



25 January 2023

Senator Nita Green

Chair

Senate Standing Committee on Legal and Constitutional Affairs

Via email: legcon.sen@aph.gov.au

Dear Chair

Inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022

Thank you for the invitation to provide a submission to your inquiry into the Public Interest Disclosure Amendment (Review) Bill 2022 (the Bill). The Australian Federal Police (AFP) supports the proposed increased protections to individuals and greater clarity on Public Interest Disclosure (PID) processes for users.

The AFP provided submissions to both the 2016 Moss Review of the *Public Interest Disclosure Act 2013* (PID Act) and the 2019-20 Parliamentary Joint Committee on Intelligence and Security's *inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press*, which this submission may be read in conjunction with.

AFP's current role under the *Public Interest Disclosure Act 2013*

The AFP has a dual role under the PID Act:

- a) To facilitate and investigate disclosures under the PID regime; and
- b) To assess and, where appropriate, investigate referrals made to the AFP alleging criminal activity.

Following the commencement of the PID Act, the AFP developed a National Guideline on public interest disclosure. This National Guideline, provided at **Attachment A**, governs the implementation of the PID Act in the AFP.

Since the commencement of the PID Act to 30 June 2022, the AFP has received **32 PID referrals about or including the AFP**:

- **Fourteen (14)** matters were accepted as PID matters, and PID investigations were subsequently conducted by the AFP;
- **Five (5)** matters were referred to the Commonwealth Ombudsman for investigation; and
- **Thirteen (13)** matters were assessed by the AFP and not accepted as PID matters by the AFP.

- **Five (5)** of these matters subsequently became an investigation under Part V of the AFP Act (by AFP Professional Standards).
- **One (1)** of these matters was subsequently referred to the Commonwealth Director of Public Prosecutions as it related to the CDPP, rather than AFP.
- The remaining **seven (7) matters** were determined to not meet the threshold for a PID under the Act and no investigation was undertaken. The discloser was made aware of the outcome.

The AFP can receive referrals relating to criminal activity associated with the PID regime via a variety of methods, including:

- Referrals from PID investigators in other Commonwealth agencies under section 56 of the PID Act; and
- Referrals from members of the public alleging a PID Act offence (such as those contained in section 19 and 20 (taking or threatening to take a reprisal against another person) and sections 65 and 67 (disclosure of protected information)).

Section 56(1) of the PID Act enables the disclosure of information obtained during the course of a PID investigation to a member of an Australian police force should the person conducting a PID investigation suspect that they have obtained evidence of an offence against a law of the Commonwealth, a State, or a Territory. Section 56(2) currently makes such a disclosure mandatory if the suspected offence is punishable by imprisonment for life or a period of 2 years or more. This can include the offences contained in sections 19 and sections 65 and 67 of the PID Act itself.

The AFP is unable to confirm the full range of matters relating to criminal activity associated with the PID regime, primarily because referring agencies and members of the public do not necessarily identify the issue as a section 56 referral, or as a matter relating to a PID Act offence. The AFP considers there would be benefit in a whole-of-government approach to such referrals to improve the quality of referrals, their assessment by the AFP and record keeping. This could be addressed in implementation of the Bill.

All referrals to the AFP relating to Commonwealth criminal offences are assessed by the AFP using the Operational Prioritisation Model (OPM). In some cases, it may be appropriate for the referring agency to continue with the PID investigation, even where criminal offences have been identified, or for the matter to be referred to another agency for investigation.

Internal AFP processes

The AFP has well-established governance regarding the standards expected of AFP appointees, and deploys expert investigative capabilities to investigate AFP Code of Conduct and criminal breaches by its own appointees as well as serious criminal offences committed against the Commonwealth by other public service officials.

The AFP has established processes under Part V of the AFP Act and AFP internal policies to respond to matters of alleged wrongdoing and maladministration, ranging from minor matters through to extremely serious matters.

The AFP has a mature integrity framework under the AFP Act and the *Law Enforcement Integrity Commissioner Act 2006*, which involves a range of mechanisms to address the types of matters considered under the PID Act, including oversight by the Integrity Commissioner, the Ombudsman, and parliamentary committees. We expect that a similar framework will be established under the National Anti-Corruption Commission (NACC).

The AFP contributes to upholding the integrity and accountability of the Commonwealth public service and will continue to work collaboratively with other agencies to protect the integrity of the Commonwealth.

Key changes relevant to AFP

Exclusion of personal work-related conduct

Item 3 of the Bill would insert new subsection 29(2A) to the PID Act to provide that personal work-related conduct is not disclosable conduct.

The AFP supports this approach as it recognises that there are other frameworks better placed to deal with personal work-related conduct. The proposed definition of personal work-related conduct in Item 4 of the Bill (new section 29A) would also appear appropriate having regard to the examples provided.

The Bill proposes two exemptions to the exclusion of personal work-related conduct from being disclosable conduct:

- significant conduct that would undermine public trust and confidence or otherwise have significant implications for an agency; and
- reprisal action.

The AFP understands the policy intent of the exemption for significant conduct is to ensure that systemic wrongdoing is not excluded from being disclosable conduct. This outcome would be consistent with the Moss Review recommendations (Recommendation 5) and the AFP considers this is appropriate to maintain the integrity of the PID Act framework.

Mandatory notification of serious criminal offences

New subsection 56(4) of the PID Act (Item 34 of the Bill) would provide that an investigator does not need to notify police of evidence of an offence punishable by at least 2 years' imprisonment where the investigator believes on reasonable grounds that:

- the agency itself has the capacity to investigate the relevant offence and meet the requirements for gathering evidence and preparing a brief of evidence for the Commonwealth Director of Public Prosecutions (CDPP); or
- the conduct relates to a corruption issue which has been referred to the NACC Commissioner under section 24 of the National Anti-Corruption Commission Act 2022.

This would not prevent an investigator from also reporting a matter in these circumstances to police. The AFP acknowledges the potential benefits of this approach to reports of crime, including that it may free up AFP resources and avoid duplication of effort where another Australian Government entity is capable of investigating such matters.

Repeal of secrecy offence

Item 63 of the Bill would repeal the secrecy provision presently in section 65 of the PID Act making it an offence to disclose *protected information*, and replace it with a new provision authorising disclosure of 'information and documents' in relation to a PID where the principal officer of the *sharing agency* considers the information or documents to be relevant to the *destination agency's* functions.

The AFP understands the policy intent of this amendment is to override perceived barriers to information sharing between agencies to better facilitate investigations and responses to outcomes of investigations. The AFP is supportive of these changes to the extent they clarify the circumstances in which disclosure is authorised, noting that disclosure is not mandatory and there are safeguards in proposed subsections (4) and (5) to permit redactions to information and protect the identity of the discloser.

The AFP appreciates the opportunity to provide a submission to the Committee and we welcome any requests for clarification or discussion on the issues raised above.

Yours sincerely

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Performing the duties of
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