



Australian Government
Attorney-General's Department

Public sector whistleblowing reforms

Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers.

Consultation paper

November 2023

We acknowledge the traditional custodians of Australia and their continuing connection to land, sea and community.

We pay our respects to the people, the cultures and their Elders, past and present, and thank them for their ongoing contributions to the culture and prosperity of our great nation.

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Glossary

Abbreviation	Definition
Legislation	
Corporations Act	<i>Corporations Act 2001</i> (Cth)
MoP(S) Act	<i>Members of Parliament (Staff) Act 1984</i> (Cth)
NACC Act	<i>National Anti-Corruption Commission Act 2022</i> (Cth)
PID Act	<i>Public Interest Disclosure Act 2013</i> (Cth)
Agencies	
IGIS	Inspector-General of Intelligence and Security
NACC	National Anti-Corruption Commission

In addition to the [2016 Review of the Public Interest Disclosure Act 2013](#) by Mr Philip Moss AM (the Moss Review), there has been a number of recent parliamentary reports, external reviews and reports from stakeholders that are relevant to issues affecting whistleblowers generally and to informing consideration of options to improve the public sector whistleblowing scheme.

Reports
Mr Philip Moss AM - Review of the Public Interest Disclosure Act 2013 (the Moss Review) (October 2016)
Parliamentary Joint Committee on Corporations and Financial Services – Whistleblower Protections (September 2017)
Senate Economics Legislation Committee – Performance of the Inspector-General of Taxation (June 2020)
Parliamentary Joint Committee on Intelligence and Security – Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press (August 2020)
Senate Environment and Communications References Committee – Freedom of the press (May 2021)
Australian Human Rights Commission – Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces (November 2021)
Commonwealth Ombudsman – Investigation into compliance with the Public Interest Disclosure Act 2013 (October 2022)
Griffith University, Human Rights Law Centre and Transparency International Australia – Protecting Australia's Whistleblowers: The Federal Roadmap (January 2023)
Senate Legal and Constitutional Affairs Legislation Committee – Public Interest Disclosure Amendment (Review) Bill 2022 [Provisions] (March 2023)
Review of the Public Interest Disclosure Act 2010 (Qld) (August 2023)
Commonwealth Ombudsman – 2022-23 Annual Report (October 2023)

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Introduction

The [Public Interest Disclosure Act 2013](#) (PID Act) establishes a framework to facilitate and protect disclosures of wrongdoing raised by public officials, with the aim of promoting integrity and accountability in the Commonwealth public sector.

On 30 November 2022, the Attorney-General, the Hon Mark Dreyfus KC MP, announced that the Government would commence a staged approach to reforming the PID Act.

The first stage of reforms, which commenced on 1 July 2023, focused on delivery of immediate improvements for public sector whistleblowers and support for disclosures of corrupt conduct to the National Anti-Corruption Commission (NACC). These reforms implemented 21 of the 33 recommendations from the 2016 Review of the *Public Interest Disclosure Act 2013* by Mr Philip Moss AM (the Moss Review), including:

- stronger protections for disclosers and witnesses
- renewed focus on integrity-related wrongdoing, and
- enhanced oversight of the scheme by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS).

Further details and accompanying guidance for these reforms is on the Commonwealth Ombudsman's website at [Public interest disclosure \(whistleblowing\) Reform 2023 | Commonwealth Ombudsman](#).

The Government has indicated that stage two of the reforms is an opportunity to improve the accessibility and effectiveness of the PID Act for reporting potential wrongdoing, and to consider options to provide effective and accessible supports for whistleblowers. This includes consideration of outstanding recommendations from the Moss Review, recent parliamentary reports, external reviews and reports from stakeholders, and significant changes to the integrity landscape since the PID Act was introduced, including the establishment of the NACC. A summary of identified reports and a list of relevant outstanding recommendations are provided at **Attachment A** to this paper.

We are interested in stakeholder views on what reforms are required to the PID Act and related measures to ensure the public sector whistleblowing framework remains fit for purpose and accessible for public officials to report wrongdoing.

In particular, we are seeking views on the following issues:

- who can make, and who within government can receive, disclosures, including a 'no wrong doors' referral approach
- pathways to make a disclosure outside of government, including requirements for external disclosures, access to professional assistance, and the treatment of intelligence information
- protections and remedies available under the PID Act, including requirements to access protections and extending immunities to cover preparatory acts
- functions of oversight and integrity agencies and supports for whistleblowers, including potential functions of a Whistleblower Protection Authority or Commissioner, as well as education and training
- a principles-based approach to regulation under the PID Act and other ways to improve the clarity of the framework.

A consolidated list of all consultation questions is also included at pages 27-28.

Making a submission

You can provide a submission in response to this consultation paper by visiting the department website at <https://consultations.ag.gov.au/integrity/pswr-stage2> and clicking 'Make a submission'.

You are welcome to only answer those questions that are relevant to you or your organisation. For government agencies, your responses to the discussion questions should be relevant to your role in making, receiving or investigating public interest disclosures.

This consultation closes on **22 December 2023**.

You can submit your response under your name or anonymously. We will publish responses at the end of the consultation period. We will not publish submissions if you do not consent, or if there is any potential legal issue with publishing the submission.

Submissions may be subject to freedom of information requests, or requests from the Parliament. Personal information shared through the consultation process will be treated in accordance with the *Privacy Act 1988*. For more information on how the Attorney-General's Department collects, stores and uses personal information, please visit the Attorney-General's Department's Privacy Policy at www.ag.gov.au/about-us/accountability-and-reporting/privacy-policy.

Overview

The PID Act has now been in operation for a decade and is one of a range of frameworks which provides for public officials and others to disclose and address reports of wrongdoing by public officials at the federal level. The Act provides protections for people who make disclosures and requires agencies, or other bodies such as the Commonwealth Ombudsman and the IGIS, to take appropriate action to investigate disclosures.

Depending on the nature of the wrongdoing, disclosures may be referred to investigative mechanisms under other legislative frameworks, including:

- the NACC since 1 July 2023
- law enforcement agencies to investigate alleged breaches of law
- the *Public Service Act 1999* (Cth), which provides for investigation of APS code of conduct matters
- the *Public Governance, Performance and Accountability Act 2013* (Cth), which provides obligations for the use and management of public funds to prevent and address fraud
- Commonwealth anti-discrimination laws, such as the *Sex Discrimination Act 1984* (Cth), which provide that it is unlawful to victimise a person who has made a claim of unlawful discrimination or harassment under those laws, and
- the *Work Health and Safety Act 2011* (Cth), which provides protections against discriminatory action taken against people who raise work health and safety issues or concerns, and provides duties on employers related to the health and safety of workers.

While the PID Act establishes a whistleblowing framework for the Commonwealth public sector, other frameworks exist at the federal level to provide whistleblower protections for other non-government sectors. These include:

- Part 9.4AAA of the *Corporations Act 2001* (Cth) (Corporations Act)
- Part IVD of the *Taxation Administration Act 1953* (Cth) (Taxation Administration Act)
- Part 4A of the *Fair Work (Registered Organisations) Act 2009* (Cth), and
- Part 4.1 of the *Aged Care Act 1997* (Cth).

The second stage of reforms to the PID Act will include consideration of recent proposals to improve the private sector whistleblowing scheme in the Corporations Act, to ensure alignment between the schemes, where appropriate. Consultation on the public sector whistleblowing framework also provides an opportunity to identify lessons for whistleblowing frameworks more broadly and inform future consultations or reviews for other federal whistleblowing frameworks.

Integrity landscape at the federal level

Since the 2016 Moss Review into the operation of the PID Act, there have been a range of improvements, as well as ongoing reforms, to broader integrity frameworks that interact with the PID Act as an avenue for public officials to disclose wrongdoing. These include:

- the establishment of the NACC, which creates a new avenue for all persons, including public officials, to raise concerns of wrongdoing that may amount to serious or systemic corruption
- ongoing implementation of the 2021 *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* to ensure Commonwealth parliamentary workplaces are safe and respectful, including to establish the proposed Independent Parliamentary Standards Commission (IPSC) to receive complaints about breaches of the Behaviour Codes for Commonwealth Parliamentarians and staff employed under the *Members of Parliament (Staff) Act 1984* (MoP(S) Act), and Behaviour Standards for Commonwealth Parliamentary Workplaces, which were endorsed by the federal Parliament on an interim basis in February 2023
- proposed reforms to whistleblower protections in the Taxation Administration Act, to extend protections for disclosures to the Tax Practitioners Board and a number of bodies providing assistance in relation to disclosures, and to align some protections with the PID Act
- considering the scope and design of a potential federal judicial commission as a transparent and independent means of addressing complaints of judicial misconduct, informed by public consultation on a discussion paper in early 2023
- proposed new requirements under the Public Governance, Performance and Accountability Rule 2014 for Commonwealth entities to take measures to prevent, detect and deal with corruption, taking effect from 1 July 2024
- a comprehensive review of Commonwealth secrecy offences by the Attorney-General's Department and resulting final report, which was delivered to the Attorney-General on 29 August 2023, and
- ongoing reforms to the Public Service Act, led by the Australian Public Service Commission, and informed by the recommendations of the Independent Review of the Australian Public Service (Thodey Review), as part of the broader APS reform agenda to ensure the APS embodies integrity in everything it does, puts people and business at the centre of policy and services, is a model employer and has the capability to do its job well.

Issue 1: Making a disclosure within government

Summary

The public sector whistleblowing framework should be accessible and straightforward to enable a person to speak up about alleged misconduct of Commonwealth public officials and for agencies to investigate and respond to issues that are raised. It should be clear who is covered by the framework, how a person can make a disclosure, and to whom they can make a disclosure under the framework.

Who can make and receive public interest disclosures

The PID Act supports:

- **current and former public officials to make a disclosure.** This includes APS and Parliamentary Service employees, members of the Australian Defence Force, Australian Federal Police appointees, statutory office holders, directors of Commonwealth companies, as well as members of staff of other agencies covered by the PID Act, including the intelligence community.¹
- **officers and employees of service providers under a Commonwealth contract**, who are considered public officials and can make disclosures under the PID Act. This includes sub-contractors.

A public official must make an ‘internal disclosure’ within government to be able to access the protections and remedies under the PID Act. These can be made to:

- the discloser’s supervisor
- an authorised officer in the discloser’s agency or the agency to which the disclosure relates,² or
- the Commonwealth Ombudsman or the IGIS,³ if the discloser believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the relevant oversight body.

The PID Act also allows for ‘internal disclosures’ to be made to other investigative agencies that have their own power to investigate the misconduct, if the agency is prescribed in rules made under the PID Act. Presently, no other investigative agencies have been prescribed.

The PID Act provides for circumstances where a person may make an **external disclosure**, an **emergency disclosure**, a **legal practitioner disclosure**, or a **disclosure to the NACC** relating to a corruption issue⁴ and have access to immunities and protections under the PID Act.

Attachment B outlines the process for making, investigating and responding to disclosures under the PID Act, including roles and responsibilities related to oversight, review and protections under the PID Act.

¹ For the purposes of the PID Act, an ‘intelligence agency’ includes the Australian Secret Intelligence Service, the Australian Security Intelligence Organisation, the Australian Geospatial-Intelligence Organisations, the Defence Intelligence Organisation, the Australian Signals Directorate, and the Office of National Intelligence: PID Act s 8.

² Section 36 of the PID Act provides that an authorised officer of an agency is a principal officer, or a public official belonging to the agency who is appointed as an authorised officer by the principal officer.

³ The IGIS handles disclosures in relation to intelligence agencies and where disclosures relate to the intelligence functions of the Australian Criminal Intelligence Commission and the Australian Federal Police.

⁴ The pathway for a public official to disclose a corruption issue to the NACC was inserted into the PID Act on commencement of the NACC Act on 1 July 2023.

In 2022-23, 249 internal disclosures were made under the PID Act and reported to, or received by, the Commonwealth Ombudsman. The most common types of alleged disclosable conduct were ‘maladministration’, ‘conduct that may result in disciplinary action’, ‘contravention of a law’ and ‘conduct that results in, or that increases, the risk of danger to the health or safety of one or more persons’.⁵

Individuals employed by parliamentarians under the MoP(S) Act cannot make disclosures under the PID Act. However, the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) provides both immunities and protections from reprisal action for staff of parliamentarians who report a corruption issue to the NACC. The Australian 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.

Issues for consideration

It is important that the PID Act effectively covers wrongdoing by the range of people who perform work within and for the Commonwealth public sector, and that the pathways to making disclosures are accessible.

Stakeholders have raised concerns that there could be **more certainty as to when the PID Act covers external consultants providing services to the Australian Government.**⁶ For example, stakeholders have raised questions about circumstances where a person reports wrongdoing internally to a colleague within the same consultancy firm, but the colleague is not able to receive an internal disclosure under the PID Act—in which case, the whistleblower may not be able to access the protections and remedies under the PID Act. While one of the private sector whistleblowing frameworks may apply to some consultancy firms (including those structured as companies), which would provide a separate avenue to disclose wrongdoing, this will not always be the case. Such internal disclosures may also not result in the wrongdoing being reported to the relevant government agency.

The 2023 review of the Queensland *Public Interest Disclosure Act 2010* (Qld) recommended that the Queensland legislation be amended to require service delivery contracts or subcontracts entered into by an agency to include requirements for contractors and subcontractors to comply with PID processes, similar to the approach in the *Public Interest Disclosures Act 2022* (NSW).⁷

The Moss Review suggested **broadening who can receive an ‘internal disclosure’ within government.**⁸ This could include:

- **Adopting a ‘no wrong doors’ approach to internal disclosures**

A no wrong doors approach involves the development of referral protocols, so that if an agency receives an enquiry, it is passed to the appropriate agency for consideration. Stakeholders have

⁵ Commonwealth Ombudsman, *2022-23 Annual Report* (Ombudsman Annual Report) (Report, October 2023) 41.

⁶ Griffith University, Human Rights Law Centre and Transparency International Australia, Submission No 34 to the Parliamentary Joint Committee on Corporate and Financial Services, *Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry* (4 September 2023) 13.

⁷ Recommendation 26 of Queensland Government, *Review of the Public Interest Disclosure Act 2010* (Queensland PID Act Review) (Report, June 2023) 81.

⁸ Recommendation 2 of Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (Moss Review) (Report, 15 July 2016) 26; Recommendation 13 of Senate Economics Legislation Committee, *Report of the Performance of the Inspector-General of Taxation* (Report, June 2020) 66; Recommendation 12.1 of the Parliamentary Joint Committee on Corporate and Financial Services, *Whistleblower Protections* (PJCCFS Report) (Report, September 2017) 158;

suggested that disclosers should have access to the protections and remedies under the PID Act where an internal disclosure is initially made to the wrong agency, and that the initial agency receiving the disclosure should refer it to the appropriate agency to handle.

This approach is taken in the Victorian scheme, where the initial agency that receives a public interest disclosure and they can send the disclosure to the right agency.⁹ The discloser can still access the protections and remedies under the *Public Interest Disclosures Act 2012* (Vic) if the agency is one that can receive disclosures under the Act and the discloser believed they were making the disclosure to the right agency. The 2023 review of the Queensland *Public Interest Disclosure Act 2010* (Qld) supported continuation of the ‘no wrong doors’ approach in that Act.¹⁰

- **Expanding the integrity, oversight and investigative agencies that can receive internal disclosures**

The PID Act currently recognises only two investigative agencies that can receive internal disclosures—the Commonwealth Ombudsman and the IGIS. However, additional investigative agencies can be prescribed in rules made under the PID Act (no agencies have been prescribed to date). The Moss Review identified a number of statutory officeholders who should be added to this list in 2016.¹¹ In light of the changes to the integrity landscape since 2016, there may be other statutory officeholders who could appropriately receive internal disclosures.

- **Expanding persons within an agency who can receive internal disclosures**

Other than an agency’s principal officer (for example, the Secretary of a department), all authorised officers who can receive an internal disclosure must be appointed in writing by the principal officer. This can limit the number of people in an agency who a discloser can approach, particularly in a small agency or if no, or only a small number of, authorised officers have been appointed. If the wrong person is approached, the discloser may not be able to access the protections and remedies under the PID Act.

One option to address this could be identifying categories of people within an agency who can receive an internal disclosure. For example, in the ACT, the *Public Interest Disclosure Act 2012* (ACT) allows disclosures to be made to a ‘public official of the entity who has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information’.¹²

Questions

1. Who should be protected for public sector whistleblowing under the PID Act?
2. What, if any, additional pathways should be created to provide ways for a public sector whistleblower, including those from intelligence agencies, to make a disclosure and receive protections?
3. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure within government?

Griffith University, Human Rights Law Centre and Transparency International Australia, *Protecting Australia’s Whistleblowers: The Federal Roadmap* (Protecting Australia’s Whistleblowers Report) (Report, 2022) 7.

⁹ *Public Interest Disclosures Act 2012* (Vic) s 18.

¹⁰ Queensland PID Act Review (June 2023) 86.

¹¹ Recommendation 2 of the Moss Review (July 2016). See Attachment A, Table 1.

¹² *Public Interest Disclosure Act 2012* (ACT) s 15(1)(c)(iii).

Issue 2: Pathways to make disclosures outside of government

Summary

The PID Act should enable disclosures of wrongdoing by public officials to be reported and investigated within government. As a starting point, it should generally be considered appropriate for disclosures of wrongdoing to be investigated internally within an agency. Some matters may be more appropriately handled by an oversight agency, or by another investigatory agency connected to the PID framework, such as the Australian Federal Police or the NACC.

Where public sector whistleblowers seek to disclose to persons outside government and continue to have protections under the PID Act, there should be clear circumstances and pathways for doing so, that also appropriately protect sensitive information. For example, disclosers should have pathways to access assistance from relevant professionals, including legal practitioners. These pathways should facilitate access to support in a manner consistent with their obligations as public officials to protect information, including classified information, obtained in the course of their work.¹³

Current pathways for making disclosures outside of government

There are three pathways for a public official to make a public interest disclosure outside of government. The PID Act **does not** permit making a disclosure to a foreign public official.

A public official can make an external disclosure where:	A public official can make an emergency disclosure where:	A public official can make a legal practitioner disclosure where:
<ul style="list-style-type: none"> • They have already made an internal disclosure.¹⁴ • They believe on reasonable grounds that the investigation of the internal disclosure or the response to the investigation was inadequate, or the investigation has not been completed within the statutory time limit. • The disclosure is not, on balance, contrary to the public interest. • They only disclose the information that is reasonably necessary to identify one or more instances of disclosable conduct.¹⁵ 	<ul style="list-style-type: none"> • They believe on reasonable grounds that the information concerns a substantial and imminent danger to the health or safety of a person or to the environment. • They only disclose the information that is necessary alert the recipient to the substantial and imminent danger. • The information is not and does not include intelligence information. • There are exceptional circumstances, either justifying the public official's failure to make an internal disclosure before making 	<ul style="list-style-type: none"> • They are making the disclosure in order to obtain legal advice or professional assistance in relation a disclosure they have made or are proposing to make. • If they know (or ought to know) that the information has a security classification, the legal practitioner holds an appropriate security clearance. • The information is not and does not include intelligence information.

¹³ Public officials are subject to a range of duties and obligations in relation to the protection of information, including obligations under the terms and conditions of their employment, policies (such as the Protective Security Policy Framework), and legislation (for example, general secrecy offences in Part 5.6 of the *Criminal Code* (Cth), as well as specific secrecy offences and non-disclosure duties in other Commonwealth laws).

¹⁴ 'Internal disclosure' is when a public official (or former public official) discloses information to their supervisor or an authorised officer of a Commonwealth agency that tends to show, or the public official believes on reasonable grounds that the information tends to show, disclosable conduct and the disclosure is not made in the course of performing the discloser's ordinary functions as a public official: PID Act s 26(1), table item 1.

¹⁵ 'Disclosable conduct' is defined as conduct engaged in by an agency, public official or contracted service provider that involves illegal conduct, corruption, maladministration, abuse of public trust, deception relating to scientific research, wastage of public money, unreasonable danger to health or safety, danger to the environment, or abuse of position or grounds for disciplinary action resulting in termination: PID Act s 29.

<ul style="list-style-type: none"> The information is not and does not include intelligence information, and none of the conduct relates to an intelligence agency. 	<p>the emergency disclosure or justifying the emergency disclosure being made before an investigation of the internal disclosure is completed.</p>	
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The restrictions on public disclosure of ‘intelligence information’¹⁶ and the conduct of an intelligence agency under the PID Act were introduced in light of the risk that highly sensitive information could be improperly or unwittingly publicly disclosed. Inadvertent or inappropriate disclosure of intelligence information may compromise national security and potentially place lives at risk.¹⁷ The Moss Review agreed that the definition of ‘intelligence information’ should be retained.¹⁸

Issues for consideration

The Moss Review, among others, identified possible reforms to the pathways under the PID Act to make a disclosure outside of government for consideration:¹⁹

- **Simplifying the requirements to make a disclosure outside of government**

A number of stakeholders have raised concerns that the current requirements to make a disclosure outside of government are too complex and difficult for disclosers to understand and use, particularly without legal advice. A discloser may be liable to criminal or civil action where they try to make an external or emergency disclosure, but have not met all of the requirements to do so. Stakeholders have supported reforms to provide greater clarity about what kinds of information can and cannot be disclosed publicly, and to simplify the test for external disclosures to determine whether the disclosure is in the public interest.

- **Expanding the grounds for when a public official can make an external disclosure**

Currently a public official can only make an external disclosure where there is inadequate handling, timeliness, or response to an investigation of their internal disclosure. An external disclosure cannot be made where an authorised officer decides not to allocate the original internal disclosure for investigation, the agency has not made any decision about allocating the original internal disclosure, or a supervisor fails to report a disclosure they received to an authorised officer. Further, an external disclosure cannot be made where the information consists of, or includes, intelligence information, or the conduct with which the disclosure is concerned relates to an intelligence agency.

An external disclosure cannot be made where the internal disclosure is referred by an agency for investigation under another law or power. When a referral is made under this power, a discloser

¹⁶ ‘Intelligence information’ includes information that has originated with or been received from an intelligence agency, as well as a range of other information that may reveal sources, technologies or operations, foreign government information from agencies with similar functions or relating to restricted technologies, the identities of ASIS staff members and ASIO employees and affiliates, and sensitive law enforcement information: PID Act s 41.

¹⁷ Commonwealth, *Parliamentary Debates: Second Reading Speech for Public Interest Disclosure Act 2013*, House of Representatives, 19 June 2013, 6407 (Mark Dreyfus, Attorney-General).

¹⁸ Moss Review (July 2016), 8.

¹⁹ Recommendations 8 and 9 of the Moss Review (July 2016); Recommendations 8.5, 8.6 and 9 of the PJCCFS Report (September 2017); Recommendation 11 of the Protecting Australia’s Whistleblowers Report (January 2023).

retains the protections and access to remedies under the PID Act, but an investigation of the disclosure under PID Act does not occur.²⁰

During parliamentary consideration of the measures in the *Public Interest Disclosure Amendment (Review) Act 2023*, submissions were made on proposals to permit an external disclosure if there has been a failure to allocate or provide notice of a decision regarding allocation, and proposals to require investigation of the disclosure within statutory timeframes.²¹

- **Removing the requirement for lawyers to hold a security clearance in order to receive disclosures of security classified information (other than intelligence information)**

The Moss Review recommended that the PID Act should permit disclosures of security classified information (other than intelligence information) to a lawyer, even if the lawyer does not hold the appropriate security clearance.²² It has been reported that individuals have experienced difficulty in ensuring that their legal practitioner ‘holds the appropriate security clearance’. Existing criminal offences that seek to prevent unauthorised disclosure of classified information could continue to be relied upon as an appropriate safeguard where disclosure to a legal practitioner does not meet the other requirements in the PID Act.²³ Another option previously proposed is a centralised list of security-cleared legal practitioners from whom a public official could seek advice.

- **Expanding access to professional support outside of government**

Stakeholders have suggested the PID Act be amended to ensure public officials can seek advice from a broader range of professionals in relation to their disclosure. Whistleblowers can experience significant stress and psychological pressure after making their disclosure,²⁴ and stakeholders and reviews have raised that access to a broader range of professionals would better support them throughout the process.

The Moss Review identified medical practitioners, union officials and employee assistance programs as professionals that the PID Act should enable public officials to seek assistance from.²⁵ Similarly, the recent review of the Queensland *Public Interest Disclosure Act 2010* recommended disclosures to health practitioners should be protected provided there is a relationship of confidentiality between the parties, and the disclosure is made under that relationship for the purpose of obtaining advice about their disclosure or the disclosure process.²⁶ That review also recommended that confidentiality obligations should provide an exception for disclosures that are made for support purposes.²⁷

²⁰ The Commonwealth Ombudsman or IGIS (as appropriate) can review the handling of a disclosure, including a decision to investigate under another law or power: PID Act s 55.

²¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 February 2023, 1001-2 (Zoe Daniels MP, Member for Goldstein); Australian Human Rights Commission, Submission No 5 to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the *Public Interest Disclosure Amendment (Review) Bill 2022 [Provisions]* (Senate Inquiry) (20 January 2023) 7-8 (recommendation 9); Law Council of Australia, Submission No 25 to the Senate Inquiry (14 February 2023) 8.

²² Recommendation 26 of the Moss Review (July 2016).

²³ Moss Review (July 2016), 55-6 [142].

²⁴ Commonwealth, *Report of Senate Inquiry into Public Interest Disclosure Amendment (Review) Bill 2022*, (PID Amendment Bill Senate Inquiry Report) (Report, March 2023) 33 [1.12].

²⁵ Recommendation 26 of the Moss Review (July 2016); Recommendation 9 of the Protecting Australia’s Whistleblowers Report (January 2023); PID Amendment Bill Senate Inquiry Report, (March 2023) 33-4 [1.12-1.15].

²⁶ Recommendation 59 of the Queensland PID Act Review (June 2023).

²⁷ Recommendation 64 of the Queensland PID Act Review (June 2023).

The NACC Act provides pathways for investigation material to be disclosed to a legal practitioner, a legal aid officer and a medical practitioner or psychologist.

Questions

4. In what circumstances should public sector whistleblowers be protected to disclose information outside of government? Are there circumstances where information should not be disclosed outside of government?
5. What safeguards are needed to ensure that information disclosed outside of government is treated appropriately, for example, without breaching confidentiality or without prejudicing Australia's national security, international relations or defence?
6. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure outside government?

Issue 3: Protections and remedies under the PID Act

Summary

Public sector whistleblowers (including former public officials) should be supported and protected when making, or assisting with, a public interest disclosure. This includes protection from adverse consequences that may arise as a result of making a disclosure, such as impacts on their employment, health or career. Where adverse consequences arise despite these protections, public sector whistleblowers should have access to appropriate remedies.

Current protections and remedies

Under the PID Act, current protections and remedies are:

- **Public sector whistleblowers and witnesses have immunity** for making, or providing assistance in relation to, a public interest disclosure. This immunity covers civil, criminal and administrative liability where the person has followed the processes under the PID Act to make the disclosure, or when providing assistance in relation to a disclosure. It does not protect disclosers from liability for knowingly disclosing false or misleading information, or from the consequences of their own wrongdoing, which may be investigated as a result of the PID.
- **There are criminal offences to protect whistleblowers and deter people from taking or threatening reprisals** against public sector whistleblowers. Reprisal captures detriment that includes injury, dismissal, discrimination and any other damage to a person. The Stage 1 reforms to the PID Act in July 2023 expanded the definition of detriment to include harm beyond a person's employment, such as harassment, psychological harm and harm to a person's reputation, property or financial position. It is a criminal offence to reveal a public sector whistleblower's identity without consent.
- **Public sector whistleblowers can access a range of civil remedies through the court system** to address or prevent reprisal action. These include compensation, apologies and injunctions.

The PID Act also **requires agencies to take reasonable steps to support public sector whistleblowers**. This includes protecting public officials from reprisals, ensuring there are procedures in place that deal with the risks of reprisals and enable confidential investigations, and providing training and education for officers on the protections for public sector whistleblowers.

Similarly, the private sector whistleblowing scheme in the Corporations Act requires public companies to have a whistleblowing policy, and to ensure that it is made available to officers and employees of the relevant company.²⁸ The policy must include, amongst other matters, the protections available to whistleblowers under the Corporations Act, who can receive disclosures and how the company will support whistleblowers and protect them from detriment. Failure to comply with the requirements for a whistleblowing policy under the Corporations Act constitutes an offence.²⁹

Separate to the PID Act, where a person makes a disclosure to the NACC, there are comparable protections under the NACC Act.³⁰ The Government has committed to continuing to consider, as the NACC matures, how these protections are operating and whether civil remedies are needed.

²⁸ Corporations Act s 1317AI.

²⁹ Corporations Act s 1317AI.

³⁰ A person makes a NACC disclosure if they provide evidence or information to the National Anti-Corruption Commissioner, the Inspector-General of Intelligence and Security or the Inspector of the NACC about a corruption issue, a

Issues for consideration

Stakeholders have identified the following possible opportunities for reform to improve protections and access to remedies for public sector whistleblowers:

- **Clarifying the scope of ‘preparatory acts’ taken by a public sector whistleblower that are covered by immunity under the PID Act³¹**

Preparatory acts may include actions taken by a whistleblower in the lead up to, or in the course of, making a disclosure. For example, preparatory conduct may involve accessing or securing classified information that the whistleblower believes is relevant to support the disclosure. A whistleblower is not required to prove an allegation when making a disclosure.³²

Preparatory acts may amount to a criminal offence under Commonwealth legislation³³ and there may be circumstances where it is not appropriate for the immunities under the PID Act to apply. It is therefore important to consider to what extent, if at all, preparatory acts should be covered by immunities, any risks associated with potential PID protections for preparatory acts, and what safeguards may be appropriate in relation to preparatory conduct to address those risks. Whistleblowers should not be encouraged to take actions that go beyond making the disclosure—such as conducting their own investigation into alleged wrongdoing—as they may prejudice any future investigation under the PID Act or another framework.

Possible safeguards could also extend to limiting preparatory actions to those that involve information to which a public official has lawful access, or where the dealing is no greater than necessary to make a disclosure.

Examples of protections for preparatory acts that have been proposed or implemented in other jurisdictions are:

- in Queensland, a 2023 review recommended that disclosers should have **limited** immunity for preparatory acts if a court is satisfied that it is appropriate for the discloser to be given the immunity.³⁴
 - the European Union Whistleblower Directive provides that disclosers are not liable for acquiring or accessing information which is the subject of their disclosure, provided that these acts are not a criminal offence.
- **Shifting the evidentiary burden from a public sector whistleblower to a respondent where civil remedies are sought under the PID Act for a reprisal or threatened reprisal³⁵**

Currently, when applying for a civil remedy, the PID Act requires a public sector whistleblower to prove that the respondent undertook or threatened the reprisal because the respondent

NACC corruption issue, a complaint about the conduct or activities of the NACC or a staff member of the NACC, or a NACC Act process such as a corruption investigation: NACC Act s 23.

³¹ Recommendation 5 of the Protecting Australia’s Whistleblowers Report (January 2023).

³² Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act 2013*: Chapter 5, 4.

³³ For example, it is an offence to make an unauthorised record of, disclose or use protected information under the *Social Security (Administration) Act 1999* (Cth). Similar provisions protect the sensitive information government collects about individuals under a range of other legislation. The copying of such records for disclosure affects the rights of the individuals whose records are copied, and adds additional complexity to the question of what is in the public interest.

³⁴ Proposed factors the court could consider include whether the preparatory conduct was reasonably necessary to make the disclosure, the seriousness of the conduct, and whether the conduct involved retaining information from the discloser’s ordinary course of work or extended to conducting an independent investigation: Recommendation 72 of the Queensland PID Act Review (June 2023) 179.

³⁵ Recommendation 6 of the Protecting Australia’s Whistleblowers Report (January 2023).

believed or suspected that the person had made, may have made, proposed to make or could make a disclosure.

This differs from the position for private sector whistleblowers under the Corporations Act.³⁶ Where the private sector whistleblower gives evidence that they suffered a detriment, and that the detriment was reasonably connected to their disclosure or ability to disclose, the burden then shifts to the respondent to prove the disclosure was not a reason for their conduct.

- **Civil remedies for public sector whistleblowers who suffer detriment resulting from another person's failure to fulfil a statutory duty to protect a whistleblower from reprisal³⁷**

The PID Act requires certain officers to take reasonable steps to protect public officials belonging to their agency from suffering a reprisal because they made, or because of their ability to make, a disclosure.³⁸

Some frameworks provide access to civil remedies where public officers and agencies fail to take positive steps to ensure whistleblowers in their agency are protected from reprisals. In NSW, the *Public Interest Disclosure Act 2022* provides that agencies are liable for damages if they fail to comply with their obligation to take proactive steps to minimise the risk of detrimental action against a person as a result of a disclosure.

A similar approach is taken to protect private sector whistleblowers under the Corporations Act where a whistleblower can apply for a remedy against a private company if the company fails to comply with its duty to take reasonable steps to prevent a third person (for example, another employee) from taking a reprisal against the whistleblower.

It is also important to consider the scope of the existing statutory duty to protect a whistleblower from reprisal and whether it should extend beyond a deliberate or intentional failure to protect a whistleblower.

- **Creating a reward system for whistleblowers**

The PJCCFS recommended that certain bodies, such as a court or whistleblower protection body, may give a reward to a whistleblower if their disclosure results in a penalty being imposed on their employer.³⁹

The PJCCFS considered arguments for and against a reward system. Stakeholders supporting the introduction of a reward system suggested that jurisdictions which offer incentives for whistleblowers had a greater number of internal disclosures, improved corporate governance practices, and greater compliance with and resourcing for internal reporting frameworks. Alternatively, other stakeholders suggested that a reward system would not effectively protect whistleblowers from reprisal, may prevent whistleblowers from accessing other remedies, and importantly, public officials have existing duties to act in the public interest and report wrongdoing regardless of whether a reward system exists or a penalty is imposed on an employer. There may be a risk that providing for rewards would create an expectation that the

³⁶ Corporations Act s 1317AD.

³⁷ Dr Helen Haines MP, Submission No 9 to the Senate Inquiry (20 January 2023) 3; CPSU, Submission No 24 to the Senate Inquiry (January 2023) 2.

³⁸ *Public Interest Disclosure Act 2013* (Cth) ss 59(9), 60(2).

³⁹ Recommendations 11.1 and 11.2 of the PJCCFS Report (September 2017).

reporting of wrongdoing requires a financial incentive, rather than being a legal duty of public officials.

A rewards system could also create perverse incentives as to the type of misconduct which is reported, with greater focus on reporting misconduct that carries financial implications.

- **Providing access to civil remedies for disclosures made to the NACC⁴⁰**

The NACC Act provides protections to any person, including public officials, who makes a disclosure to the NACC.⁴¹ These protections are consistent with the PID Act,⁴² to ensure consistency in how public officials are protected regardless of the pathway they take to make a public interest disclosure.

However, unlike the PID Act, the NACC Act does not include civil remedy provisions. This means a person who makes a disclosure or provides information about a corruption issue to the NACC (or has the ability to do so) cannot apply for civil remedies under the NACC Act to address or prevent a reprisal. Civil remedies are available under the PID Act for public officials who make a NACC disclosure that also constitutes a valid public interest disclosure under the PID Act.

Questions

7. What reforms to the PID Act should be considered to ensure public sector whistleblowers and witnesses have access to effective and appropriate protections and remedies?
8. Should the Act prescribe additional statutory minimum requirements for agency procedures under the PID Act?
9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?
10. Do you have any other views on reforms for protecting public sector whistleblowers who make a disclosure under the PID Act, and remedies for when protections fail?
11. Should the PID Act establish other incentives for public sector whistleblowers, and if so, what form should such incentives take?
12. What improvements should be made, if any, to the compensation scheme in the PID Act if a reward system is not established?
13. Are there benefits to better aligning the whistleblower protections available under the NACC Act?

⁴⁰ Transparency International Australia and members of parliamentary crossbench have advocated for the inclusion of civil remedy provisions in the NACC Act for any detriment suffered by a whistleblower as a result of a NACC disclosure.

⁴¹ For requirements for a 'NACC disclosure' see NACC Act s 23.

Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner

Summary

The effectiveness of the PID Act relies upon agencies having appropriate powers to investigate public interest disclosures and support and protect public sector whistleblowers. Further, independent oversight agencies play an important role monitoring compliance with the PID Act.

The effective operation of the framework relies on avoiding duplication of functions across agencies, and having the right connections and referral pathways between agencies with roles under the PID framework.

Current functions and players

Federal agencies have a number of obligations under the PID Act to support the effectiveness of the scheme and raise awareness of the framework within their agency. These include requirements to:

- encourage and support public officials who make, or are considering making, disclosures
- establish internal procedures for making and dealing with disclosures
- protect public officials against reprisals that have been, or may be, taken in relation to disclosures or possible disclosures
- take appropriate action in response to recommendations in an investigation report, and
- provide ongoing training and education about the PID Act, including how to make a disclosure and the protections available.

As the Commonwealth Ombudsman recently observed, agencies take a range of actions in response to investigations, including delivering training and guidance material, reviewing policy and procedures, taking administrative action and referring matters for external investigation or assessment.⁴³ A number of agencies also participate in a quarterly community of practice, that includes the Office of the Commonwealth Ombudsman, to share experiences and learnings on their PID Act responsibilities.⁴⁴

The Commonwealth Ombudsman oversees agencies' conduct to operationalise the PID Act. This includes receiving reports of investigations completed under the PID Act, reviewing the handling of disclosures (on the basis of a notification or a complaint) and making recommendations to agencies to improve how they meet their obligations. The Commonwealth Ombudsman can set standards with which agencies must comply, and make recommendations to agencies on how they operationalise the PID Act. In addition to powers under the PID Act, the Commonwealth Ombudsman can use their separate powers under the *Ombudsman Act 1976* (Cth) to handle complaints and investigate disclosures and related matters.

The Commonwealth Ombudsman also provides support to public sector whistleblowers. Where a public sector whistleblower believes it is not appropriate for an agency to handle the disclosure (for example, due to a conflict of interest or confidentiality issue), they can make their disclosure to the Commonwealth Ombudsman instead. Additionally, if a public sector whistleblower has concerns

⁴³ Ombudsman Annual Report (October 2023) 43.

⁴⁴ Ombudsman Annual Report (October 2023) 48.

about how their disclosure was handled by an agency, they are able to lodge a complaint with the Commonwealth Ombudsman.

The Commonwealth Ombudsman conducts education and awareness programs relating to the PID Act, and provides resources to support agencies to meet their obligation to provide training to employees.⁴⁵

The IGIS can receive internal disclosures from public officials in intelligence agencies, or where the disclosure relates to the intelligence functions of the Australian Criminal Intelligence Commission or Australian Federal Police, and provides oversight of the PID Act framework for intelligence agencies. Intelligence agencies include the Australian Security Intelligence Organisation (ASIO), the Australian Secret Intelligence Service (ASIS), the Office of National Intelligence (ONI), the Australian Geospatial-Intelligence Organisation (AGO), the Defence Intelligence Organisation (DIO), and the Australian Signals Directorate (ASD).

Similar to the Commonwealth Ombudsman, the IGIS can also use their separate powers under the *Inspector-General of Intelligence and Security Act 1986* (Cth) to handle complaints and investigate disclosures and related matters.

Pathways have been created to ensure public sector whistleblowers can disclose alleged corrupt conduct directly to the NACC, and agencies have mandatory obligations to refer certain information to the NACC. While the NACC is independent of the PID scheme, agencies have protection obligations to public officials who disclose a corruption issue directly to the NACC, despite not making an internal disclosure to their own agency. The NACC Act requires authorised officers and principal officers of agencies to refer corruption issues to the NACC that they become aware of in performing their functions under the PID Act, where they suspect the issue could involve serious or systemic corrupt conduct.⁴⁶

Issues for consideration

Some stakeholders have raised that **an additional independent body is needed that can take an active role to protect public sector whistleblowers** and witnesses, such as a whistleblower protection authority or commissioner.⁴⁷ Some stakeholders suggest that such a body would address the power imbalance that a whistleblower may experience in relation to a well-resourced agency.

Functions for such a body that have been raised by stakeholders, or that are in other models, include:

- advocating and enforcing public sector whistleblowing laws on behalf of whistleblowers
- providing mediation or arbitration where whistleblowers seek to enforce protections and remedies
- providing referrals to whistleblowers seeking professional assistance
- providing complaints handling in relation to alleged reprisals and breaches of positive duties by agencies, and

⁴⁵ Ombudsman Annual Report (October 2023) 44.

⁴⁶ NACC Act s 35.

⁴⁷ This includes proposals in the Protecting Australia's Whistleblowers Report as well as submissions to and recommendations arising from the Senate Economics Legislation Committee's inquiry into the *Performance of the Inspector-General of Taxation* (June 2020) and the Parliamentary Joint Committee on Corporations and Financial Services' inquiry into *Whistleblower Protections* (September 2017).

- conducting public inquiries into systemic issues in relation to the implementation of whistleblowing laws.

The range of mechanisms within a jurisdiction’s integrity framework that are relevant to reporting wrongdoing and protecting whistleblowers need to be considered, and create variation between jurisdictions. No Australian state or territory has a whistleblower protection authority as part of its public sector whistleblowing framework. Examples that have been raised in recent inquiries include the Netherlands which has an independent whistleblowers authority (the Huis voor Klokkeluiders) for public and private sector whistleblowers. There is a private members’ (non-government) Bill before the UK Parliament to establish an Office of the Whistleblower. The UK private member’s Bill would also provide for the Office of the Whistleblower to set, monitor and enforce standards for the management of whistleblowing cases, provide disclosure and advice services, direct whistleblowing investigations and order redress of detriment suffered by whistleblowers, and would create offences relating to the treatment of whistleblowers and the handling of whistleblowing cases.⁴⁸

Some stakeholders have also suggested that **a tribunal such as the Fair Work Commission should be able to conciliate and arbitrate disputes over public sector whistleblower protections and remedies.**⁴⁹ Stakeholders suggest this could improve access to justice for whistleblowers as well as quicker resolution of disputes.

A recent report into Queensland’s *Public Interest Disclosure Act 2010* (Qld) was not persuaded of the efficacy of a standalone body, and accepted the need for caution against a new body in an already crowded integrity landscape. The report raised concerns about housing all of the relevant functions, including provision of advice and support in one agency and potential conflicts of interest, and noted that the relatively small number of cases raised a concern as to whether the resourcing needed to establish an agency was justified. In considering possible gaps in the Queensland scheme, the report recommended the following mechanisms to support whistleblowers:

- funding for a pilot legal assistance program to provide legal advice and/or representation for public sector whistleblowers seeking remedies under the Queensland PID Act⁵⁰
- establishing a PID Steering Committee to better coordinate effort between integrity bodies involved in the administration of the PID scheme and the broader Queensland integrity landscape⁵¹
- requiring any court or tribunal hearing a dispute to consider whether the parties ought to be ordered to attend conciliation or another alternate dispute resolution process before the matter can be heard, or continue to be heard, substantively,⁵² and
- establishing a function in the Queensland oversight agency to provide whistleblower support, separate and confidential from its other functions, to ensure whistleblowers would have the same protections for matters discussed with the whistleblower support function as they would if they had made a disclosure, including protection from reprisals.⁵³

⁴⁸ United Kingdom, Whistleblowing Bill, HC Bill (Session 2021-22).

⁴⁹ Dr Helen Haines MP, Submission No 9 to the Senate Inquiry (20 January 2023) 3; CPSU, Submission No 24 to the Senate Inquiry (January 2023) 5; Recommendation 12.4 of the PJCCFS Report (September 2017).

⁵⁰ Recommendation 89 of the Queensland PID Act Review (June 2023).

⁵¹ Recommendation 105 of the Queensland PID Act Review (June 2023).

⁵² Recommendation 87 of the Queensland PID Act Review (June 2023).

⁵³ Recommendation 61 of the Queensland PID Act Review (June 2023).

At the federal level, there are a range of legal financial assistance schemes, a number of integrity bodies have memorandums of understanding to assist with referrals between agencies as well as forums for engagement, and the *Civil Dispute Resolution Act 2011* (Cth) requires filing of a statement on what steps, if any, were taken to resolve the dispute prior to heading to a federal court.

Questions

14. Do any gaps exist in the current oversight and whistleblower protection functions of agencies, the Commonwealth Ombudsman and the IGIS? Who is best-placed to take on additional responsibilities to fill these gaps?
15. Do you have any other views on reforms to the functions performed by agencies or interactions between agencies?
16. Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?
17. If established, is there an existing agency where it might be appropriate for an additional independent body to be located?
18. If an additional independent body is established, do you have any views on its operation, for example in relation to referral pathways, who should be able to make a referral, intersection with the external disclosure process, or the impact, if any, on available remedies for individuals that use the independent body?
19. How would the role of an additional independent body differ from and intersect with other existing oversight agencies? Are there risks associated with establishing an additional integrity body alongside existing agencies – for example, duplication of functions, stakeholder confusion or delays in conducting investigations, handling disclosures or processing complaints?

Issue 5: Clarity of the PID Act

Summary

To optimise the operation of the PID Act, those affected by the Act, including public officials, federal agencies and oversight bodies, should be able to understand how the law applies to them and what it requires. The PID Act should minimise the risk of confusing or disincentivising whistleblowers, hindering an agency's ability to deal with wrongdoing, or be so complex that it impedes general awareness and understanding.

Current objects and procedural requirements

The Moss Review noted that 'the PID Act framework is not only intended to bring to light wrongdoing, but also to help agencies to understand wrongdoing and to respond appropriately'.⁵⁴

The PID Act includes features designed to help a reader to understand the law. This includes setting out that the objects of the Act are to:

- promote the integrity and accountability of the Commonwealth public sector
- encourage and facilitate the making of public interest disclosures by public officials and former public officials
- ensure that public officials, and former public officials, who make public interest disclosures are supported and are protected from adverse consequences relating to the disclosures
- ensure that disclosures are properly investigated and dealt with.⁵⁵

The PID Act also includes simplified outlines, which are intended to help a reader easily gain a general understanding of what the PID Act is about.⁵⁶

Issues for consideration

The Moss Review found that parts of the PID Act are overly complex and the framework is perceived as legalistic, which undermines the intention to create a pro-disclosure framework.⁵⁷ Stage two of the reforms provides an opportunity to improve the use and understanding of the requirements of the PID Act. For example, possible areas could include:

- **Redrafting the objects of the PID Act**

The second stage of reform provides an opportunity to reevaluate the objects of the PID Act, to ensure they reflect current expectations around the purpose of the PID Act. This includes ensuring the objects reflect the role of the PID Act in light of changes to the Commonwealth integrity landscape.

For example, in Queensland it has recently been recommended that the word 'whistleblower' or 'whistleblowing' be included in the title of any new Queensland legislation to improve accessibility, promote the purpose of the Act, and to align it with the suite of Queensland public sector Acts.⁵⁸

⁵⁴ Moss Review (July 2016), 6.

⁵⁵ PID Act s 6.

⁵⁶ PID Act ss 7, 9, 25, 42, 46, 58, 64 and 68.

⁵⁷ Moss Review (July 2016), 6–7.

⁵⁸ Recommendation 2 of the Queensland PID Act Review (June 2023).

- **Adopting a ‘principles-based’ approach to certain requirements in the PID Act**

The Moss Review recommended adopting a ‘principles-based’ approach to the procedural requirements set out in the PID Act. The PID Act has been criticised as overly cumbersome and not meeting the needs of users, with the prescriptive elements contained within the PID Act obscuring and undermining the policy intention.

The PID Act could be redrafted with an emphasis on achieving the objects of the Act, and less detailed procedural requirements.⁵⁹ This could include a combination of outcome-focused statements about the intended result of the legislation, and simple procedural requirements which could be supported by delegated legislation and guidance material for disclosers and Commonwealth agencies to understand how to make and handle disclosures.⁶⁰ The Moss Review suggested that the following matters would benefit from a principles-based approach:

- the procedures to allocate or reallocate a disclosure
- an agency’s obligation to notify a discloser of a disclosure’s progress and investigation
- an agency’s obligation to notify the Commonwealth Ombudsman or the IGIS about the progress of a disclosure and its investigation, and
- an agency’s obligations to investigate and the timeframes for investigation.⁶¹

A range of Commonwealth legislation uses a principles-based approach.⁶² The *Public Interest Disclosure Act 2003* (WA) also incorporates some principles-based provisions.⁶³ Following the recent review of the *Public Interest Disclosure Act 2010* (Qld), the Queensland Government is also considering recommendations that a replacement Queensland Act be drafted carefully with a focus on ensuring key concepts can be understood by a wide range of users of the legislation, similar to that of the *Protected Disclosures (Protection of Whistleblowers) Act 2022* (NZ).⁶⁴

- **Statutory recognition of Commonwealth Ombudsman guidance material**

If a principles-based approach were to be adopted in the PID Act, some areas would likely benefit from continued prescription or detailed guidance as to their implementation. One option could be that guidance issued by the Commonwealth Ombudsman have an expanded role in supporting agencies and disclosers in their understanding of the requirements under the PID Act.

It has been suggested that the PID Act be amended to include statutory recognition of guidance material provided by the Commonwealth Ombudsman.⁶⁵ This would mean that, when performing functions or exercising powers under the PID Act, agencies would be required to have regard to

⁵⁹ Recommendation 10 of the Moss Review (July 2016).

⁶⁰ The Moss Review considered the following statements as examples: ‘that the agency best able to respond to the reported wrongdoing should investigate the disclosure’ (an outcome-focussed statement), and ‘such as ‘investigations must be completed within 90 days unless the Commonwealth Ombudsman or the IGIS have agreed to an exemption’ (a simple statement): Moss Review (July 2016), 41 [99].

⁶¹ Moss Review (July 2016), 41–2.

⁶² As identified by the Moss Review, examples include: the *Privacy Act 1988*, the *Fair Work Act 2009*, the *Income Tax Assessment Act 1997*, Infrastructure Australia’s ‘Infrastructure Plan’, and in 2015 amendments to the *Telecommunications Act 1997* to manage national security risks across the sector: Moss Review (July 2016), 40 [96].

⁶³ The Commissioner must establish a Code detailing minimum standards of conduct to be complied with by any person to whom a disclosure is made under that Act. The Code includes broad statements of principle such as that persons receiving disclosures must take all reasonable steps to seek to ensure informants who make a public interest disclosure are protected according to the Act: *Public Interest Disclosure Act 2003* (WA) s 20.

⁶⁴ Recommendation 1 of the Queensland PID Act Review (June 2023).

⁶⁵ Recommendation 12 of the Moss Review (July 2016).

the guidance issued by the Commonwealth Ombudsman. This could assist in giving more weight to the guidance issued by oversight bodies, improving agency decision-making and implementing a principles-based approach.

Questions

20. What should be the overarching purposes of the PID Act? Are these currently reflected in the objects outlined in section 6 of the PID Act?
21. What changes could be made to the PID Act to make it less complex and easier to understand and comply with?
22. Should a principles-based approach to regulation be adopted in the PID Act? If so, to what extent? What risks might be associated with adopting this approach?
23. What, if any, measures in the PID Act should remain prescriptive if a principles-based approach were to be adopted?
24. Do you have any other views on reforms to improve the clarity of the PID Act?

Appendices

Consultation Questions

Issue 1: Making a disclosure within government

1. Who should be protected for public sector whistleblowing under the PID Act?
2. What, if any, additional pathways should be created to provide ways for a public sector whistleblower, including those from intelligence agencies, to make a disclosure and receive protections?
3. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure within government?

Issue 2: Pathways to make disclosures outside of government

4. In what circumstances should public sector whistleblowers be protected to disclose information outside of government? Are there circumstances where information should not be disclosed outside of government?
5. What safeguards are needed to ensure that information disclosed outside of government is treated appropriately, for example, without breaching confidentiality or without prejudicing Australia's national security, international relations or defence?
6. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure outside government?

Issue 3: Protections and remedies under the PID Act

7. What reforms to the PID Act should be considered to ensure public sector whistleblowers and witnesses have access to effective and appropriate protections and remedies?
8. Should the Act prescribe additional statutory minimum requirements for agency procedures under the PID Act?
9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?
10. Do you have any other views on reforms for protecting public sector whistleblowers who make a disclosure under the PID Act, and remedies for when protections fail?
11. Should the PID Act establish other incentives for public sector whistleblowers, and if so, what form should such incentives take?
12. What improvements should be made, if any, to the compensation scheme in the PID Act if a reward system is not established?
13. Are there benefits to better aligning the whistleblower protections available under the NACC Act?

Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner

14. Do any gaps exist in the current oversight and whistleblower protection functions of agencies, the Commonwealth Ombudsman and the IGIS? Who is best-placed to take on additional responsibilities to fill these gaps?
15. Do you have any other views on reforms to the functions performed by agencies or interactions between agencies?
16. Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?
17. If established, is there an existing agency where it might be appropriate for an additional independent body to be located?
18. If an additional independent body is established, do you have any views on its operation, for example in relation to referral pathways, who should be able to make a referral, intersection with the external disclosure process, or the impact, if any, on available remedies for individuals that use the independent body?
19. How would the role of an additional independent body differ from and intersect with other existing oversight agencies? Are there risks associated with establishing an additional integrity body alongside existing agencies – for example, duplication of functions, stakeholder confusion or delays in conducting investigations, handling disclosures or processing complaints?

Issue 5: Clarity of the PID Act

20. What should be the overarching purposes of the PID Act? Are these currently reflected in the objects outlined in section 6 of the PID Act?
21. What changes could be made to the PID Act to make it less complex and easier to understand and comply with?
22. Should a principles-based approach to regulation be adopted in the PID Act? If so, to what extent? What risks might be associated with adopting this approach?
23. What, if any, measures in the PID Act should remain prescriptive if a principles-based approach were to be adopted?
24. Do you have any other views on reforms to improve the clarity of the PID Act?

Background

Commonwealth whistleblowing legislation, including the public sector whistleblowing framework in the PID Act, has been considered by a number of parliamentary inquiries and statutory reviews. The issues identified in this consultation paper include consideration of outstanding recommendations related to the public sector whistleblowing framework from these reports, which are identified in Table 1 below.

Summary of relevant reports

Review of the Public Interest Disclosure Act 2013 (the Moss Review)

In 2016, Mr Philip Moss AM conducted an independent statutory review of the PID Act under section 82A of that Act. The Moss Review considered the experience of whistleblowers and agencies, the scope of conduct that can be disclosed under the PID Act, and the interaction between the PID Act and other investigative frameworks. The Moss Review was conducted in consultation with the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security and considered public submissions from a range of stakeholders.

The Moss Review made 33 recommendations to improve the PID Act across seven key themes: stronger oversight; a stronger focus on wrongdoing; simpler legislative procedures; balancing transparency, confidentiality and procedural fairness; making it easier for people to get advice and help; clarifying the coverage of the legislation, and simpler interactions with other investigative regimes.

21 of the Moss Review recommendations were implemented as part of the priority reforms to the PID Act, which commenced on 1 July 2023.

Inquiry into the Performance of the Inspector-General of Taxation (2020)

The Senate Economics Legislation Committee's inquiry into the performance of the Inspector-General of Taxation (IGT) (SELC Inquiry) considered, among other things, the complaints management policies and practices of the IGT and the protections afforded to whistleblowers who disclose information to the IGT. In relation to public sector whistleblowing, the SELC inquiry recommended considering establishing a single whistleblower authority and that the IGTO be made an investigative agency under the PID Act.

Inquiry into Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors (2017)

In 2017, the Parliamentary Joint Committee on Corporations and Financial Services conducted an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. This inquiry made 15 recommendations across broad themes, including the consistency of whistleblower protections, remedies and sanctions across sectors, the scope of disclosable conduct, thresholds for whistleblower protections, external disclosures, reward systems and establishing a Whistleblower Protection Authority.

Table 1: Outstanding recommendations referenced in the consultation paper

REPORT	RECOMMENDATIONS	WHERE TO FIND IN PAPER
<p><i>Review of the Public Interest Disclosure Act 2013 (2016)</i> (Moss Review)</p>	<p>Recommendation 2: That 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 be prescribed as investigative agencies to simplify the PID Act’s interaction with other</p>	<p>Issue 1: Making a disclosure within government</p>
	<p>Recommendation 8: That the external and emergency disclosure provisions be considered in a future review of the PID Act, when further evidence about how they are being used is available.</p>	<p>Issue 2: Pathways to make disclosures outside government</p>
	<p>Recommendation 9: That the PID Act be amended to include situations when an authorised officer failed to allocate an internal PID, or a supervisor failed to report information they received about disclosable conduct to an authorised officer, as grounds for external disclosure.</p>	<p>Issue 2: Pathways to make disclosures outside government</p>
	<p>Recommendation 10: That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.</p>	<p>Issue 5: Clarity of the PID Act</p>
	<p>Recommendation 12: That the PID Act be amended to include statutory recognition of guidance material provided by the Commonwealth Ombudsman, similar to the recognition of guidance material in section 93A of the <i>Freedom of Information Act 1982</i>.</p>	<p>Issue 5: Clarity of the PID Act</p>
	<p>Recommendation 24: 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.</p>	<p>Issue 2: Pathways to make disclosures outside government</p>
	<p>Recommendation 25: That the PID Act be amended to protect disclosures for the purpose of seeking professional advice about using the PID Act.</p>	<p>Issue 2: Pathways to make disclosures outside government</p>

REPORT	RECOMMENDATIONS	WHERE TO FIND IN PAPER
<p><i>Performance of the Inspector-General of Taxation (2020), Senate Economics Legislation Committee</i></p>	<p>Recommendation 12: The committee recommends an independent review of the PID Act be undertaken in 2021, which includes consideration of establishing a single whistleblower authority.</p>	<p>Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner</p>
	<p>Recommendation 13: The committee recommends the IGTO to be made an 'investigative agency' under the PID Act.</p>	<p>Issue 1: Making a disclosure within government</p>
<p><i>Whistleblower Protections (2017), Parliamentary Joint Committee on Corporations and Financial Services</i></p>	<p>Recommendation 8.5: The existing whistleblower protections for external disclosures in the PID Act be simplified (including a more objective test) and extended to disclosures to a registered organisation, a federal Member of Parliament or their office, and be included in a Whistleblowing Protection Act, except the provisions relating to intelligence functions which should continue to apply to the public sector only.</p>	<p>Issue 2: Pathways to make disclosures outside government</p>
	<p>Recommendation 8.6: The Committee recommends that the existing whistleblower protections for external disclosures in the PID Act be simplified (including a more objective test) and extended to disclosures to a registered organisation, a federal Member of Parliament or their office, and by included in a Whistleblowing Protection Act, except the provisions relating to intelligence functions which should continue to apply to the public sector only.</p>	<p>Issue 2: Pathways to make disclosures outside government</p>
	<p>Recommendation 11.1: Following the imposition of a penalty against a wrongdoer by a Court, a whistleblower protection body or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.</p>	<p>Issue 3: Protections and remedies under the PID Act</p>
	<p>Recommendation 11.2: The committee recommends that such a reward should be determined within such body's absolute discretion within a legislated range of percentages of the penalty imposed by the Court (or other body imposing the penalty) against the whistleblower's employer (or principal) in relation to the matters raised by the whistleblower or uncovered as a result of an investigation instigated from the whistleblowing and where the specific percentage allocated will be determined by the body taking into account stated relevant factors.</p>	<p>Issue 3 Protections and remedies under the PID Act</p>
	<p>Recommendation 12.1: That a Whistleblower Protection Authority (WPA) be established to cover both the public and private sectors.</p>	<p>Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner</p>

REPORT	RECOMMENDATIONS	WHERE TO FIND IN PAPER
	<p>Recommendation 12.2: The committee recommends that where a whistleblower is the subject of reprisals from their current employer, or a subsequent employer/principal due to their whistleblowing, the Whistleblower Protection Authority be authorised, after consulting with relevant law enforcement agencies to which the conduct relates, to pay a replacement wage commensurate to the whistleblower's current salary as an advance of reasonably projected compensation until the resolution of any compensation or adverse action claim brought by the whistleblower.</p>	<p>Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner</p>
	<p>Recommendation 12.5: The committee recommends that the public and private sector whistleblower legislation include consistent provisions that allow civil proceedings and remedies to be pursued if a criminal case is not pursued.</p>	<p>Issue 3 Protections and remedies under the PID Act</p>
	<p>Recommendation 12.6: The committee recommends that the compensation obtainable by a whistleblower through a tribunal system be uncapped.</p>	<p>Issue 3 Protections and remedies under the PID Act</p>
	<p>Recommendation 12.7: The committee recommends that the WPA be given powers to set standards for internal disclosure procedures in the public sector (where internal disclosure should be mandated before external disclosures are permitted) and private sector (which may include mandatory internal disclosures in organisations above a prescribed size and recommended approaches for others).</p>	<p>Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner</p>
	<p>Recommendation 12.8: The committee recommends that the WPA provide annual reports to Parliament, and that the information on the public and private sectors be closely aligned in format and content to facilitate comparison.</p>	<p>Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner</p>
	<p>Recommendation 12.9: The committee recommends that provisions that override confidentiality clauses in employer-employee agreements or settlements be made consistent in public and private sector whistleblower legislation (including maintenance of public sector security and intelligence exceptions).</p>	<p>Issue 3 Protections and remedies under the PID Act</p>
	<p>Recommendation 12.11: The committee recommends that there be a statutory requirement for a post-implementation review of the new whistleblower legislation, within a prescribed time.</p>	<p>Issue 5: Clarity of the PID Act</p>

Attachment B—Flowchart: disclosure pathways under the PID Act

