the

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<sup>2</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009).

<sup>3</sup> *Ibid*, 255 [7.120].

<sup>4</sup> *Ibid*, 12.

<sup>5</sup> Law Council of Australia, Submission to the Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, 27 February 2009, 5 [18].

<sup>6</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 249, [8.6].

<sup>7</sup> The PID Act may capture a contracted service provider for a Commonwealth contract as discussed further in this submission.

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Banking Act, Insurance Act, Life Insurance Act and Superannuation Industry (Supervision) Act.

11. It is unclear whether this whistleblower protection for the private sector is effective. The Senate Standing Committee on Economics has, for example, recommended that the government develop legislative amendments to:
  - expand the definition of a whistleblower in Part 9.4AAA of the *Corporations Act 2001* (Cth) to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners;
  - expand the scope of information protected by the whistleblower protections to cover any misconduct that ASIC may investigate; and
  - provide that ASIC cannot be required to produce a document revealing a whistleblower's identity unless ordered by a court or tribunal, following certain criteria.<sup>8</sup>
12. The Law Council encourages the Department of Prime Minister and Cabinet to consider whether expanding the jurisdiction of the PID Act to include the private sector would be more effective and comprehensive than the current approach.

**Recommendation:**

- **Consideration be given to whether the PID Act's jurisdiction should be expanded to include the private sector in-and-of-itself, and not simply Commonwealth Government contractors.**

## Scope – Public Sector

13. The PID Act does not apply to Ministers, parliamentarians, their staff or members of the judiciary. These positions are not included in the list of 'public officials' set out in section 69 of the PID Act, thereby excluding them from the application of the Act.<sup>9</sup>
14. A question arises as to whether existing whistleblower arrangements for these public sector groups are adequate. The Government response to the House Standing Committee on Legal and Constitutional Affairs' *Inquiry into Whistleblowing Protections within the Australian Government Public Sector Report*<sup>10</sup> (Whistleblowing Report) noted explicitly that Members of Parliament and employees would not be covered by a Public Interest Disclosure scheme, and stated that allegations of wrongdoing by Members of Parliament and their staff should be addressed by the Parliament.<sup>11</sup>

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<sup>8</sup> Senate Standing Committee on Economics, 'The Performance of the Australian Securities & Investments Commission: Report of the Senate Economics Committee Inquiry', June 2014, Recommendation 12. The Government has 'noted' this recommendation – see Australian Government, Australian Government Response to the Senate Economics References Committee Report, Performance of the Australian Securities & Investments Commission, October 2014, 9.

<sup>9</sup> In contrast, for example, ministers, members of parliament and commonwealth judicial officers are actually listed as being Commonwealth public officials in the *Criminal Code Act 1995* (Cth).

<sup>10</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Whistleblowing Protections within the Australian Government Public Sector Report*, (2009).

<sup>11</sup> Government Response, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, (17 March 2010).

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15. Under section 31 of the PID Act, conduct is not disclosable conduct if it relates only to action that has been, is being, or is proposed to be, taken by a Minister, with which a person disagrees.<sup>12</sup>

16. In relation to judicial officers, the Explanatory Memorandum to the PID Act notes:

*Subclause 32(1) establishes that conduct is not disclosable conduct if it is conduct of a judicial officer. Disclosable conduct also does not include conduct of the chief executive officer of a court, or a member of that person's staff, when exercising a power of the court, performing a function of a judicial nature or exercising a power of a judicial nature.*<sup>13</sup>

17. In relation to staff of Members of Parliament, the House Standing Committee on Legal and Constitutional Affairs noted in its Whistleblowing Report:

*Staff of Members of Parliament should be included in whistleblower protection. In recognition of the political environment within which staff work and their employment arrangements which may not provide an internal disclosure option, the Committee considers that the Commonwealth Ombudsman should be the authority authorised to receive public interest disclosures from the employees of Members of Parliament employed under the Members of Parliament (Staff) Act 1984.*<sup>14</sup>

18. In a submission to the Whistleblowing Report, the Commonwealth Ombudsman articulated relevant instances of official misconduct, underlying the need for comprehensive legislation on whistleblower protection:

*Over the past two decades across all levels of government in Australia we have witnessed the prosecution and at times imprisonment on corruption and fraud offences of a state premier, state government ministers, a commissioner of police, a chief magistrate, members of parliament, judges, numerous officials at all levels of government.*<sup>15</sup>

19. On the basis of the Whistleblowing Report and the Ombudsman's submission, the Law Council encourages the Independent Reviewer recommend that the Commonwealth Parliament (through a Joint Standing Committee) conduct an inquiry into whether existing whistleblower arrangements for Ministers, parliamentarians, their staff or members of the judiciary are operating effectively;

#### **Recommendation**

- **The Independent Reviewer recommend that the Commonwealth Parliament (through a Joint Standing Committee) conduct an inquiry into whether existing whistleblower arrangements for Ministers, parliamentarians, their staff or members of the judiciary are operating effectively.**

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<sup>12</sup> *Public Interest Disclosure Act 2013* (Cth), sub-s 31(b)(i).

<sup>13</sup> Explanatory Memorandum, *Public Interest Disclosure Act 2013* (Cth), 17.

<sup>14</sup> House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Whistleblowing Protections within the Australian Government Public Sector Report*, (2009) 53.

<sup>15</sup> *Ibid*, 2.

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## Disclosable conduct – intelligence information

20. Members of the AIC are currently afforded fewer whistleblowing protections than other individuals covered by the PID Act.
21. Sections 33 and section 41 of the PID Act exclude ‘intelligence information’ from external disclosure. Disclosures containing ‘intelligence information’ may only be made internally to authorised persons or to the Inspector-General of Intelligence and Security (IGIS). Broader public disclosures in the public interest where it involves intelligence information are not permitted under the PID Act.
22. The Law Council understands the PID Act only applies to allow disclosure of information by an AIC employee in three very limited scenarios, namely:
  - a public official would be protected for disclosing intelligence information to his or her immediate supervisor, an authorised internal recipient, or the IGIS but only where this relates to unlawful activity;<sup>16</sup>
  - a public official would be protected for disclosing information relating to intelligence agencies (but not intelligence information) where there is a substantial and imminent danger to health, safety or the environment;<sup>17</sup>
  - a public official would be protected for disclosing information relating to intelligence agencies to an Australian legal practitioner.<sup>18</sup> The legal practitioner, however, would need to hold an appropriate security clearance, and the protection would not extend to intelligence information<sup>19</sup> such as operations, sources and methods.<sup>20</sup>
23. The Law Council recognises that a wide range of information held by intelligence agencies requires the protection of secrecy provisions. A duty not to disclose information is essential to the proper functioning of the AIC and to protect the identity of individuals.
24. However, the Law Council also recognises, as did the ALRC, that ‘a balance must be found between the principles of open government and the need to protect Commonwealth information where unauthorised disclosure would harm identified public interests’.<sup>21</sup>

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<sup>16</sup> *Public Interest Disclosure Act 2013* (Cth), sub-s 26(1).

<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.*

<sup>19</sup> ‘Intelligence information’ is comprehensively defined in section 41 of the PID Act, and includes for example: a) information from an intelligence agency; b) information that is about, or that might reveal: i. a source of information referred to in paragraph a); or ii. the technologies or methods used by an intelligence agency to deal with information referred to in paragraph a); or iii. operations that have been, are being, or are proposed to be, undertaken by an intelligence agency; c) information: i. received by a public official from an authority of a foreign government that has functions similar to the functions of an intelligence agency; and ii. that is about a matter communicated by that authority in confidence; d) information from the Defence Department about: i. the collection, reporting, or analysis of operational intelligence; or ii. a program under which a foreign government provides restricted access to technology; e) information: i. that identifies a person as being, or having been, an agent or member of the Australian Secret Intelligence Service; fa) information: i. that identifies a person as an Australian Security Intelligence Organisation (ASIO) employee an ASIO affiliate, a former ASIO employee, or a former ASIO affiliate, f) sensitive law enforcement information.

<sup>20</sup> *Public Interest Disclosure Act 2013* (Cth), sub-s 26(1).

<sup>21</sup> Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report No 112 (2009) 103-104.

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25. The Law Council is concerned about the inability of AIC employees to seek legal advice on matters which may involve a disclosure of intelligence information. The rule of law requires that everyone should have access to a competent and independent lawyer of their choice in order to establish and defend their rights.<sup>22</sup> The Law Council's preferred view is that members of the AIC should have appropriate means of seeking independent legal advice. It is concerned that the current process may not allow legal advice to be sought by AIC members, even where the disclosure may not pose a risk to Australia's national security.
26. For example, the Law Council queries how the average public official would find a legal practitioner with a security clearance, and also how practically they would seek advice about something – which may, for example, have involved corrupt conduct or abuse of power, or injury to themselves or another person - without disclosing 'intelligence information'. Individuals may be severely limited from obtaining, and their legal practitioners from providing, legal advice.

**Recommendation:**

- **Consideration be given to granting the IGIS powers to authorise a person to seek discrete legal advice on certain matters and subject to certain conditions being met. Alternatively, the Independent Reviewer may wish to consider some other mechanism which would enable an AIC employee to obtain independent legal advice.**

## Employment grievances

27. The Law Council is advised that there is significant overlap for Commonwealth Government contractors between protections afforded under the PID Act and other legislative schemes such as industrial relations legislation. The Law Council suggests it would be preferable to remove this unnecessary complexity regarding employment-related grievances where there may be limited to no public interest served by the disclosure under the PID Act.
28. The breadth of disclosable conduct caught under the PID Act is too broad in capturing conduct relating to employment-related grievances, particularly of Commonwealth Government contractors.<sup>23</sup> This appears to go beyond the intent of the legislation, which is to address corruption, maladministration and wrongdoing.<sup>24</sup> It also creates unnecessary administrative burden for PID officers and confusion as to whether whether/when a workplace grievance or conflict is a PID.
29. Conduct about employment-related grievances – that is, 'conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official'<sup>25</sup> – should be removed. Employees have the *Fair Work Act 2009* (Cth), discrimination legislation, or other legislation such as the *Privacy Act 1988* (Cth),<sup>26</sup> which may be available to them to address their employment-related grievances. They may also use internal agency processes to deal with such issues.

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<sup>22</sup> Law Council of Australia, *Policy Statement: Rule of Law Principles*, March 2011, Principle 4.

<sup>23</sup> *Public Interest Disclosure Act 2013* (Cth), sub-s 30(2).

<sup>24</sup> Explanatory Memorandum, *Public Interest Disclosure Bill 2013* (Cth), 2.

<sup>25</sup> *Public Interest Disclosure Act 2013* (Cth), paragraph 29(2)(b).

<sup>26</sup> Noting that generally, in a typical private sector employment dispute, the personal information would come within the definition of an *employee record* of section 6 of the *Privacy Act 1988* (Cth) and be an act or practice

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30. Alternatively, a whistleblower's disclosure that relates to an employment-related grievance should at least partially be in the public interest. This would accord with the purpose of the PID Act, ensure that the PID Act protections are being appropriately utilised and avoid disclosures relating to personal employment-related grievances which may not be in the public interest.

**Recommendation:**

- **Employment grievances should be expressly removed from the scope of the PID Act. Alternatively, a whistleblower's disclosure that relates to an employment-related grievance should at least partially be in the public interest.**

## Conclusion

31. The Law Council considers that the PID Act must be considered in terms of its operation with relevant secrecy provisions. The ALRC's recommendations regarding secrecy provisions should be implemented to ensure the effectiveness of the whistleblowing regime as a whole. Consideration should also be given to whether the PID Act should be extended to the private sector and whether existing whistleblower protections for Ministers, parliamentarians, their staff or members of the judiciary are operating effectively.
32. Consideration should be given to granting the IGIS powers to authorise a person to seek discrete legal advice on certain matters subject to certain conditions being met. Alternatively, the Independent Reviewer may wish to consider some other mechanism which would enable an AIC employee to obtain independent legal advice.
33. The PID Act should also be amended to remove paragraph 29(2)(b) relating to conduct about employment-related grievances, or alternatively a whistleblower's disclosure that relates to an employment-related grievance should at least partially be in the public interest.

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that is exempt under section 7B (3) of the Act. The employee records exception applies only to private sector organisations not agencies.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote 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 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

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

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

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 the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2016 Executive as at 1 January 2016 are:

- Mr S. Stuart Clark AM, President
- Ms Fiona McLeod SC, President-Elect
- Mr Morry Bailes, Treasurer
- Mr Arthur Moses SC, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Michael Fitzgerald, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.