Australian Human Rights Commission

# Public sector whistleblowing reforms – stage 2

## Submission to the Attorney-General's Department

22 December 2023

ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
National Information Service 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

# 1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Attorney-General's Department in relation to its November 2023 consultation paper on the second stage of public sector whistleblowing reforms, aimed at improving the effectiveness and accessibility of protections for whistleblowers.

# 2 Summary

2. The Commission welcomes the opportunity to make a submission in relation to the issues raised in the consultation paper. This submission draws on the Commission's January 2023 submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to the *Public Interest Disclosure Amendment (Review) Bill 2022* (Cth).[1] Many of the issues raised by the Commission in that submission, but not incorporated into the first stage of amendments to the *Public Interest Disclosure Act 2013* (Cth) (PID Act), are contained in the consultation paper.

3. Of all of the issues raised in the consultation paper, the last one is potentially the most important. The PID Act needs to be easy to understand for whistleblowers so that they can be confident in making a public interest disclosure. The Act should be redrafted in clear and direct language that is non-technical and easy to navigate.

4. Many of the Commission's recommendations are directed to tempering the highly prescriptive nature of the PID Act and the associated potential for whistleblowers who intend to do the right thing to miss out on protection. These recommendations would:

   - broaden the scope of the PID Act to include parliamentary staff
   - provide flexibility in the making of disclosures, by adopting a 'no wrong doors' approach
   - provide protection for reasonable preparatory acts that are consistent with the objects of the PID Act
   - make it easier for whistleblowers to obtain advice and assistance in relation to the making of a disclosure
   - broaden the scope for external disclosures

- make it easier for whistleblowers to bring proceedings in relation to reprisals.

5. The Commission also considers that there is merit in the establishment of an independent public sector whistleblower protection authority in a form that could be expanded to cover the private sector in the future. There is a good case based on the operation of the current regime for such a body to be given at least the following functions:
   - acting as a clearing house for whistleblowers bringing forward public interest disclosures
   - providing advice and assistance to whistleblowers
   - investigating allegations of reprisals against whistleblowers.
6. It may be that further functions could also be added, either at the outset or in the future. Ultimately, there is a need for greater consistency across the highly fragmented patchwork of public and private sector whistleblower regimes. The establishment of a whistleblower protection authority would provide an anchor for increasing coherence over time.

# 3 Recommendations

7. The Commission makes the following recommendations.

**Recommendation 1**

The Commission recommends that people employed under the *Members of Parliament (Staff) Act 1984* (Cth) be included within the definition of 'public officials' in the PID Act.

**Recommendation 2**

The Commission recommends that the PID Act adopt a 'no wrong door' approach to the making of disclosures, which recognises that a person makes a public interest disclosure if they make a disclosure to an agency that can receive public interest disclosures, and they honestly believed that the agency was an appropriate entity to which to make the disclosure.

**Recommendation 3**

The Commission recommends that a whistleblower receive the protections of the PID Act if they make a disclosure to a senior public

officer of a relevant agency, even if that officer is not their supervisor or an 'authorised officer' for the purposes of the PID Act.

**Recommendation 4**

The Commission recommends that a whistleblower be permitted to make an external disclosure if an authorised officer has failed to comply with their statutory obligation to make a decision about the allocation of the disclosure within the time provided for in the PID Act.

**Recommendation 5**

The Commission recommends that the PID Act be amended to provide that a whistleblower may make an external disclosure if an internal investigation has not been completed within 90 days.

**Recommendation 6**

The Commission recommends that a legal practitioner disclosure is only required to be made to a lawyer with a relevant security clearance if the whistleblower knew, or ought reasonably to have known, that any of the information had a protective security classification of 'secret' or 'top secret'.

**Recommendation 7**

The Commission recommends that public officials with access to 'secret' or 'top-secret' information are provided with details of how to access a list of security cleared lawyers that they can approach for independent advice about making a public interest disclosure.

**Recommendation 8**

The Commission recommends that the Government consider an appropriate mechanism to ensure that staff within the Australian Intelligence Community can access legal advice about the potential to make an internal disclosure under the PID Act that includes intelligence information.

**Recommendation 9**

The Commission recommends that the offence provision in s 67 of the PID Act applying to legal practitioners be amended so that it is limited to a disclosure or use of information that caused, or was likely or intended to cause, harm to an identified essential public interest, or disclosure of narrow categories of information where harm to an essential public interest is implicit.

**Recommendation 10**

The Commission recommends that a whistleblower be permitted to make a disclosure to other relevant advisers, including a union representative or a person providing an employee assistance program, for the purpose of obtaining advice and assistance in relation to making or having made a public interest disclosure, or to relevant health practitioners for the purpose of obtaining medical advice and support in relation to the making of a disclosure.

**Recommendation 11**

The Commission recommends that whistleblower have immunity for preparatory acts if a court is satisfied that it is appropriate for the whistleblower to be given immunity having regard to:

- whether the conduct was reasonably necessary to make the public interest disclosure
- whether the conduct was reasonably necessary to demonstrate that the disclosure was a public interest disclosure
- whether the conduct was consistent with the objects of the PID Act
- the seriousness of the conduct
- the extent to which the conduct impacted on the rights of others.

**Recommendation 12**

The Commission recommends that there be a shifting evidential burden from a public sector whistleblower to a respondent where civil remedies are sought under the PID Act for a reprisal or threatened reprisal.

**Recommendation 13**

The Commission recommends that the PID Act provide for accessorial liability in civil actions relating to reprisals, and that it provide for civil remedies for a breach of positive duties in the PID Act.

**Recommendation 14**

The Commission recommends that the *National Anti-Corruption Commission Act 2022* (Cth) provide for civil remedies for reprisals.

**Recommendation 15**

The Commission recommends that consideration be given to the establishment of a whistleblower protection authority, to have functions including:

- acting as a clearing house for whistleblowers bringing forward public interest disclosures
- providing advice and assistance to whistleblowers
- investigating allegations of reprisals against whistleblowers.

**Recommendation 16**

The Commission recommends that the PID Act be redrafted using language that is simple and easy for a prospective whistleblower to understand.

**Recommendation 17**

The Commission recommends that the PID Act provide that a whistleblower is entitled to the protections offered by the Act, even if there has been technical non-compliance with disclosure requirements, provided that the whistleblower has substantially complied.

# 4 Relevant human rights

8. Public servants, in common with all members of the community, enjoy the right to freedom of expression. This right is recognised in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). Article 19(3) provides that the right carries special duties and responsibilities and therefore may be subject to certain restrictions that are provided for by law, and are necessary in order to respect the rights and reputations of others, or to protect national security, public order, or public health or morals.

9. The free speech of public servants needs to accommodate their common law duty of trust and fidelity to the government of the day, as well as obligations contained in the APS Code of Conduct. This means that some restrictions on political speech are permissible.[2] Further, some work by public servants is properly regulated by secrecy provisions. The Australian Law Reform Commission published a report in 2009, *Secrecy Laws and Open Government in Australia* (ALRC Secrecy

Report), which provided a comprehensive review of Commonwealth secrecy laws.[3] The ALRC noted that while secrecy was necessary in some circumstances, it needed to be properly circumscribed in order to achieve the aim of open and accountable government.

10. Public sector whistleblowing legislation such as the PID Act is designed to facilitate speech (including, in some instances, public speech) by public servants, particularly those subject to secrecy provisions that would otherwise limit their speech, by providing them with legal protections for disclosing serious misconduct such as fraud, corruption or maladministration. This kind of speech promotes the rule of law and democratic accountability that underpins the protection and fulfilment of a range of other important rights.

11. Whistleblowing can come at great personal cost to individuals who are prepared to disclose wrongdoing. As a result, it is important that the privacy of whistleblowers is also protected, reflecting the general right to privacy outlined in article 17 of the ICCPR. The PID Act seeks to do this by including offences designed to protect the identity of whistleblowers and by including civil and criminal provisions prohibiting reprisals. The provisions prohibiting reprisals also assist in protecting the right to work and the right to just and favourable conditions of work in articles 6(1) and 7 of the *International Covenant on Economic, Social and Cultural Rights*.

12. Australia has ratified the United Nations Convention against Corruption.[4] Article 33 of that instrument provides:

> Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

13. The recommendations made by the Commission in this submission in relation to the proposed amendments to the PID Act are designed to ensure that whistleblowers are properly informed about their rights, that they are well protected in making disclosures, that these protections extend to all relevant Commonwealth public servants, that disclosures are properly investigated, and that there is greater protection for appropriate public disclosures. In doing so, the Commission is guided by the importance of protecting the human rights identified above.

# 5 Background

## 5.1 Operation of the PID Act

14. The PID Act provides protections for current and former public officials and public contractors who seek to disclose wrongdoing in the public sector (whistleblowers). The policy aim is to encourage such disclosures so that they can be properly investigated and reduce the incidence of such wrongdoing.

15. Whistleblowers are provided with immunity from civil, criminal or administrative liability for the making of the disclosure (including any liability for defamation or breach of contract).[5] However, whistleblowers who report about their own wrongdoing are not provided with immunity in relation to the conduct that is the subject of the disclosure.[6] There are both civil and criminal prohibitions against taking reprisal action against whistleblowers.[7]

16. The PID Act only protects disclosures by whistleblowers in relation to certain kinds of conduct (disclosable conduct) that are made in the way provided for by the PID Act.

17. 'Disclosable conduct', in general terms, is conduct that is unlawful, corrupt, perverts the course of justice, constitutes maladministration, is an abuse of public trust, involves misconduct in relation to scientific research or analysis, results in the wastage of public money or property, unreasonably results in a danger to health or safety or results in a danger to the environment.[8]

18. Certain conduct is excluded from the definition of disclosable conduct, including:

    - conduct by judicial officers
    - conduct related only to action by a Minister, the Speaker of the House of Representatives or the President of the Senate with which a person disagrees
    - conduct related only to policies or proposed policies of the Australian Government with which a person disagrees
    - conduct related only to expenditure on government polices or the actions of Ministers, the Speaker or the President.[9]

19. Four kinds of disclosure are permitted:

(a) The primary form of disclosure is an 'internal disclosure' within government. In most cases, this may be made to the whistleblower's supervisor, to an authorised officer of the whistleblower's agency or the agency to which the conduct relates, or to the Ombudsman. In the case of conduct that relates to an intelligence agency, the disclosure may be made to that intelligence agency or to the IGIS.

(b) An 'external disclosure' outside of government may only be made in limited circumstances. Unless it is an emergency (see (c) below), the whistleblower must first make an internal disclosure. An external disclosure is permitted if:

- an investigation was conducted and the whistleblower believes on reasonable grounds that that the investigation was inadequate
- an investigation was conducted and the whistleblower believes on reasonable grounds that the response to the investigation was inadequate
- an investigation has not been completed within the time limit prescribed by s 52.

Provided that one of these criteria is satisfied, an external disclosure may be made, but only if all of the following criteria are also met:

- The disclosure is not, on balance, contrary to the public interest.
- No more information is publicly disclosed than is reasonably necessary to identify one or more instances of disclosable conduct.
- The information does not include intelligence information.
- None of the conduct with which the disclosure is concerned relates to an intelligence agency.

(c) An 'emergency disclosure' can be made publicly if the whistleblower believes on reasonable grounds that the information concerns a 'substantial and imminent danger to the health or safety of one or more persons or to the environment'. In addition, there must be 'exceptional circumstances' justifying not making an internal disclosure or waiting for an internal investigation to be completed. As with a standard external disclosure, an emergency disclosure

must be limited to the minimum necessary – in this case, to alert the recipient to the substantial and imminent danger. Even in emergency situations, the information must not include intelligence information of any kind.

(d) A potential or actual whistleblower may make a 'legal practitioner disclosure' to a lawyer for the purpose of obtaining legal advice or professional assistance. If the person making the disclosure knew, or ought reasonably to have known, that any of the information has a national security classification, the whistleblower must ensure that the lawyer holds the appropriate level of security clearance. As with other disclosures, intelligence information may not be disclosed.

20. The PID Act provides for the investigation of internal disclosures, either by the agency to which the disclosure relates, the Ombudsman or the IGIS.[10] There are a range of circumstances in which an officer of the relevant agency has a discretion not to investigate.[11] There is an initial time limit for the investigation of 90 days, but this can be extended indefinitely by the Ombudsman or the IGIS.[12] At the conclusion of the investigation, the agency must prepare a report including details of any findings and action to be taken as a result, and provide a copy of the report to the whistleblower.[13] The principal officer of the agency must ensure that appropriate action is taken in response to the report and its recommendations.[14]

21. This submission is focused on proposed amendments to the PID Act that deal with public sector whistleblowing. It also makes some references by way of comparison to the regimes for whistleblower protections in the:

- *Corporations Act 2001* (Cth) which, since 2019, covers the corporate, financial and credit sectors[15]
- *Taxation Administration Act 1953* (Cth)[16]
- *Fair Work (Registered Organisations) Act 2009* (Cth).[17]

## 5.2 Review of the PID Act

22. The PID Act commenced on 15 January 2014. Section 82A provided that the Minister must cause a review of the operation of the Act to be undertaken, to start 2 years after commencement and to be completed within 6 months.

23. The review was undertaken by Mr Philip Moss AM (Moss Review) and the report of the review was provided to the Minister Assisting the Prime Minister for the Public Service on 15 July 2016.[18] Mr Moss was the Integrity Commissioner and head of the Australian Commission for Law Enforcement Integrity between 2007 and 2014.

24. The Moss Review identified several issues of concern with the PID Act regime. Whistleblowers reported that they did not feel supported, that their concerns were not properly responded to and that they had experienced reprisals as a result of bringing forward their concerns. Agencies found the regime complex and difficult to apply.[19]

25. The Moss Review made 33 recommendations. The then Australian Government released its response to the Moss Review on 16 December 2020.[20] The *Public Interest Disclosure Amendment (Review) Act 2022* (Cth) was primarily aimed at the implementation of 21 of those recommendations.

26. The current consultation paper seeks comment in relation to 7 outstanding recommendations of the Moss Review, as well as a number of recommendations from the reports of two other parliamentary inquiries:

    - the 2017 Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Whistleblower protections in the corporate, public and not-for-profit sectors* (PJCCFS Whistleblower Report)
    - the 2020 Senate Economics Legislation Committee report into the *Performance of the Inspector-General of Taxation* (Senate IGTO Report).

# 6 Response to consultation issues

27. The Commission responds below to the specific issues raised in the consultation paper.

## 6.1 Issue 1: Making a disclosure within government

*(a) Extension of protections of PID Act to parliamentary staff*

28. A regime to protect public sector whistleblowing should, to the greatest extent possible, protect all people who blow the whistle on public

sector misconduct, and should do so in a manner that is clear and consistent.

29. At present, the definition of 'public official' is too narrow because it does not include people employed under the *Members of Parliament (Staff) Act 1984* (Cth) (MoP(S) Act).[21] This includes people employed by parliamentarians such as policy advisers and electorate officers. The Commission heard in the *Set the Standard* inquiry that MoP(S) Act staff felt additional levels of work insecurity when compared to other parliamentary workers due to the perception that the MoP(S) Act provides parliamentarians with broad powers to dismiss their staff with limited protections. The review found that the insecurity of employment had a chilling effect on people speaking up about bullying, sexual harassment and sexual assault.[22] The same power dynamics are also likely to impact on the willingness of MoP(S) Act staff to make public interest disclosures.

30. A person need not be directly employed by, or appointed to a position in, the public sector in order to have information that should properly be disclosed pursuant to a whistleblowing regime. In broad terms, whistleblower protections are likely to be necessary for people who have information that should be disclosed, but who:

    - would otherwise be prevented from doing so because of secrecy or non-disclosure requirements (for example as a result of secrecy offences, employment or appointment conditions, or contractual requirements); and/or
    - would be at risk of reprisals as a result of making a disclosure.

31. The PID Act currently applies to current and former public officials and public contractors. 'Public official' is defined in a long table in s 69 of the PID Act and includes:

    - APS employees of Commonwealth Departments, staff of Commonwealth agencies, Parliamentary Service employees, and members of the Defence Force
    - Secretaries of Departments, principal officers of agencies, and directors of Commonwealth companies
    - prescribed authorities, AFP appointees and other statutory office holders
    - officers and employees of service providers under a Commonwealth contract, including sub-contractors.

32. Importantly, s 70 of the PID Act also permits an authorised officer of an agency to make a written determination that the PID Act extends to a person who does not fall within the definition of 'public official' if the person has information about disclosable conduct that they have disclosed or propose to disclose. If the authorised officer refuses to make such a determination, they must provide reasons, and the refusal is subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

33. Section 70 provides an important way to extend the operation of the PID Act to people who do not fall within the highly technical definitions in s 69. However, the PID Act has a number of exclusions from both ss 69 and 70. The following are not public officials and cannot obtain the benefit of the PID Act:

    - a judicial officer
    - a member of a Royal Commission
    - a member of Parliament
    - a person employed under the MoP(S) Act.

34. The exercise of judicial powers is not disclosable conduct under the PID Act,[23] given the constitutional separation of powers and the importance of preserving judicial independence, and there are good reasons for also excluding judicial officers from the definition of 'public official'. Similar conditions apply to members of a Royal Commission who are given equivalent protections and immunities as Justices of the High Court.[24] There is less need for members of Parliament to have access to the protections in the PID Act, given their broad ability to disclose misconduct under the protections of parliamentary privilege.

35. However, the Commission is concerned about the exclusion of MoPS Act staff from the protections afforded by the PID Act. While there are some limited avenues for MoP(S) Act staff to disclose misconduct, those avenues relate to a narrower range of conduct.

36. The House of Representatives Committee that proposed the whistleblower protection scheme for the public sector in 2009 recommended that it include disclosures by parliamentary staff.[25] This recommendation was not accepted by the then Government and did not form part of the PID Act when it was first passed.[26]

37. A disclosure by parliamentary staff need not relate to conduct by a parliamentarian and could relate to conduct by any agency in the

public service. As noted in the House of Representatives report in 2009, staff employed under the MoP(S) Act 'may have "insider" access to information, be in a position to observe serious conduct contrary to the public interest and face risks of reprisal for speaking out'.[27]

38. In November 2021, the Commission provided the then Attorney-General with a report of its review into Commonwealth Parliamentary Workplaces, *Set the Standard*.[28] One of the recommendations of the *Set the Standard* report was that parliamentary staff employed under the MoP(S) Act should be included as 'public officials' in s 69 of the PID Act and be permitted to make public interest disclosures. This recommendation reflected recommendation 27 of the Moss Review.

39. Significantly, the Moss Review concluded:

> If an independent body is created with the power to scrutinise alleged wrongdoing by members of Parliament or their staff, such as a comprehensive federal integrity body, the Review recommends that consideration be given to extending the application of the PID Act to these groups.

40. The recommendation by the Commission in *Set the Standard* was made in the context of also recommending the establishment of an Independent Parliamentary Standards Commission (IPSC). The report considered how such a body could be integrated into the regime in the PID Act:

> The IPSC (and, in the future, any Commonwealth Integrity Commission which may be established) should be made authorised recipients of disclosures by parliamentarians' staff.[29]

41. The current consultation paper notes that the *National Anti-Corruption Commission Act 2022* (Cth) provides both immunities and protections from reprisal action for staff of parliamentarians who report a corruption issue to the NACC. It also notes that the Government is also considering protections for MoP(S) Act staff and others who report alleged breaches of codes of conduct for parliamentarians and their staff to the proposed IPSC.[30]

42. The Commission welcomed the NACC legislation, including the protections afforded to people who make relevant disclosures about corruption issues.[31] It appears that there are significant similarities with the protections under the PID Act and the NACC Act as set out in the following table.

| Provision | PID Act | NACC Act |
|---|---|---|
| Protection for whistleblowers against civil, criminal or administrative liability (including defamation) and contractual remedies for making the disclosure | s 10 | s 24 |
| Protection for witnesses against civil, criminal or administrative liability (including defamation) and contractual remedies for providing assistance in relation to the disclosure | s 12A | s 24 |
| Civil liability for taking reprisals against whistleblowers or witnesses | ss 13–18 and 19A | N/A |
| Criminal offence to take reprisals against whistleblowers or witnesses | ss 13 and 19 | ss 29–30 |
| Protection of the identity of whistleblowers | ss 20–21 | ss 227–228 |

43. However, the scope of protected disclosures that may be made under the PID Act is broader than protected disclosures that may be made under the NACC Act. The NACC Act is focused on 'corrupt conduct', which is defined in s 8(1) to mean:

> (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;

(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.

44. These elements of corrupt conduct are likely to overlap with some items of disclosable conduct in the table in s 29(1) of the PID Act, including unlawful conduct (items 1 and 2), conduct that involves corruption or perverting the course of justice (item 3), conduct that constitutes intentional maladministration (item 4(a)) and conduct that is an abuse of public trust (item 5). However, other elements of disclosable conduct in s 29 of the PID Act would not or would be unlikely to come within the definition of corrupt conduct. These include negligent maladministration (item 4(c)), conduct that results in the wastage of public money or property (item 7), conduct that unreasonably results in a danger to the health and safety of one or more persons (item 8) and conduct that results in a danger to the environment (item 9).

45. The inclusion of MoP(S) Act staff within the scheme of the PID Act would ensure that they would be protected in relation to disclosures about these issues. Significantly, there are already provisions in the PID Act that would prevent parliamentary staff from making disclosures only in relation to political decisions that they may disagree with. Conduct that relates only to a Commonwealth policy, or action by a Minister, or money expended for either purpose, with which the person disagrees, is not disclosable conduct.[32]

46. Unlike the position with judicial officers, discussed above, there do not appear to be any compelling legal reasons why MoP(S) Act staff could not be included within the scheme of the PID Act. The Commission notes the submission from the Clerk of the Senate to the PJCCFS Whistleblower inquiry that: 'there is no obstacle to including, in a properly-designed scheme, mechanisms for disclosures about, by or to members (or their staff), provided the distinction between privilege and the whistleblower protection regime is maintained'.[33]

47. The Commission maintains that now that there is at least one independent body with the power to scrutinise members of Parliament or their staff, it is appropriate for MoP(S) Act staff to have the protection of the PID Act. Further, the unique position of MoP(S) Act staff means that they should also have the protection of the PID Act for making disclosures in relation to conduct in other parts of the public service.

**Recommendation 1**

The Commission recommends that people employed under the *Members of Parliament (Staff) Act 1984* (Cth) be included within the definition of 'public officials' in the PID Act.

*(b) No wrong door approach*

48. The PID Act is highly prescriptive in relation to the way in which disclosures may be made. An internal disclosure may only be made to the person's supervisor or an 'authorised internal recipient'. An authorised internal recipient is an authorised officer of the discloser's agency, the agency to which the disclosure relates, the Ombudsman, or (if the disclosure relates to an intelligence agency) the IGIS.[34]

49. There is a real risk that a person who genuinely intends to make a public interest disclosure is denied the protections of the PID Act because the disclosure is made to the wrong agency, or the wrong person within an agency.

50. The objects of the PID Act would be better achieved if it adopted a 'no wrong door' approach. Such an approach would:

- better promote the integrity and accountability of the public sector
- encourage and facilitate the making of public interest disclosures
- ensure that whistleblowers are supported and protected from adverse consequences relating to disclosures
- ensure that disclosures are properly investigated and dealt with.[35]

51. The Commission supports the approach in the *Public Interest Disclosures Act 2012* (Vic) which provides protection to whistleblowers if:

- they make a disclosure to an agency that can receive public interest disclosures, and
- the person honestly believed that the agency was an appropriate entity to which to make the disclosure.[36]

52. The 'honest belief' criterion is consistent with Australia's obligations under article 33 of the United Nations Convention against Corruption, to consider legislative protections where a person reports corruption issues in good faith to competent authorities.

53. If the agency is not an appropriate entity to investigate the disclosure, it should be able to refer the disclosure to an appropriate entity.[37]

**Recommendation 2**

The Commission recommends that the PID Act adopt a 'no wrong door' approach to the making of disclosures, which recognises that a person makes a public interest disclosure if they make a disclosure to an agency that can receive public interest disclosures, and they honestly believed that the agency was an appropriate entity to which to make the disclosure.

*(c) Investigative agencies*

54. Establishing a dedicated whistleblower protection authority is likely to facilitate a 'no wrong door' approach, either by providing information and assistance to people considering making a public interest disclosure, or by acting as a clearing house for disclosures (see issue 4 discussed in section 6.4 below). However, the model proposed for a whistleblower protection authority would not see it as responsible for the primary investigation of public interest disclosures, unless those disclosures were about whistleblower reprisals.[38] Instead, the agency responsible for investigation would be either the agency to which the conduct related, or an investigative agency such as the Ombudsman or the IGIS.

55. The definition of 'investigative agency' in the PID Act also permits other agencies to be prescribed by the PID rules, however, no other agencies have been prescribed to date. The Moss Review recommended that the following additional agencies be prescribed: the Australian Public Service Commissioner, the Merit Protection Commissioner, the Integrity Commissioner, the Parliamentary Services Commissioner, the Parliamentary Services Merit Protection Commissioner, and the Inspector-General of Taxation.[39]

56. Deciding whether to prescribe additional agencies and, if so, which to prescribe, will involve questions about capacity, expertise and resourcing. Factors that may be relevant in determining whether to prescribe additional investigative agencies may include whether the agency has specialised expertise in relation to particular kinds of investigations that a more generalised investigative agency may lack. The Commission notes, for example, that the Senate Economics Legislation Committee report into the *Performance of the Inspector-*

*General of Taxation* recommended that the Inspector-General of Taxation and Taxation Ombudsman (IGTO) be made an 'investigative agency' under the PID Act, which would reflect that transfer in 2015 to the IGTO of the Ombudsman's function of investigating administrative tax complaints.[40]

### *(d) Supervisors and authorised officers*

57. Supervisors and authorised officers have different responsibilities under the PID Act. A person may make a disclosure to their supervisor or to an authorised officer of a relevant agency.[41]

58. If a supervisor receives a disclosure, they have an obligation to explain certain matters to the whistleblower about the operation of the PID Act, and to give the information disclosed to an authorised officer 'as soon as reasonably practicable' after the disclosure is made.[42]

59. An authorised officer must either allocate the disclosure to an agency for investigation or decide not to allocate the disclosure to an agency.[43] The authorised officer must use their best endeavours to make a decision about allocation within 14 days.[44]

60. The Commission agrees with the comment in the consultation paper that in some agencies there may only be a small number of authorised officers and, depending on internal arrangements put in place by the agency, it may not be clear who these officers are.[45] A whistleblower should not be deprived of the protections of the PID Act because of a lack of clarity about the identity of an officer to whom a disclosure should be made. The Commission considers that a more flexible process should be adopted which permits whistleblowers to report initially to senior public officers in an agency (either their own, or an agency they honestly believe to be an appropriate entity to which to make the disclosure). Those officers could then be given similar referral obligations to those currently given to supervisors, that require the officer to give the information disclosed to an authorised officer within their agency as soon as reasonably practicable.

**Recommendation 3**

The Commission recommends that a whistleblower receive the protections of the PID Act if they make a disclosure to a senior public officer of a relevant agency, even if that officer is not their supervisor or an 'authorised officer' for the purposes of the PID Act.

## 6.2 Issue 2: Pathways to make disclosures outside of government

61. As noted in paragraph 19(b) above, there are limited circumstances in which an external disclosure is permitted. The Commission suggests below two additional instances where an external disclosure should be permitted, to improve the transparency of the system and encourage prompt investigation of complaints.

*(a) Failures during an internal investigation*

62. Recommendation 9 of the Moss Review was that an external disclosure be permitted if an authorised officer failed to allocate an internal disclosure or a supervisor failed to report information they received about disclosable conduct to an authorised officer. The Moss Review considered that the failure by an agency or supervisor to comply with these process requirements of the PID Act would be a threat to the integrity of the scheme.[46] It considered that the approach of permitting an external disclosure in these circumstances (provided the other requirements of an external disclosure were met) would be consistent with the existing grounds permitting an external disclosure based on agencies' failure to conduct an adequate or timely investigation, or to adequately respond to the findings of an investigation.[47]

63. In December 2020, the then Government agreed with this recommendation in principle and said that the issue would be considered as part of a review of the effectiveness of the external disclosure provisions.[48]

64. As noted above, supervisors and authorised officers have different responsibilities under the PID Act. A disclosure may be made either to a supervisor or to an authorised officer of an agency.

65. In the Commission's view, there are some aspects of the scheme that mean that it may be inappropriate to permit an external disclosure merely because of a failure by a supervisor to refer a disclosure to an authorised officer. In particular:

- a public interest disclosure may be made without the whistleblower asserting that the disclosure is made for the purposes of the PID Act[49]

- many agencies receive few or no disclosures a year and so staff have little direct experience with the operation of the PID Act, including identifying disclosures[50]
- agencies told the Moss Review that during the first two years of the operation of the PID Act, supervisors often did not understand or comply with the obligation to refer matters to an authorised officer.[51]

66. Ultimately, if a whistleblower was dissatisfied with a supervisor's failure to give the information disclosed to an authorised officer, it would be open to the whistleblower to give the information to an authorised officer directly.

67. However, the situation is different in relation to the obligations of an authorised officer. Authorised officers are appointed in writing to a position that carries with it specific duties.[52] Principal officers of an agency must ensure that their staff are aware of the identity of each authorised officer,[53] and must provide appropriate training to authorised officers.[54] It is not open to a whistleblower to allocate their own complaint to an agency for investigation. The failure by an authorised officer to do so has the real potential to delay or frustrate the conduct of an investigation.

68. While a whistleblower could make a disclosure directly to the Ombudsman,[55] the Ombudsman discourages this. On its website, the Ombudsman says:

> It is best to make a disclosure to the relevant Australian Government agency you belong to, or last belonged to.
>
> If you believe that it is not appropriate for an agency to handle a disclosure, we can receive a PID.
>
> Where we do accept a PID, we will work with the discloser and the agency to give that matter back to the agency, or to another agency within the same portfolio, for investigation.
>
> Generally, we will only investigate a disclosure under the PID Act if:
>
> - we assess the relevant Australian Government agency cannot handle the matter, or
> - there is a conflict of interest, confidentiality or reprisal issue the agency cannot manage.[56]

69. The Commission considers that a refusal or failure by an authorised officer to either allocate an internal disclosure or decide not to allocate

an internal disclosure under ss 43(3) and (11) should give rise to an ability on the part of the whistleblower to make an external disclosure, provided that the other criteria for making an external disclosure are also met. This would provide an additional incentive for those responsible for administering the PID Act, and who have had specific training in relation to these responsibilities, to make a decision in relation to allocation promptly.

70. There are a number of ways in which a trigger for an external disclosure could be framed. In its submission in relation to the Public Interest Disclosure Amendment (Review) Bill 2022, the Commission suggested a trigger based on two objective dates that would be available to a whistleblower: the date that they made their disclosure, and the date that they are notified that their disclosure has been allocated.

71. The Commission noted that the 14 day deadline in s 43(11) to make a decision about the allocation of a disclosure is a 'best endeavours' deadline. Further, ss 44(4) and 44A(3) provide an obligation on the authorised officer to (if reasonably practicable) give a written notice to the whistleblower about the decision to allocate or not allocate the disclosure as soon as reasonably practicable after that decision is made. In light of these various obligations (and the obligation on supervisors to refer complaints to an authorised officer 'as soon as reasonably practicable'), the Commission considered that it would be reasonable to permit a whistleblower to make an external disclosure if:

- they have provided their name and contact details in connection with making the disclosure; and
- they have not been provided with a notice under ss 44(4) or 44A(3) within 28 days of making the disclosure.

72. This recommendation was endorsed by the Law Council of Australia.[57] There may well be other ways to achieve the same result. Arguably, it may also be necessary for the whistleblower to either make clear that the disclosure is a PID disclosure, or to have made the disclosure directly to an authorised officer.

73. The Commission remains of the view that provision for an external disclosure is warranted where there has been a failure to comply with the obligation to make a decision about allocation, but does not seek to be prescriptive about how the trigger for the external disclosure is framed.

### Recommendation 4

The Commission recommends that a whistleblower be permitted to make an external disclosure if an authorised officer has failed to comply with their statutory obligation to make a decision about the allocation of the disclosure within the time provided for in the PID Act.

74. In light of the discussion in the consultation paper, the Commission has also considered whether a whistleblower should be permitted to make an external disclosure if an authorised officer decides not to allocate an internal disclosure for investigation. That could occur in one of two circumstances. The authorised officer is satisfied on reasonable grounds that, either:

- there is no reasonable basis on which the disclosure could be considered an internal disclosure, or
- the conduct disclosed would be more appropriately investigated under another law or power.

75. There is less justification for permitting an external disclosure in these circumstances. The first basis for non-referral is essentially jurisdictional. If a finding of this nature is made by an authorised officer, any remedy for the purported whistleblower is more appropriately limited to judicial review. If the second basis for non-referral is relied on, the authorised officer is required to take steps to refer the conduct disclosed, or to facilitate its referral, for investigation under the other law or power. This provides a substantive alternative remedy for the whistleblower.

76. While the PID Act is not particularly clear on this point, the Commission understands that a whistleblower *would* be entitled to make an external disclosure if an authorised officer allocated a disclosure to an agency but the principal officer of the agency decided *not* to investigate the disclosure. This is because one basis for an external disclosure is that:

> this Act requires an investigation relating to the internal disclosure to be conducted under Division 2 of Part 3, and that investigation has not been completed within the time limit under section 52.[58]

77. Once a disclosure has been allocated, s 47 of the PID Act (which is within Division 2 of Part 3) provides that: 'The principal officer of an agency *must investigate* a disclosure if the disclosure is allocated to the agency under Division 1' (emphasis added). Therefore, it seems that

the allocation of a disclosure is sufficient to permit a subsequent external disclosure (once all applicable criteria are satisfied), even if the principal officer of the agency decides under s 48 *not* to investigate. The complexity of the interaction of these provisions is one small example of why the Act would benefit from redrafting to make it easier to understand (see section 6.5 below dealing with Issue 5 from the consultation paper).

*(b) Delay in investigation*

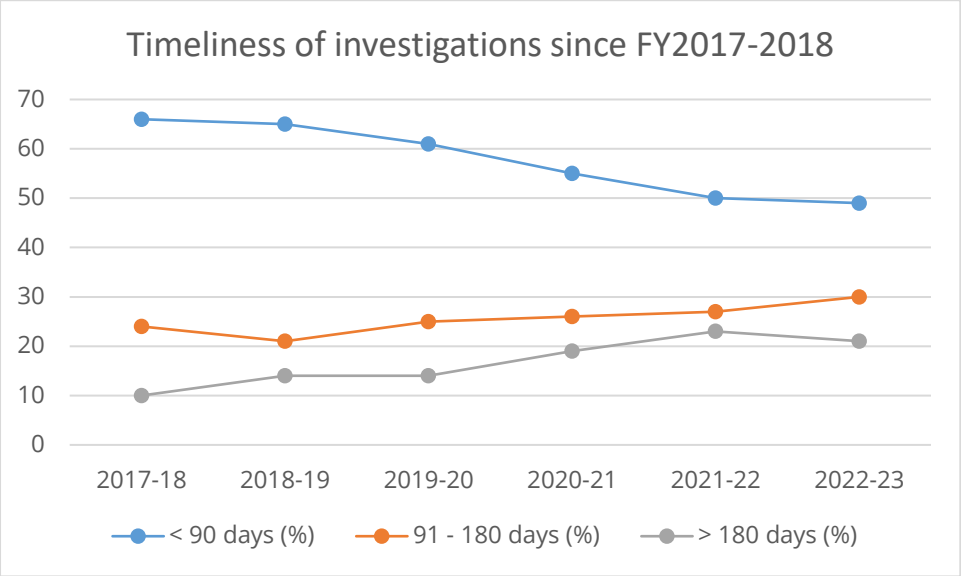
78. The PID Act currently provides that an external disclosure may be made if:

- an internal investigation has been completed, and the whistleblower believes on reasonable grounds that either the investigation or the response to the investigation was inadequate; or
- the investigation has not been completed within the time limit under s 52.

79. However, the time limit under s 52 is not a fixed limit. The section provides that an investigation must be completed within 90 days, but then also provides for the 90 day period to be extended by either the Ombudsman or the IGIS (as appropriate). There is no limit to the number of extensions that may be granted and there is no limit to the length of any individual extension.

80. In practice, it appears that extensions are regularly granted. The annual reports of the Ombudsman since 2015–16 include data about the number of extensions of time granted under the PID Act. Since that time, there have been 1,285 requests for an extension, of which 1,226 were granted and 59 were either refused or withdrawn prior to a decision being made. The proportion of extension requests granted is greater than 95%.

81. The annual reports of the Ombudsman show that in the 2015–16 and 2016–17 years, the proportion of investigations completed within 90 days was 82% and 85% respectively. Since then, that figure has steadily declined each year. From the 2017–18 annual report, the Ombudsman has reported on the proportion of investigations completed within 90 days, between 91 and 180 days, and in more than 180 days. These figures are set out in the following table.




Source: Ombudsman annual reports.

82. Now, less than half of all investigations are completed within the initial 90 day period prescribed by the PID Act. In its 2022–23 annual report, the Ombudsman recorded that 21% of investigations took longer than 180 days to complete. The report does not indicate how long the longest investigations took to resolve.

83. The provisions in the PID Act relating to external disclosure stand in contrast to the equivalent provision in the *Corporations Act 2001* (Cth), which permits a whistleblower in the private sector to make a public interest disclosure if at least 90 days have passed since the original disclosure and the whistleblower does not have reasonable grounds to believe that action is being, or has been, taken to address the matters to which the disclosure related.[59]

84. The Commission is concerned that there are no real effective time limits for investigation under the PID Act and that, in practice, an external disclosure would not be permitted until an investigation, including any extensions sought by an agency, is completed. Consistently with recommendation 8 of the Moss Review, the Commission considers that setting effective time limits, after which an external disclosure may be made, would be likely to lead to improved efficiency in the internal investigation process.

85. The Commission considers that this would also be consistent with recommendation 3.1 of the PJCCFS Whistleblower Report and recommendation 9 of the PJCIS Press Freedom Report,[60] each of which encouraged the Government to examine options for ensuring ongoing

alignment between the public and private sector whistleblower protections. The Commission has also had regard to recommendation 8.5 of the PJCCFS Whistleblower Report which called for a simplification of the existing whistleblower protections for external disclosures under the PID Act, including a more objective test.

**Recommendation 5**

The Commission recommends that the PID Act be amended to provide that a whistleblower may make an external disclosure if an internal investigation has not been completed within 90 days.

*(c) Dealing with security classified information*

86. It is important for potential whistleblowers to be able to access appropriate advice and assistance prior to and after making a disclosure.

87. As noted in paragraph 19(d) above, the PID Act permits disclosures for the purpose of obtaining legal advice and professional assistance, but such disclosures are limited in two key ways. First, the disclosure may only be made to an Australian legal practitioner. Secondly, if the whistleblower knew or ought to have known that the information has a national security or other protective security classification, the onus is on the whistleblower to ensure that the lawyer to whom the disclosure is made holds the appropriate level of security clearance.[61]

88. Recommendation 24 of the Moss Review was that the PID Act be amended to permit disclosures of security classified information (other than intelligence information) to a lawyer for the purpose of seeking legal advice about a public interest disclosure, without requiring the lawyer to hold the requisite security clearance.

89. The Moss Review noted that several survey respondents said that they would never choose to make a disclosure, particularly an external disclosure, without legal advice. However, it was difficult for people to find a security cleared lawyer, and many people may prefer to seek advice from their own trusted lawyer.[62]

90. In December 2020, the then Government said that it agreed with this recommendation in part and 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.[63]

91. In February 2023, the Attorney-General's Department told the Senate Legal and Constitutional Affairs Legislation Committee that there were concerns about making the identities of those with security clearances public, but recognised the importance of people being able to identify a security cleared lawyer if this was a legislative requirement.[64]

92. The Commission's view is that the requirement to seek out a security-cleared lawyer should be limited to situations where the information is particularly sensitive, but in those cases the pathways to access a security cleared lawyer need to be made clear. This does not mean that a list needs to be made public, but for those public officials with access to sufficiently sensitive information there should be internal channels through their own agency and potentially agencies such as the AGD, the Ombudsman, the Inspector General of Intelligence and Security and the Australian Public Service Commissioner.

93. The Australian Government currently uses three security classifications: 'protected', 'secret' and 'top secret'. All other information from business operations and services is 'official' or 'official: sensitive'.[65]

94. When the then Government was considering new 'general' secrecy offences in 2017, it initially proposed that the disclosure of any information with a protective security classification was inherently harmful and should be subject to criminal sanctions. This issue was considered by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) and the Parliamentary Joint Committee on Human Rights. Submitters to the PJCIS noted a number of problems with a broad security classification being the basis for criminal sanctions, including:

    - evidence that documents are routinely 'over-classified' or classified incorrectly
    - evidence that classification decisions are not routinely re-evaluated over time
    - the approach of basing liability on the label attaching to a document did not necessarily reflect the harm that would be caused by its release
    - there was no mechanism to test the appropriateness of document classifications.[66]

95. Following consultation with the public and civil society, the then Attorney-General proposed amendments to the Bill to limit these offences to the disclosure of material that was either secret or top secret.[67] This was reflected in the definition of 'security classification' in s 90.5 of the Criminal Code.

96. Similar issues arise when limiting a whistleblower's ability to access legal advice on the basis of a broad protective security classification. Adopting a broad approach to security classification will mean that recourse to a security cleared lawyer, rather than a lawyer of the whistleblower's own choosing, will be required far more regularly and in circumstances that may not be warranted. This additional obstacle to obtaining what, for many, is essential preliminary advice, may discourage whistleblowers from making important public interest disclosures.

97. In the circumstances, the Commission recommends that the requirement in s 26 for a legal practitioner disclosure to be limited to a security cleared lawyer should only apply if the information had a protective security classification of 'secret' or 'top secret'.

**Recommendation 6**

The Commission recommends that a legal practitioner disclosure is only required to be made to a lawyer with a relevant security clearance if the whistleblower knew, or ought reasonably to have known, that any of the information had a protective security classification of 'secret' or 'top secret'.

**Recommendation 7**

The Commission recommends that public officials with access to 'secret' or 'top-secret' information are provided with details of how to access a list of security-cleared lawyers that they can approach for independent advice about making a public interest disclosure.

### *(d) Dealing with intelligence information*

98. The Commission also considers that it is important for public officials in the Australian Intelligence Community (AIC) to be able to access legal assistance in relation to the making of a public interest disclosure. At present, obtaining legal advice about the substance of the proposed disclosure may effectively be stymied in some cases because of the broad definition of 'intelligence information' and the exclusion of

intelligence information from the information that may be the subject of a legal practitioner disclosure.

99. 'Intelligence information' is defined in s 41 of the PID Act and includes 'information that originated with, or has been received from, an intelligence agency'. This is a particularly broad definition that focuses on the source of the information rather than the harm that may be caused if it were to be released. It is consistent with secrecy provisions that apply to staff of the AIC. The ALRC Secrecy Report concluded that these kinds of secrecy provisions were justified by the sensitive nature of the information and the special duties and responsibilities of officers and others who work in and with such agencies.[68] An important factor in reaching that conclusion was the oversight provided by the IGIS and the then proposed whistleblower laws.[69]

100. Under the PID Act, intelligence information may only be disclosed as part of an internal disclosure to the relevant intelligence agency or to the IGIS. Few such reports are made, but those that are made have the potential to be particularly important. In 2022–23 the IGIS reported that it had received six disclosures relating to intelligence agencies. Four of those were allocated to intelligence agencies for investigation and the remaining two were investigated by the IGIS under the PID Act.[70] In 2021-22, IGIS received 10 public interest disclosures and in 2020-21 it received 16.[71]

101. In its submission to the Moss Review, the IGIS recognised that in some cases a disclosure by an AIC agency 'necessarily involves the communication of intelligence information'.[72] In those circumstances, the restrictions in the PID Act mean that the officer would not be able to obtain legal advice in relation to the substance of the disclosure, regardless of the security clearance of any lawyer. The Commission considers that this is undesirable and has the potential to limit the willingness of AIC staff to make a disclosure. It may be that in responding to recommendation 7 above, the Government can also identify a subset of lawyers who are able to provide legal advice to AIC staff about a potential internal disclosure that includes intelligence information.

### Recommendation 8

The Commission recommends that the Government consider an appropriate mechanism to ensure that staff within the Australian Intelligence Community can access legal advice about the potential to

make an internal disclosure under the PID Act that includes intelligence information.

*(e) Secrecy offence applicable to lawyers*

102. Section 67 of the PID Act provides that if a lawyer has received a legal practitioner disclosure and the person discloses the information to another person or uses the information, the lawyer commits an offence punishable by up to 2 years imprisonment or a penalty of up to $33,000 or both. This provision is significantly broader than the general secrecy provision in s 122.4A of the Criminal Code, for people who are not Commonwealth officers, in that it applies regardless of any harm that might be caused by disclosure. As a result, s 67 is contrary to the recommendations made by the ALRC Secrecy Report.[73] By contrast, s 122.4A prohibits further communication or dealing with information received from a Commonwealth officer (unless a defence in s 122.5 applies) if:
    - the information has a security classification of 'secret' or 'top secret'
    - the communication of, or dealing with, the information:
        - damages the security or defence of Australia
        - interferes with or prejudices the prevention, detection, investigation, prosecution or punishment of a criminal offence against a law of the Commonwealth
        - harms or prejudices the health or safety of the Australian public or a section of the Australian public.
103. It may be that the specific secrecy offence in s 67 of the PID Act is required to be broader than the general secrecy offence in s 122.5 of the Criminal Code because a legal practitioner disclosure *may* include information the communication of which would otherwise be prohibited by another secrecy provision applying to the whistleblower. This means that the lawyer may receive information that, under ordinary circumstances, the whistleblower would not be authorised to disclose. However, in prohibiting the further disclosure or use of *any* information disclosed to the lawyer, s 67 goes further than is necessary to protect legitimately confidential information.
104. The Commission considers that s 67 should be amended in a way that is consistent with recommendation 8-2 of the ALRC Secrecy Report

(including, if necessary, a prohibition on the further disclosure of intelligence information).

**Recommendation 9**

The Commission recommends that the offence provision in s 67 of the PID Act applying to legal practitioners be amended so that it is limited to a disclosure or use of information that caused, or was likely or intended to cause, harm to an identified essential public interest, or disclosure of narrow categories of information where harm to an essential public interest is implicit.

*(f) Obtaining advice from other professionals*

105. Recommendation 25 of the Moss Review was that the class of people to whom disclosures could be made should be expanded to allow a whistleblower to seek 'professional advice' about using the PID Act. The Moss Review had in mind disclosures to unions, employee assistance programs and professional associations.[74] According to submissions and survey responses to the Moss Review, people who made a public interest disclosure reported long-term health and career effects because they reported wrongdoing.[75] These are the kinds of impacts that an individual may legitimately seek to mitigate through expert advice and assistance.

106. In December 2020, the then Government said that it agreed with this recommendation in part, but considered that obtaining assistance from a lawyer, the Commonwealth Ombudsman or the IGIS was sufficient.[76]

107. The Commission considers that there is merit in expanding the range of assistance available to potential and actual whistleblowers, given the different types of professional expertise and assistance that can usefully be offered by people who are not lawyers. For example, the Moss Review noted the important role played by unions in advising workers on work, health and safety matters (recognised in the *Work Health and Safety Act 2011* (Cth)).[77] Similarly, employee assistance programs typically provide free, confidential and professional counselling services for public sector employees, and are an important aspect of addressing mental health concerns in the workplace.

108. There is also merit in permitting whistleblowers to seek assistance from other health practitioners on a confidential basis.[78]

109. In addition to any confidentiality requirements that apply to those advisory and support relationships, the information contained in a disclosure to such people would continue to be protected by the general secrecy provision in s 122.4A of the Criminal Code referred to above.

110. If there is a need to retain a specific secrecy offence in s 67 in relation to lawyers (bearing in mind recommendation 9 above), then that secrecy offence could also be extended to those professionals providing additional assistance and support to whistleblowers.

**Recommendation 10**

The Commission recommends that a whistleblower be permitted to make a disclosure to other relevant advisers, including a union representative or a person providing an employee assistance program, for the purpose of obtaining advice and assistance in relation to making or having made a public interest disclosure, or to relevant health practitioners for the purpose of obtaining medical advice and support in relation to the making of a disclosure.

## 6.3 Issue 3: Protections and remedies under the PID Act

*(a) Protection for preparatory acts*

111. The PID Act provides protection for whistleblowers from any civil, criminal or administrative liability for 'making' a public interest disclosure. However, the whistleblower may still be liable for other preparatory acts such as accessing or securing information that the whistleblower believes is relevant to support the disclosure. The scope of these protections is the subject of a current appeal to the Supreme Court of South Australia.[79]

112. At present, it appears that the path to protection is narrow and prescriptive. It appears to leave whistleblowers vulnerable to legal actions, including prosecution, in relation to preparatory acts even if their conduct was in the public interest and consistent with the objects of the PID Act.

**Case study: Richard Boyle**

Mr Richard Boyle made a public interest disclosure on 12 October 2017 in relation to certain conduct at the Australian Taxation Office (ATO). The disclosure related to a directive given to ATO staff about the

issuing of garnishee notices, in a way that Mr Boyle considered was unethical and could be particularly detrimental to some taxpayers.[80]

The ATO made a decision not to investigate the disclosure, but the basis for this decision was later criticised by the District Court of South Australia.[81] Mr Boyle's lawyer made a complaint to the Inspector-General of Taxation, Taxation Ombudsman (IGTO) in similar terms to the public interest disclosure. In December 2017, the IGTO said that it would 'formally record Mr Boyle's concerns for future consideration' but did not indicate that it would take any further action.[82]

In April 2018, Mr Boyle appeared as a whistleblower on a *Four Corners* program on the ABC that featured taxpayers talking about their adverse experiences with the ATO.[83] Following that program, the IGTO conducted a review into the ATO's use of garnishee notices which found that: '[p]roblems did arise in certain localised pockets with the issuing of *enduring* garnishee notices for a limited period, particularly so at the ATO's Adelaide local site, but these problems were anticipated and addressed by management once they became aware of them'.[84]

The Senate Economics Committee later observed that 'as a result of the review, the IGTO identified a number of opportunities for improvement and made a number of recommendations which were agreed to, and implemented by the ATO'.[85]

In September 2020, criminal proceedings were instituted against Mr Boyle. He was charged with committing 24 offences. Fourteen of those charges alleged that he used his mobile phone to take photographs of taxpayer information (7 counts) and covertly record conversations with his colleagues at the ATO (7 counts) before making his internal public interest disclosure.[86] Eight of those charges alleged that he 'attempted to disclose taxpayer information to his lawyer' by uploading information to a secure server.[87] In relation to those latter charges, the evidence demonstrated that the photographs were uploaded on the 'clear understanding' that the lawyer not look at them and, in accordance with that understanding, the lawyer did not look at them.[88]

Mr Boyle sought to rely on the immunities in the PID Act. He said that he recorded the material to formulate the public interest disclosure and to obtain evidence in support of the complaint to be contained in it.[89] A key issue during the hearing was whether this conduct fell within the scope of 'making' a complaint. Significantly, the Court said:

*'It is understandable that a public official may feel that they may not be believed if they do not have 'evidence' to 'back up' what they are disclosing. Mr Boyle expressed that sentiment on multiple occasions during his evidence. Over time he formed the belief that the ATO would not investigate his allegations. … He collected evidence to substantiate his claims because he believed the ATO would not hold itself to account.'*[90]

The Court observed that Mr Boyle 'may have been justified in his belief', given the decision by the ATO not to investigate his complaint, but ultimately held that the PID Act did not protect public officials in performing an 'investigative role'.[91]

With the exception of one charge that alleged Mr Boyle had disclosed taxpayer information during a conversation with his father prior to making his disclosure,[92] all of the charges against him involved allegations of *recording* information, and none of the charges involved an allegation that he *disclosed* confidential information to anyone else.

Mr Boyle's case is currently subject to appeal to the Supreme Court of South Australia.

113. Some secrecy offences prohibit not only the communication or publication of information but also copying, holding or otherwise dealing with information. There can be prudent reasons for seeking to limit the copying of information, or to prevent the removal of information from a regulated system, because of the increased risk of that information being subsequently communicated or published. However, these are prophylactic offences in the sense that they seek to criminalise conduct that *may* lead to harm but are not necessarily inherently harmful themselves.

114. The existence of inchoate, preparatory or prophylactic offences raises significant problems for a potential whistleblower who is genuinely seeking to make a full report about serious misconduct, but is only given protection for the 'making' of the public interest disclosure.

115. The policy rationale for granting immunities for making a public interest disclosure is that the public benefit of being able to investigate allegations of serious wrongdoing is more important than adherence to a secrecy norm that would have otherwise prevented that alleged wrongdoing from being investigated. Similar reasoning compels a broader protection for preparatory acts against precursor offences. This is particularly so where there was no communication by the whistleblower of information obtained to the public, consistently with

the scheme of the PID Act that requires disclosures to be made internally first.

116. The Commission generally agrees with the discretionary test proposed in the recent Queensland PID Act Review. This would permit a whistleblower to have limited immunity for preparatory acts if a court was satisfied that it was appropriate for the whistleblower to be given immunity having regard to a number of relevant factors.

**Recommendation 11**

The Commission recommends that whistleblower have immunity for preparatory acts if a court is satisfied that it is appropriate for the whistleblower to be given immunity having regard to:

- whether the conduct was reasonably necessary to make the public interest disclosure
- whether the conduct was reasonably necessary to demonstrate that the disclosure was a public interest disclosure
- whether the conduct was consistent with the objects of the PID Act
- the seriousness of the conduct
- the extent to which the conduct impacted on the rights of others.

*(b) Shifting onus*

117. The Commission agrees that there should be a shifting evidential burden in relation to civil actions in relation to reprisals.

118. Under s 13 of the PID Act, a person (the first person) takes a reprisal against another person (the second person) if the following elements are established:

(a) the first person engages in conduct that threatens or results in detriment to the second person

(b) at the time, the first person <u>believes or suspects</u> that the second person (or any other person) has made, may have made, proposes to make, or could make, a public interest disclosure

(c) the belief or suspicion of the first person is <u>the reason, or part of the reason</u> for engaging in the conduct.

119. In an action by the second person (eg the whistleblower), they have the onus of proving each of these elements, even though the 'belief' of the first person and the 'reasons' that motivated their conduct are wholly within the knowledge of the first person.

120. This differs from the position under s 1317AD of the *Corporation Act 2001* (Cth), where the second person (eg the whistleblower) only has the onus of 'adducing or pointing to evidence that suggests a reasonable possibility' that the matters in element (a) are made out. If that onus is discharged, then the first person (who is alleged to have threatened or caused the detriment) bears the onus of proving that the allegation of reprisals is not made out, which may include disproving elements (b) and/or (c). An equivalent shifting evidential burden is found in s 14ZZZ(2B) of the *Taxation Administration Act 1953* (Cth), dealing with civil remedies for detrimental conduct towards whistleblowers under that Act.

121. The Commission has previously recommended a shifting evidential burden in similar circumstances, where the motivation for engaging in conduct is an element of unlawful conduct under discrimination law. Currently, in cases of *indirect* discrimination, once an applicant has established the discriminatory impact of a condition, requirement or practice, then the *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act 1992* (Cth) and *Sex Discrimination Act 1984* (Cth) shift the evidential burden of proving that the condition was reasonable to the respondent.[93] However, currently the tests for *direct* discrimination require the applicant to prove matters relating to the state of mind of the respondent (namely, the reason or purpose for engaging in discriminatory conduct). The Commission has recommended a similar shifting burden for the element of direct discrimination that relates to this element of the test for direct discrimination.[94]

122. For the same reasons, the Commission recommends that the PID Act be amended to adopt the shifting burden for private sector whistleblowers in the *Corporations Act 2001* (Cth). This would have the additional benefit of creating more consistency between the regimes dealing with public and private sector whistleblowing.

**Recommendation 12**

The Commission recommends that there be a shifting evidential burden, from a public sector whistleblower to a respondent, where civil

remedies are sought under the PID Act for a reprisal or threatened reprisal.

*(c) Accessorial liability, and liability for a breach of positive duties*

123. The Commission considers that the PID Act should provide civil remedies for a whistleblower where a person aided or abetted, or was knowingly concerned in, a reprisal. This would provide equivalent protection to that currently found in each of the following federal whistleblower regimes:
    - s 1317AD(2) of the *Corporations Act 2001* (Cth)
    - s 14ZZZ(2) of the *Taxation Administration Act 1953* (Cth)
    - s 337BB(6) of the *Fair Work (Registered Organisations) Act 2009* (Cth).

124. Similarly, the PID Act should provide civil remedies for a whistleblower against an agency when a relevant officer of that agency failed to fulfil a duty imposed by the PID Act to take reasonable steps to prevent reprisals, and reprisal conduct occurred. This would provide equivalent protection to that currently found in each of the following federal whistleblower regimes:
    - s 1317AD(2A) of the *Corporations Act 2001* (Cth)
    - s 14ZZZ(2A) of the *Taxation Administration Act 1953* (Cth)
    - s 337BB(3) of the *Fair Work (Registered Organisations) Act 2009* (Cth).[95]

125. Relevant duties to which liability should apply include:
    - the duty on the principal officer of an agency to take reasonable steps to protect public officials who belong to the agency against reprisals (PID Act, s 59(9))
    - the duty on authorised officers of an agency to take reasonable steps to protect public officials who belong to the agency against reprisals (PID Act, s 60(2)).

**Recommendation 13**

The Commission recommends that the PID Act provide for accessorial liability in civil actions relating to reprisals, and that it provide for civil remedies for a breach of positive duties in the PID Act.

*(d) Rewards system*

126. The Commission has not given detailed consideration to whether a reward system should operate, for example to provide whistleblowers with a share of a penalty imposed on their employer as recommended in the PJCCFS Whistleblower Report.[96]

127. Rewards are conceptually different from compensation for detriment. They provide a positive benefit to a person for their role in uncovering wrongdoing. Rewards are sometimes used in Australia by police forces for evidence that leads to an arrest or prosecution.

128. The introduction of monetary rewards also creates incentives to report wrongdoing, or alleged wrongdoing. The impact of these incentives, and whether they result in any perverse incentives or outcomes, would benefit from expert economic analysis. It may be the kind of review appropriate for the Productivity Commission.

*(e) Civil remedies for reprisals under the NACC Act*

129. The consultation paper notes that while the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) includes immunities for whistleblowers, and creates criminal offences for reprisals, it does not make provision for civil actions for compensation for reprisals. In this respect, the NACC Act is different from the PID Act which permits civil actions for compensation if a person has suffered a reprisal. A comparison of the relevant provisions is set out in the table in paragraph 42 above.

130. The Commission considers that civil actions for compensation for reprisals should be included in the NACC Act.

131. Australia's federal discrimination laws make provision for both civil actions and criminal offences for victimisation. Victimisation involves causing detriment to a person because they have sought to rely on their rights under discrimination law, or have participated in an investigation by the Commission. Victimisation is analogous to reprisals under the PID Act and the NACC Act. For some time, there was confusion about whether a civil action for damages could be brought alleging victimisation. This issue was discussed in a number of publications by the Commission.[97] In 2021, this issue was clarified in the *Sex Discrimination Act 1984* (Cth),[98] and equivalent amendments to

the three other federal discrimination Acts were made the following year.[99]

132. In the Commission's view, it was important to confirm that civil actions for victimisation were available because they are a far more accessible remedy for those who suffer detriment and are seeking to protect their rights. The Commission is not aware of any prosecutions being taken under the criminal victimisation offences in the four federal discrimination Acts. There is likely to be a range of reasons for this, but one will be the limited resources available to police services which can impact on decisions about what matters to prosecute. However, now that it is clear that a victimisation claim can amount to unlawful discrimination and be determined in a civil proceeding, the potential for effective remedies for victimisation has significantly expanded.

**Recommendation 14**

The Commission recommends that the *National Anti-Corruption Commission Act 2022* (Cth) provide for civil remedies for reprisals.

## 6.4 Issue 4: Whistleblower Protection Authority

133. Every review of whistleblower protections at the federal level in Australia has noted how complex and confusing the system is for a whistleblower to navigate.[100]

134. The establishment of a 'one-stop shop' whistleblower protection authority to cover both the public and private sectors was a key recommendation of the PJCCFS Whistleblower Report.[101] This recommendation was endorsed by the Senate IGTO Report, which observed:

> Given the complexity, confusion, and the potentially poor outcomes for individuals who make disclosures, the committee sees merit in having a single, centralised, agency responsible for the oversight of enforcing whistleblower protections. The committee supports the examination of the establishment of such an authority, and suggests that this be considered as part of a review of the PID Act.[102]

135. The Commission considers that there is likely to be a significant benefit in establishing an independent public sector whistleblower protection authority in a form that could be expanded to cover the private sector in the future.

136. One of the most significant benefits for whistleblowers is likely to be clarity about where to go when seeking advice and assistance. As the recent Queensland review of its PID Act noted, language matters. People understand what a 'whistleblower' is while the phrase 'public interest disclosure' was 'not well-understood or easily recognised for its meaning, or widely known' and 'there is nothing intrinsic to the phrase "public interest disclosure" that tells a person the nature of the disclosure being made (other than it is in the public interest)'.[103] Further, a 'whistleblower protection authority' would make clear that the primary purpose of the body was to serve the interests of whistleblowers.[104] This would be likely to improve the confidence of prospective whistleblowers to come forward and make a disclosure.

137. A centralised and high-profile whistleblower protection authority would be likely to improve the allocation of disclosures for investigation by the appropriate agency. This was one of the key functions that the PJCCFS Whistleblower Report identified as being performed by a whistleblower protection authority: acting as a clearing house for disclosures.[105] In the Commission's view, this would work in tandem with the 'no wrong doors' approach (see paragraphs 48–53 above) to make it easier for whistleblowers to come forward, to facilitate referrals, and to ensure that whistleblowers obtain the benefits of the PID Act at the earliest point in the process.

138. Most of the information published by the Ombudsman about the PID Act is directed to agencies. The Ombudsman has the function of determining standards for agencies in dealing with internal disclosures and conducting investigations under the PID Act.[106] In pursuance of this function, the Ombudsman has made the *Public Interest Disclosure Standard 2013* (Cth). It has published a detailed Agency Guide and a range of fact sheets to assist agencies in fulfilling their obligations under the PID Act.[107]

139. The Ombudsman has also published some information for disclosers in the form of a list of list of answers to frequently asked questions,[108] and has indicated that it intends to publish an updated *Guide to making a disclosure under the PID Act*.[109] As noted in paragraph 68 above, the Ombudsman encourages whistleblowers to approach their agency directly to make a PID, while being available to receive a PID if the whistleblower is concerned about making a PID to their agency, or if they want to make a complaint about how their PID was handled by their agency. The above comments are not intended to be critical of

the way that the Ombudsman deals with PID matters given the scope of the PID Act and the decisions that it needs to make about the efficient use of limited resources. However, it may be that a whistleblower protection authority could be better resourced to provide initial advice and assistance to individual whistleblowers, including about how to manage the risk of reprisals.

140. A key regulatory gap identified in the PJCCFS Whistleblower Report that could be filled by a whistleblower protection authority is the investigation of reprisals that involve employment issues.

141. The PID Act provides that if a whistleblower experiences a reprisal they are entitled to bring civil proceedings for compensation.[110] However, that can be a daunting prospect for an individual against a well-resourced agency,[111] even with the benefit of costs protections.[112]

142. The PID Act also provides that an allegation that an agency has taken a reprisal against a whistleblower is also 'disclosable conduct', even if the reprisal involves personal work-related conduct.[113] However, there are real concerns about how a disclosure about reprisal conduct would be investigated. There are currently two options for a whistleblower: investigation by their agency, or investigation by the Ombudsman.

143. As noted by the PJCCFS Whistleblower Report, if the investigation was referred to the whistleblower's own agency, that would involve an investigation by 'the same agency that, if the allegation had substance, had failed to adequately protect the whistleblower from reprisal action in the first place'.[114]

144. That suggests that it would be more appropriate for the Ombudsman to conduct the investigation. However, the Ombudsman gave evidence to the PJCCFS Whistleblower inquiry that its Act prevented it from conducting an inquiry in these circumstances. The PID Act provides that the Ombudsman is an 'authorised internal recipient' of a public interest disclosure about an agency (other than an intelligence agency).[115] The Ombudsman is also an agency to which a disclosure may be allocated for investigation.[116] If a disclosure about a reprisal were allocated to the Ombudsman, the PID Act suggests that it would usually have a duty to investigate the disclosure.[117] However, the Ombudsman has said that this would be prohibited by s 5(2)(d) of the *Ombudsman Act 1976* (Cth), which provides that:

> (2) The Ombudsman is not authorized to investigate: …
>
> (d) action taken by any body or person with respect to persons employed in the Australian Public Service or the service of a prescribed authority, being action taken in relation to that employment, including action taken with respect to the promotion, termination of appointment or discipline of a person so employed or the payment of remuneration to such a person.

145. The Ombudsman said that its practice in such circumstances was to 'refer the allegation back to the agency that had conducted the original investigation into the disclosure, or direct the whistleblower to the Fair Work Commission or the courts'.[118]

146. It seems that there is real scope for a whistleblower protection authority to fill this regulatory gap if it was empowered to conduct investigations of reprisal action by agencies.

147. There are also other ways in which the issue of reprisals could be addressed prior to requiring a whistleblower to go to court to seek to enforce their rights. The first important step is to ensure that an independent investigation can be carried out into the allegations.

148. It may be that it is also appropriate to have a facility for conciliation or mediation of disputes between a whistleblower and their agency that is less formal than court proceedings. Several models for this exist, such as the conciliation process at the Commission for allegations of unlawful discrimination or breaches of human rights, and the procedures of the Fair Work Commission. It may be that a whistleblower protection authority could perform this conciliation or mediation function, although some consideration would need to be given to whether that function was compatible with the conduct of the initial investigation of complaints of reprisals. Similar issues may need to be considered if the whistleblower protection authority was also given the function of representing whistleblowers in significant court proceedings.

**Recommendation 15**

The Commission recommends that consideration be given to the establishment of a whistleblower protection authority, to have functions including:

- acting as a clearing house for whistleblowers bringing forward public interest disclosures

- providing advice and assistance to whistleblowers
- investigating allegations of reprisals against whistleblowers.

## 6.5 Issue 5: Clarity of the PID Act

149. The recent review of Queensland's PID Act made 107 recommendations, but the first recommendation was that the existing Act should be repealed and replaced with a new Act, 'with a focus on ensuring key concepts can be understood by a wide range of users of the legislation, including individual whistleblowers'.[119]

150. As noted in the previous section of this submission, the Commonwealth PID Act is also regularly criticised for its complexity.

151. It is important that all legislation is drafted in a way that makes it as easy to read as possible. However, there are a number of factors relevant to the PID Act that make it particularly important for a different approach to be taken from the current drafting. The first point is that this legislation must be able to be navigated easily by prospective whistleblowers who often will not be lawyers. Whistleblowers can feel isolated in their organisation and apprehensive about making the kind of public interest disclosure that the PID Act seeks to encourage. It is important that they can easily understand their rights and responsibilities at the outset and that they are able to navigate the primary legislation themselves, so that they can have confidence in taking the first step in making a disclosure.

152. The importance of whistleblowers being able to obtain that initial degree of confidence themselves, is magnified in a regime such as the PID Act which places detailed restrictions on who a whistleblower can even speak with about making a disclosure. At present, the rules about how to speak with a lawyer are contained in the last row of a table on pages 34 and 35 of the current compilation of the Act.

153. Making a mistake about how to get advice and assistance can have serious consequences. As noted in the case study in paragraph 112 above in relation to the trial of Mr Richard Boyle, eight of the charges against him relate to alleged attempts to communicate with a lawyer.

154. The Queensland review recommended that the recently enacted *Protected Disclosures (Protection of Whistleblowers) Act 2022* (NZ) be used as a model for the drafting of a new Act. This was because it uses plain and direct language that is easier for a general audience to

understand. The Commission considers that the same approach should be adopted in redrafting the Commonwealth PID Act.

155. The Queensland review also identified a further provision of the NZ Act that it considered should be included in a new Queensland PID Act.[120] Section 11(4)(c) of the NZ Act provides that a discloser is entitled to protection even if they technically failed to comply with the requirements for making a disclosure, as long as they have substantially complied. The Commission considers that it would also be valuable to have a similar provision in the Commonwealth PID Act that provides the benefit of the doubt to a whistleblower and provides them with the protections of the Act despite technical and minor non-compliance.

**Recommendation 16**

The Commission recommends that the PID Act be redrafted using language that is simple and easy for a prospective whistleblower to understand.

**Recommendation 17**

The Commission recommends that the PID Act provide that a whistleblower is entitled to the protections offered by the Act, even if there has been technical non-compliance with disclosure requirements, provided that the whistleblower has substantially complied.

# Endnotes

[1] Australian Human Rights Commission, submission to the Legal and Constitutional Affairs Legislation Committee in relation to the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), 20 January 2023, at https://www.aph.gov.au/DocumentStore.ashx?id=7b966ce8-3a78-4107-8f9d-fcee9f33d830&subId=732198.

[2] *Comcare v Banerji* (2019) 267 CLR 373 at [34].

[3] Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009).

[4] *United Nations Convention against Corruption*, opened for signature 31 October 2003, UN Doc A/RES/58/4 (entered into force 14 December 2005).

[5] PID Act, s 10.

[6] PID Act, s 12.

[7] PID Act, ss 13–19A.

[8] PID Act, s 29.

[9] PID Act, ss 31–32.

[10] PID Act, s 43.

[11] PID Act, s 48.

[12] PID Act, s 52.

[13] PID Act, s 51.

[14] PID Act, s 59(6).

[15] *Corporations Act 2001* (Cth), Part 9.4AAA, substantially amended by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth). This amendment consolidated previous regimes found in the *Banking Act 1959* (Cth), *Insurance Act 1973* (Cth), *Life Insurance Act 1995* (Cth) and *Superannuation Industry (Supervision) Act 1993* (Cth).

[16] *Taxation Administration Act 1953* (Cth), Part IVD.

[17] *Fair Work (Registered Organisations) Act 2009* (Cth), Ch 11, Part 4A.

[18] Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (15 July 2016).

[19] Moss Review, at [5]–[6], [22]–[23], [30].

[20] Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020.

[21] PID Act, ss 69(4)(d) and 70(3A)(d).

[22] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces*, November 2021, p 16.

[23] PID Act, s 32.

[24] *Royal Commissions Act 1902* (Cth), s 7(1).

[25] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* (2009), pp 45–48, at https://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=laca/whistleblowing/report/fullreport.pdf.

[26] Government Response, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* (2010), p 5.

[27] House of Representatives Standing Committee on Legal and Constitutional Affairs, *Whistleblower protection: a comprehensive scheme for the Commonwealth public sector* (2009), p 45.
[28] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (2021).
[29] Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (2021), p 246.
[30] AGD Consultation Paper, p 10.
[31] Australian Human Rights Commission, Submission to the Joint Select Committee on National Anti-Corruption Commission Legislation, 14 October 2022.
[32] PID Act, s 31.
[33] Letter from Mr Richard Pye, Clerk of the Senate, to Dr Patrick Hodder, Secretary of the Parliamentary Joint Committee on Corporation and Financial Services dated 21 June 2017, at https://www.aph.gov.au/DocumentStore.ashx?id=bc814359-4016-4bec-9aa0-d290e9bd4853&subId=512273.
[34] PID Act, s 34.
[35] PID Act, s 6.
[36] *Public Interest Disclosures Act 2012* (Vic), ss 18 and 38(1)(b).
[37] *Public Interest Disclosures Act 2012* (Vic), s 21.
[38] PJCCFS Whistleblower Report, at [12.23]–[12.25].
[39] Moss Review, recommendation 2.
[40] Senate Economics Legislation Committee, *Performance of the Inspector-General of Taxation*, Report, June 2020, [4.15]–[4.20], recommendation 13.
[41] PID Act, ss 26 and 34.
[42] PID Act, s 60A.
[43] PID Act, s 43(3).
[44] PID Act, s 43(11).
[45] AGD Consultation Paper, p 11.
[46] Moss Review, at [90].
[47] Moss Review, at [91].
[48] 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.
[49] PID Act, s 28(3).
[50] Moss Review, at [29].
[51] Moss Review, at [30].
[52] PID Act, s 36.
[53] PID Act, s 59(1)(b).
[54] PID Act, s 59(8).
[55] PID Act, s 34, table, item 1, column 2, paragraph (c).
[56] Commonwealth Ombudsman, *Information for Disclosers*, at https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing/information-for-disclosers.
[57] Law Council of Australia, submission to the Senate Standing Committee on Legal and Constitutional Affairs, Public Interest Disclosure Amendment (Review) Bill 2022 (Cth), at [64]–[68].

[58] PID Act, s 26, table, item 2, column 3, paragraph (c)(iii).
[59] *Corporations Act 2001* (Cth), s 1317AAD.
[60] 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* (2020).
[61] PID Act, s 26(1), item 4 of the table dealing with a 'legal practitioner disclosure'.
[62] Moss Review, at [142].
[63] 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.
[64] Senate, Legal and Constitutional Affairs Legislation Committee, *Public Interest Disclosure Amendment (Review) Bill 2022, Proof Committee Hansard*, 27 February 2023, pp 41–42.
[65] Attorney-General's Department, *Protective Security and Policy Framework, Policy 8: Sensitive and classified information*, at https://www.protectivesecurity.gov.au/publications-library/policy-8-sensitive-and-classified-information.
[66] PJCIS, Advisory Report on the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017, (2018) at [3.110]ff. See also ALRC Secrecy Report at [8.51] and reports cited in that paragraph.
[67] Letter from the Attorney-General the Hon Christian Porter MP to the Chair of the Parliamentary Joint Committee on Intelligence and Security Mr Andrew Hastie MP (undated), at https://www.aph.gov.au/DocumentStore.ashx?id=0efb0f22-249e-44c2-9638-734eecdc8c0a&subId=564119.
[68] ALRC Secrecy Report, at [8.33]–[8.72], [8.144].
[69] ALRC Secrecy Report, at [8.67]–[8.68].
[70] Inspector General of Intelligence and Security, *Annual Report 2022-23*, p 126.
[71] Inspector General of Intelligence and Security, *Annual Report 2022-23*, p 123.
[72] Inspector General of Intelligence and Security, *Submission to the Moss Review of the PID Act*, March 2016, p 4, at https://webarchive.nla.gov.au/awa/20160615184146/https://www.dpmc.gov.au/government/legislation-review/statutory-review-public-interest-disclosure-act-2013.
[73] ALRC Secrecy Report, recommendations 5-1 and 8-2.
[74] Moss Review, at [145].
[75] Moss Review, at [22].
[76] Australian Government, *Australian Government response to the Review of the Public Interest Disclosure Act 2013 by Mr Philip Moss AM*, 16 December 2020, pp 16–17.
[77] *Work Health and Safety Act 2011* (Cth), s 121.
[78] Queensland PID Act Review, June 2023, p 141 and recommendations 59 and 64.
[79] *Boyle v Commonwealth Director of Public Prosecutions*, Supreme Court of South Australia, Court of Appeal proceeding CIV-23-004375.
[80] *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [47]–[49], [52]–[57] and [97]–[98].
[81] *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [152]–[156].
[82] *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [157]–[158].
[83] *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [163].
[84] Inspector-General of Taxation, Taxation Ombudsman, *IGTO Review into the Australian Taxation Office's use of Garnishee Notices*, March 2019, at https://www.igt.gov.au/wp-

content/uploads/2021/07/162_190313-Review-into-the-ATOs-use-of-Garnishee-Notices-FINAL.pdf (emphasis in original).

85 Senate Economics Legislation Committee, *Performance of the Inspector-General of Taxation*, Report, June 2020, [3.15].

86 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [1].

87 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [1], [264].

88 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [280].

89 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [33], [184].

90 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [227].

91 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [227].

92 *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 at [1].

93 *Age Discrimination Act 2004* (Cth) s 15(2); *Sex Discrimination Act 1984* (Cth) s 7C; *Disability Discrimination Act 1992* (Cth) s 6(4).

94 Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws*, December 2021, pp 203–211.

95 See also *Public Interest Disclosure Act 2022* (NSW), s 62.

96 PJCCFS Whistleblower Report, Chapter 11.

97 Australian Human Rights Commission, *Free & Equal: A reform agenda for federal discrimination laws*, December 2021, pp 298–299; Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (2020), pp 488–490; Australian Human Rights Commission, *Federal Discrimination Law* (2016), pp 157–161.

98 *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

99 *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth).

100 For example: Moss Review, p 6; PJCCFS Whistleblower Report, pp 27–31; Senate Economics Legislation Committee, *Performance of the Inspector-General of Taxation*, June 2020, at [4.72].

101 PJCCFS Whistleblower Report, chapter 12.

102 Senate Economics Legislation Committee, *Performance of the Inspector-General of Taxation*, June 2020, at [4.74].

103 Queensland PID Act Review, June 2023, pp 36–38.

104 PJCCFS Whistleblower Report at [12.78].

105 PJCCFS Whistleblower Report at [12.79].

106 PID Act, s 74.

107 Commonwealth Ombudsman, *Amendments to the PID Act*, https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing/pid-reform-2023.

108 Commonwealth Ombudsman, *Information for Disclosers*, https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing/information-for-disclosers.

109 Commonwealth Ombudsman, *Amendments to the PID Act*, https://www.ombudsman.gov.au/complaints/public-interest-disclosure-whistleblowing/pid-reform-2023.

110 PID Act, ss 13–17.

111 PJCCFS Whistleblower Report at [12.68]–[12.71].

112 PID Act, s 18.

113 PID Act, s 29.

[114] PJCCFS Whistleblower Report at [12.63].
[115] PID Act, s 34.
[116] PID Act, s 43.
[117] PID Act, s 47.
[118] PJCCFS Whistleblower Report at [12.62].
[119] Queensland PID Act Review, June 2023, p 36.
[120] Queensland PID Act Review, June 2023, p 101.