Human Rights Law Centre

Pathway to Protection

Reforming the *Public Interest Disclosure Act 2013* (Cth) on the Road Towards Comprehensive, Best-Practice Federal Whistleblower Protections

Submission to the Attorney-General's Department

Human Rights Law Centre

January 2024

Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia.

Whistleblower protection is an essential part of the wider human rights framework in this country, underpinned by Australia's international obligations. The ability of whistleblowers to speak up, and the public's right to know, is protected under the right to freedom of opinion and expression in international human rights law. In recent decades whistleblowers have proven critical to exposing human rights abuses around the world – without robust whistleblowers protections and public interest journalism, too often human rights violations go unchecked. Whistleblower protections have emerged as an important aspect of the obligations of state parties, including Australia, to fight corruption under the *United Nations Convention against Corruption*. Whistleblowers also play an important role in upholding Australia's transparent, accountable democracy, ensuring governments respect and uphold human rights and build a fairer, more compassionate country.

In 2023, we launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who want to speak up about wrongdoing. We provide legal advice and representation to whistleblowers, as well as advocating for stronger legal protections and an end to the prosecution of whistleblowers. The Human Rights Law Centre is also a member of the Whistleblowing International Network.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

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Introduction

Australia's federal whistleblower protection framework requires urgent reform. Not only is it presently failing to effectively protect whistleblowers who disclose wrongdoing or misconduct in the public interest, but the scheme's inadequacies are exacerbating the risks faced by whistleblowers. The *Public Interest Disclosure Act 2013* (Cth) (***PID Act***) is failing to prevent the reprisals and prosecutions which in turn are having a 'chilling effect' on whistleblowing in Australia. That must change.

This submission responds to the consultation questions in the Attorney-General's Department Consultation Paper, '*Public Sector Whistleblowing Reforms – Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers'* (**Consultation Paper**). In doing so, it addresses the need for comprehensive, consistent and holistic reform of Commonwealth whistleblower protection legislation, beginning with substantial reforms to the *PID Act* to restore confidence in sufficient legal protection and support for whistleblowers in practice.

These stage 2 reforms must also set the standard, and initiate the process, for a consistent, harmonised, and holistic regulatory approach for delivering effective and accessible whistleblower protections under all Commonwealth laws. As the Department has acknowledged,[1] the present review can and should inform further reforms to other federal whistleblowing frameworks such as those which cover the private sector.

Consistency should be sought between the public, not-for-profit and private sectors to the greatest extent possible, based on new best practice principles, to ensure that the Commonwealth Government takes a comprehensive, uniform approach to the enhanced regulation and protection of whistleblowing in all areas. Currently, overlapping disclosure schemes mean a discloser (and their workplace) may be simultaneously subject to multiple whistleblowing regimes. That is suboptimal.

In August 2023, the Human Rights Law Centre formally launched the Whistleblower Project – an Australia-first legal service to advise and represent whistleblowers under relevant laws including the *PID Act*. Our submission is therefore informed by our practical experience advising clients on making disclosures under the *PID Act*. It is structured as follows:

Section 1 provides the broader context to this submission and outlines the basis for the Human Rights Law Centre's responses to the consultation questions in the Consultation Paper. This draws on our recent review of whistleblowing cases under Australian law, published in August as *The Cost of Courage: Fixing Australia's Whistleblower Protections* (**Cost of Courage**) (**Appendix 1**).

Section 2 includes our responses to the consultation questions in the Consultation Paper. Many of our responses draw on the reform agenda outlined in our joint report, with the Centre for Governance and Public Policy at Griffith University and Transparency International Australia, *Protecting Australia's Whistleblowers: The Federal Roadmap* (**Roadmap**). The *Roadmap* was first published in November 2022, and revised in June 2023 to reflect the passage of the *Public Interest Disclosure*

[1] Attorney-General's Department Consultation Paper, '*Public Sector Whistleblowing Reforms – Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*', 7.

Amendment (Review) Bill 2022. The *Roadmap* is included as an appendix to the submission of Griffith University to the present review. We have had the benefit of reviewing that submission and endorse its recommendations.

The Human Rights Law Centre has frequently called for the establishment of an independent body to protect whistleblowers – a whistleblower protection authority (**WPA**). The HRLC submits that the WPA should be granted powers in relation to the protection of, and support for, whistleblowers in all sectors, in accordance with joint design principles developed by the Human Rights Law Centre, Transparency International Australia, and Griffith University, discussed in detail in the submission of Transparency International Australia to the present review (**Draft Design Principles**). Our submission includes reference to the comparative international perspective, but otherwise we endorse the Draft Design Principles and the commentary and recommendations contained in Transparency International Australia's submission.

Section 3 concludes with some remarks about the way forward in light of the wider context. In our submission, the recommended reforms in Section 2 of this submission are best pursued in a manner that supports simplified, consistent and enhanced protections and support for whistleblowers across *all sectors*. This is preferable to proceeding in a piecemeal manner that will only compound the fragmentation, duplication and inconsistency present in the federal whistleblower protections landscape.

In particular, the establishment of a single Whistleblower Protection Act for non-public sector whistleblowing, in accordance with the Parliamentary Joint Committee on Corporations and Financial Services (**PJC**)'s 2017 recommendation,[2] is overdue. Such an Act should cover all non-public sector employers and entities, in preference to the multiple, inconsistent pieces of legislation applicable to different industries and sectors.

The enactment of a single Whistleblower Protection Act, together with a broadly-symmetrical *PID Act*, would prevent the continued piecemeal approach to law reform, which presently results in expanded legislative provisions in certain areas and not others. Even in the absence of a single, comprehensive Whistleblower Protection Act, ongoing legislative symmetry should be pursued as between the *PID Act* and legislation applicable to the private sector including the *Corporations Act 2001* (Cth) (***Corporations Act***).

The best way to prevent significant wrongdoing and the current chilling effect on disclosures, and the best way to ensure that wrongdoing is effectively identified and swiftly addressed, is to protect, support, and empower those who wish to speak up – in all sectors – in a holistic way. Otherwise, further reforms made today will necessitate yet more reform to fill resulting gaps in the legislation in the future.

While much of our submission is necessarily higher-level, we stand ready to provide further technical input as the reform process continues. We hope our practical and policy expertise in this area can be of assistance to the Department.

[2] Parliamentary Joint Committee on Corporations and Financial Services. *Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors*. September 2017 (Steve Irons MP, Chair). Recommendation 3.1.

Recommendations

We make the following specific recommendations in response to the questions in the Consultation Paper.

Recommendation 1: The *PID Act*'s scope should be expanded to cover: (i) the wider category of individuals presently protected under the *Corporations Act*; (ii) employees engaged under the *Members of Parliament (Staff) Act 1984*; (iii) private sector workers blowing the whistle in relation to public sector wrongdoing, including in the context of contractor arrangements; and (iv) public servants disclosing corrupt conduct, wherever occurring.

Recommendation 2: The *PID Act* should be amended to provide for a 'no wrong doors' approach to receipt of disclosures. Whistleblowers should be empowered to make disclosures to whichever agencies or authority they feel comfortable approaching, and agencies should accordingly have obligations and responsibilities to make appropriate referrals upon receipt of disclosures. Disclosure pathways for intelligence whistleblowers should be improved.

Recommendation 3: The *PID Act* should be amended to simplify and expand avenues for public disclosure, including to: (i) lawyers for the purpose of seeking legal advice; (ii) other support avenues, including unions and medical professionals; and (iii) media and members of parliament, including parliamentary committees. The *PID Act* should also be reformed to ensure appropriate accountability mechanisms for wrongdoing at intelligence agencies.

Recommendation 4: The *PID Act*'s terminology in relation to different types of disclosure could be revised to improve clarity and accessibility.

Recommendation 5: The *PID Act* should be amended in improve access to protection, including by: (i) clarifying the standard of proof in immunity proceedings; and (ii) providing immunity for the receipt of a disclosure.

Recommendation 6: A program should be established (with appropriate funding and legislative amendments as necessary) to ensure whistleblowers can obtain access to legal support (to an appropriate cap) to seek advice in relation to their rights concerning potential or actual disclosures, and potential steps to vindicate their rights and seek remedies, in addition to a smaller capped amount for associated costs such as welfare and career transition costs.

Recommendation 7: The *PID Act* should be amended to provide minimum standards for agencies in handling disclosures, with further guidance provided by the Commonwealth Ombudsman and/or a WPA.

Recommendation 8: The *PID Act* should be amended to expressly protect preparatory conduct which is reasonably necessary to the making of a disclosure.

Recommendation 9: The *PID Act* should be amended to: (i) adopt a wider approach to making civil, employment and administrative remedies available for 'detriment', as opposed to simply 'reprisal'; (ii) reverse the burden of proof, consistently with international best practice; and (iii) provide a specific right to

remedies where an agency fails to fulfil its duties to protect and support whistleblowers and prevent detriment.

Recommendation 10: A rewards scheme should be established under the *PID Act*, to be administered by a WPA. Consideration should also be given to establishing a *qui tam* mechanism under Australian law.

Recommendation 11: A WPA should be established, with appropriate functions, resourcing and independence, to oversee and enforce federal whistleblower protections and support whistleblowers.

Recommendation 12: Consideration should be given to the establishment of a Parliamentary Whistleblowing Office.

Recommendation 13: The title and objects of the *PID Act* be revised to underscore the paramount importance of protecting whistleblowers.

Recommendation 14: The *PID Act* should be redrafted with a principles-based approach to ensure accessibility and clarity.

Additionally, we make the following overarching recommendation.[3]

Recommendation 15: That the Government pursue a comprehensive, consistent approach to whistleblower protections, including by:

- Explicitly designing the proposed best practice *PID Act* reforms as a suitable model with which to also update protections for the private and not-for-profit sections to the maximum extent possible;
- Establishing a standalone and independent WPA with jurisdiction, ultimately, to oversee and enforce both public sector and private sector protections;
- Enacting a single Whistleblower Protection Act covering all non-government entities and employers, alongside the *PID Act*; and
- Maintaining ongoing consistency and symmetry between the Whistleblower Protection Act and the *PID Act*, as reformed, by aligning statutory review provisions to ensure these are updated together as needed in the future, rather than as separate exercises.

[3] Consistent with our joint recommendations (Recommendation 1 and 2) in 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).

1. Context

When the *PID Act* scheme commenced, it was designed to 'provide robust protections for current or former public officials who make qualifying public interest disclosures under the scheme'[4]. Amongst its objects were the intention to promote integrity and accountability in the public sector[5] and to encourage and facilitate the making of public interest disclosures by current and former public officials.[6] On paper, the *PID Act* represented a significant step forward for whistleblower protections in Australia. However, in practice it has failed to have the desired effect. In the interim, global best practice has moved forward rapidly, while the *PID Act* has fallen behind.

Misconduct flourishes when there is no accountability for wrongdoing. Strong whistleblower protections help Australians to expose wrongdoing with sufficient protection for the benefit of all of us. Our *Roadmap* provided an overview of the shortcomings of Australian whistleblowing law, and the resulting need for robust, comprehensive reform. We built on this in the subsequent *Cost of Courage* Report, which included a compilation of whistleblower cases which proceeded to judgment in Australia from the enactment of the relevant pieces of legislation to April 2023. It therefore constitutes the most comprehensive empirical review of Australia's whistleblower protection laws in practice undertaken to date.[7]

Relevantly, the *Cost of Courage* Report found 16 judgments relating to the *PID Act*. Not one constituted a substantive successful outcome for the whistleblower. In a number of cases, the whistleblower had been self-represented. The *PID Act* findings mirrored the wider state of affairs. Across all Australian whistleblowing laws, since the first laws were introduced in the early 1990s, only one whistleblower has been awarded compensation at judgment. Of 78 judgments across 70 distinct cases, seven saw the whistleblower succeed on a substantive issue. Our findings underscore the need for well-considered and comprehensive reform, coupled with an independent oversight and enforcement body in the form of a WPA, to ensure whistleblowers are not deterred from speaking out.

This reform process comes at a critical time. In recent years, a number of whistleblowers in Australia have faced prosecution. These high-profile cases have likely had a significant chilling effect on those who may otherwise have blown the whistle, including to expose matters of great public importance. The prosecutions illustrate a number of flaws in the *PID Act*, which we consider in more detail below. The reform also comes following the establishment of the National Anti-Corruption Commission, which will rely on whistleblowers to be effective, and as the Australian Government is pursuing reform to secrecy offences and other transparency and integrity measures across government. A robust and effective whistleblowing framework must sit at the heart of the wider transparency and integrity landscape.

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[4] Revised Explanatory Memorandum – *Public Interest Disclosure Bill 2013*.
[5] Revised Explanatory Memorandum – *Public Interest Disclosure Bill 2013*; *PID Act,* section 6(a).
[6] *PID Act,* section 6(b).
[7] Kieran Pender, Human Rights Law Centre, '*The Cost of Courage: Fixing Australia's Whistleblower Protections*' (August 2023) 7 (***Cost of Courage***).

2. Responses to Consultation Questions

We welcome the Department's commitment to improving the accessibility of the *PID Act* and the strengthening of the disclosure protections it provides for whistleblowers in the federal public sector. The Human Rights Law Centre supports the introduction of the reforms proposed in the Consultation Paper in the public sector including but not limited to all outstanding recommendations of the Moss Review[8] which are yet to be implemented.[9] We also recommend the introduction of corresponding reforms for the private and not-for-profit sectors (where appropriate), as part of the ongoing process needed as described in part 3.

We respond to each of the consultation questions in the Consultation Paper as follows.

Issue 1: Making a disclosure within government

Question 1: Who should be protected for public sector whistleblowing under the PID Act?

The Consultation Paper rightly recognised that there are gaps in respect of who may be able to access the whistleblower protections scheme under the *PID Act*.[10] These gaps should be addressed.

First, the scope of the *PID Act* should be extended to align with the wider approach to coverage in s 1317AAA in the *Corporations Act*, to the extent practicable.

Second, the *PID Act* should be amended (with necessary consequential amendments to the *Members of Parliament (Staff) Act 1984* (Cth)) to include parliamentary and ministerial staff as public officials, to ensure that they receive full *PID Act* protection for reporting any wrongdoing. The existing exclusion of such staff from the *PID Act*, beyond the limited protections available for reporting corruption under the *National Anti-Corruption Commission Act 2022* (Cth) (***NACC Act***), is problematic. The present status of Parliament as a 'black hole' for whistleblower protections is inconsistent with the need for robust integrity mechanisms in Australia's place of government. We reiterate the views we set out in our joint submission to the Senate Legal and Constitutional Affairs Committee in this respect.[11]

While the *PID Act* framework will operate more effectively in this context following the establishment of the proposed Independent Parliamentary Standards Commission, we do not believe such a body is a prerequisite, or any form of substitute, for the application of *PID Act* protections to parliamentary staff. If the aim is to restore or develop the *PID Act* as a comprehensive framework for whistleblower protections, it needs to apply to all publicly-funded officials even if, as is already the case, this may

[8] Moss, Philip 2016. *Review of the Public Interest Disclosure Act 2013: An independent statutory review*. Commonwealth of Australia (**Moss Review**).
[9] See Consultation Paper, Attachment A, citing Moss Review.
[10] Consultation Paper, 10.
[11] Human Rights Law Centre, Griffith University, and Transparency International Australia, *'Stronger Whistleblower Protections: A First Step?'* Submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Public Interest Disclosure Amendment (Review) Bill 2022* (January 2023) 12.

involve overlap with (or an overlay on) other particular complaint and regulatory systems.

Third, as we stated in a joint submission earlier this year to the Parliamentary Joint Committee on Corporate and Financial Services, there are gaps and inconsistencies in the *PID Act*'s application to officers and employees of consulting firms as contracted service providers to the Commonwealth Government.[12] The *PID Act* should be amended to more effectively address the intersection between public sector and private sector whistleblowing to ensure that contractors who are engaged on government contracts benefit from *PID Act* protections – including when making disclosures about wrongdoing related to the relevant contract or to the contracting government agency. The *PID Act* protections should also be amended to extend protections from reprisals to private sector workers or private contractors who disclose public sector wrongdoing and face detriment in their employment or at their workplace, irrespective of whether the wrongdoing directly relates to a Commonwealth contract.

This should be achieved by requiring Commonwealth contractors and non-government service providers to have their own whistleblowing policies, pathways and protections which meet consistent minimum standards; and by extending *PID Act* protections to those internal disclosures (except where the entity is required to have a whistleblowing policy and is subject to legislated whistleblower protections of no lesser standard, such as the proposed private sector Whistleblower Protection Act, or, until then, equivalent existing legislation such as the *Corporations Act*). This is necessary because the existing incomplete protections in the private sector mean that it is not guaranteed that an employee of a government contractor will benefit from *PID Act*-equivalent protections; some consulting firms, for example, are partnerships rather than corporations, so are not necessarily covered by the *Corporations Act*.

Finally, any public servant who discloses corrupt conduct internally or anywhere in the public sector should attract *PID Act* protections (see also Transparency International Australia's submission in this regard). This should be so even where the disclosure does not relate to their agency or the agency to which they make a disclosure. There is a gap that presently exists which means that a person who blows the whistle within their agency about corruption by their own Minister does not trigger *PID Act* protections, due to the current inaccessible and complex nuances of the *PID Act* and the *National Anti-Corruption Commission Act 2022* (Cth), and the present definition of 'NACC disclosure'.[13] This gap should be filled as part of the present review to improve access to protections for public sector officials.

Consideration should also be given to the application of whistleblower protections to court staff, including in relation to the proposed federal Judicial Conduct Commission.

> **Recommendation 1**: The *PID Act*'s scope should be expanded to cover: (i) the wider category of individuals presently protected under the *Corporations Act*; (ii) employees engaged under the *Members of Parliament (Staff) Act 1984*; (iii) private sector workers blowing the whistle in relation to public sector

[12] Consistent with our joint recommendation (Recommendation 1) in 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) 10 – 13.
[13] *PID Act,* section 8; *National Anti-Corruption Commission Act 2022* (Cth), section 23(a).

wrongdoing, including in the context of contractor arrangements; and (iv) public servants disclosing corrupt conduct, wherever occurring.

Question 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?

The Human Rights Law Centre strongly endorses the Moss Review's emphasis on a 'no wrong doors' approach to the receipt of disclosures, and it was the second key recommendation of our joint *Roadmap*.[14] Increasing the number of investigative agencies under the *PID Act* would be a welcome development. Whistleblowers should be empowered to make disclosures to whichever agencies or central authority they feel comfortable approaching. Any disclosure by a whistleblower to any agency to whom they would logically report wrongdoing should therefore constitute an internal disclosure and trigger *PID Act* protections. This should include all specific integrity agencies, and any agency (or internal officer or area) with a general function of investigating relevant matters.

Agencies who receive disclosures should have a responsibility to refer whistleblowers to the right place. In handling disclosures, agencies should not be able to 'opt out' or override basic principles in the *PID Act*, including that disclosers are protected even if anonymous or do not explicitly identify their disclosure as a public interest disclosure. A major benefit of a WPA would be to serve as a clearing house for the receipt and referral of disclosures, and to foster greater coordination and more appropriate processes for referrals of whistleblowing matters across government.

As outlined below, we would encourage consideration of expanded disclosure pathways for employees of intelligence agencies. We consider that the blanket prohibition on external disclosure, no matter the circumstances, to be inappropriate, particularly given the broad definitions of intelligence information. Consideration should be given to refining the scope of this exclusion, and considering other potential avenues for external disclosure, such as the Parliamentary Joint Committee on Intelligence and Security.

> **Recommendation 2**: The *PID Act* should be amended to provide for a 'no wrong doors' approach to receipt of disclosures. Whistleblowers should be empowered to make disclosures to whichever agencies or authority they feel comfortable approaching, and agencies should accordingly have obligations and responsibilities to make appropriate referrals upon receipt of disclosures. Disclosure pathways for intelligence whistleblowers should be improved.

Question 3: Do you have any other views on reforms for how a public sector whistleblower makes a disclosure within government?

Our views are outlined above.

[14] *Roadmap*, 7.

Issue 2: Pathways to make disclosures outside of government

Question 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?

We consider it helpful to distinguish between four sub-categories of disclosures to third parties outside government – disclosures to legal practitioners; disclosures to other avenues of support; disclosures to parties who can or should take the matter further in the public domain (including journalists, Members of Parliament and Senators); and disclosures relating to intelligence agencies. We discuss each in turn below.

Disclosures to Legal Practitioners

It is important that prospective and actual whistleblowers can seek legal advice in relation to their rights and obligations under the *PID Act*.

The provisions in the *PID Act* which permit disclosures to be made to a lawyer are not available where the disclosure concerns intelligence information or 'information [that] has a national security or other protective security classification'.[15] The Moss Review determined that the limitation in relation to classified information (but not intelligence information) was unnecessary and unduly limited prospective whistleblowers from seeking advice from a trusted lawyer. The Moss Review noted that secrecy law (both in general law and in the *PID Act*) already provided a safeguard against a lawyer misusing information obtained in the course of providing legal advice to a whistleblower.[16] A lawyer's professional regulatory obligations provide an additional safeguard: a lawyer who misused classified information in such circumstances would face disciplinary action including the possibility of being struck off.[17] We support the approach proposed by the Moss Review (removing the limitation on classified information for disclosures to legal practitioners) and consider it preferable to the other approach proposed, being the creation of a centralised list of security-cleared lawyers.

Disclosures to Other Avenues of Support

The *PID Act* should also be amended to expand the grounds for making third party external disclosures to allow for disclosures to non-legal support persons to obtain their assistance in the whistleblowing process, including professional associations, unions, medical practitioners, and psychologists (as appropriate). We note that such an approach was supported by the Moss Review and in the review of Queensland's public sector whistleblowing legislation, the *Public Interest Disclosure Act 2010* (Qld), by the Hon Alan Wilson KC (**Queensland Review**), and that equivalent provisions exist in the *NACC Act* and have been proposed in the *Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023*, presently before Parliament. Empirical and anecdotal evidence underscore the hardships faced by whistleblowers – it is critical,

[15] *PID Act* section 26(1).
[16] Moss Review, 56.
[17] Misuse of the confidential information of a client is a serious disciplinary matter. In 2018, for example, a NSW solicitor was struck off for sending client information to a judicial officer without permission: *Council of the Law Society of New South Wales v King* [2018] NSWCATOD 157 (19 September 2018).

therefore, that they be permitted to seek greater support from a wider variety of individuals and organisations.

Intended Public Disclosures

The external and emergency disclosure provisions in the *PID Act* are unnecessarily complex. The public interest test in section 26 should be removed altogether, given that disclosure of wrongdoing in the public sector is necessarily in the public interest. If any such test is retained, it needs to be substantially simplified, and in a form that is then suitable to replace the existing albeit inconsistent public interest test in the *Corporations Act*. We would also recommend that the grounds for making an emergency disclosure be expanded to include serious violations of human rights.[18]

We would also recommend the insertion of an additional category of public disclosure, where the existing requirements are not met, but disclosure outside government was nonetheless reasonable in all the circumstances. We commend the amendment to the *PID Act* proposed by Zoe Daniel MP in this respect.[19] Having a 'fail-safe' provision like this would enable courts to hold that an external disclosure was protected even where technical requirements may not have been met.

The *PID Act* should also make provision for external disclosures in circumstances where an internal or regulatory disclosure could not reasonably or safely be made, and where there has been a failure to allocate or provide notice of a decision regarding allocation, or undertake an investigation within a prescribed timeframe.

In these respects, parallel amendments should also be made to the *Corporations Act* protections.[20]

Disclosures Relating to Intelligence Agencies

Presently, a whistleblower cannot make an external disclosure where the disclosure consists of or includes intelligence information, or where the disclosure relates to the conduct of an intelligence agency. Similarly, a whistleblower cannot make an emergency disclosure where the disclosure consists of or includes intelligence information.[21] Intelligence information is voluminously defined to include 16 categories of information, with one category, 'sensitive law enforcement information', then including another five subcategories of information.

The definition includes, at its broadest, 'information that has originated with, or has been received from, an intelligence agency', which may easily capture non-intelligence information, particularly if copies of documents are held by multiple agencies.[22] The breadth of this definition, and the blanket prohibition on external or emergency disclosures, prevents proper accountability for serious misconduct by Australia's intelligence agencies. For example, protections are not given for any third party disclosure of grave human rights violations, including murder, committed by an

[18] As we previously recommended: see Human Rights Law Centre, 'Protecting press freedom to ensure transparency and government accountability', submission to the 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 (July 2019), 31-2.
[19] Proposed amendment to the *Public Interest Disclosure Amendment (Review) Bill 2022* (Zoe Daniel MP).
[20] *Corporations Act 2001* (Cth), section 1317AAD.
[21] *PID Act*, section 26.
[22] *PID Act*, section 41.

intelligence agent, no matter the circumstances. At the other end of the spectrum, nor are protections given for external disclosure of, say, corruption in the procurement of supplies or premises by an intelligence agency, even though protections would apply for any public servant revealing the exact same corruption involving any other type of agency. In neither circumstance is the *PID Act* presently appropriately calibrated to the risk of harm to the public interest, despite its objects.

Undoubtedly the intelligence context requires special care and consideration, and we are not suggesting that the current exemption be removed entirely. However, it needs to be refined. The *PID Act*'s external and emergency disclosure provisions operate on an assumption that sometimes internal checks and balances fail, as do those at oversight bodies. That is true in the intelligence context, too.

We recommend that the definition of 'intelligence information' in section 41 of the *PID Act* be limited to information which is actually sensitive or which carries unjustified risk if it were released to the public.

We also recommend that consideration be given to establishing a mechanism for external disclosure of intelligence information. We have previously proposed[23] that this could take the form of an independent review mechanism – such as a retired judge – being empowered to examine and, where appropriate, authorise the disclosure of 'intelligence information', where such information reveals that Australian Government employees have been involved in corruption, misconduct or human rights abuses, and where disclosure would not cause undue risk to national security. Such an approach would ensure that the public accountability necessary for good governance is protected as much as possible without causing undue risk to national security.

Alternatively, or additionally, another category of third party disclosures which could be better integrated into the *PID Act* is disclosures to relevant parliamentary committees. For example, in the intelligence and national security context, in light of the current absence of any framework for public disclosures, consideration should be given to permitting external disclosure to the Parliamentary Joint Committee on Intelligence and Security to inform its work.

> **Recommendation 3:** The *PID Act* should be amended to simplify and expand avenues for public disclosure, including to: (i) lawyers for the purpose of seeking legal advice; (ii) other support avenues, including unions and medical professionals; and (iii) media and members of parliament, including parliamentary committees. The *PID Act* should also be reformed to ensure appropriate accountability mechanisms for wrongdoing at intelligence agencies.

[23] Human Rights Law Centre, 'Protecting press freedom to ensure transparency and government accountability', submission to the 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 (July 2019), 33.

Question 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?

Section 26 presently contains a number of safeguards to protect Australia's national security, international relations and defence. These do not need to be expanded – in fact, they are already overly broad and need to be narrowed (as outlined above).

The ability of government agencies to claim public interest immunity over evidence relevant in a *PID Act* claim should be balanced with the ability of a whistleblower to rely on evidence in support of any defence that a disclosure was made in the public interest. It is important that whistleblowers are not deprived of the ability to rely on crucial information in support of their claims or defences. In most cases where national security matters are raised, the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) will already be engaged, meaning that sufficient protection is already applicable to any sensitive information. We note the comments of the Independent National Security Legislation Monitor in relation to the overlap between this legislative regime, and public interest immunity claims, and the problems that arise.[24]

Question 6: Do you have any other views on reforms for how a public sector whistleblower makes a disclosure outside government?

In the interests of improving clarity and accessibility, we would recommend revisions to the terminology used in the *PID Act*. For example, 'internal' disclosures should describe those made within an agency, 'external' disclosures should be those made to a regulator or different government agency (which currently, confusingly, are also described as 'internal'), while all disclosures made to journalists and other non-government parties, whether in ordinary or emergency contexts, could more accurately described as 'public' disclosures. Given the significant distinction between public disclosures made for the purpose of seeking advice or support (including to a lawyer), and to journalists, politicians and others for public accountability purposes, it might be helpful to separate out these two sub-categories of 'public' disclosure.

> **Recommendation 4:** The *PID Act*'s terminology in relation to different types of disclosure could be revised to improve clarity and accessibility.

[24] Independent National Security Legislation Monitor, Review into the operation and effectiveness of the *National Security Information (Criminal and Civil Proceedings) Act 2020* (October 2023) Chapter 10.

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?

The *PID Act* has been described as 'technical, obtuse and intractable'[25]. It is highly complex and is therefore not accessible or effective in its current form. At present, prospective whistleblowers are deterred from raising their concerns or making complaints due to fears of retribution or reprisal.[26] This in turn has a chilling effect on potential complaints about agencies in the public sector, which is contrary to the public interest. The Human Rights Law Centre recommends that the following key reforms be introduced to amend the *PID Act* to minimise technicality, improve clarity and consistency, and to ensure that public sector whistleblowers and have access to effective and appropriate best practice protections and remedies. These build on the reforms outlined in our *Roadmap*.

Immunity for Preparatory Acts/Reasonably Necessary Anterior Conduct

Please see our response to Consultation Question 9 below.

Claims for Protection – Immunity Proceedings

There is a deficit in the *PID Act* in that there is no legislative provision addressing separate immunity proceedings and the standard of proof required therein. The nature of the separate immunity proceedings was considered in *Boyle v Commonwealth Director of Public Prosecutions* [2023] SADC 27 (***Boyle***), in which Judge Kudelka determined that, in proceedings concerning a pleading of the immunity in defence of a criminal prosecution, the separate immunity proceedings were civil in nature,[27] and hence a balance of probabilities standard applies. This holding in *Boyle* was appealed and the Court of Appeal of South Australia is presently reserved. Given the ongoing uncertainty, we consider it would be advantageous for an amendment to specify the nature of the jurisdiction and the standard of proof required, to promote greater accessibility and clarity in the legislation. The standard of proof should mirror the primary proceedings – i.e. in criminal proceedings, the standard should be beyond reasonable doubt. See also Point 5 of our *Roadmap*, which noted the existing uncertainty:

> affects multiple issues, including: whether issues should be determined on a balance of probabilities or beyond reasonable doubt; whether federal constitutional rights to a jury trial apply; and how to ensure open justice even though media coverage could impact on a later criminal trial. The *Corporations Act* procedure is even less clear than in the *PID Act*, which reverses the burden of proof in immunity claims.[28]

Protection for Disclosure Receipt

We are concerned that the present immunity in section 10 of the *PID Act* limits protection to the discloser only for liability for *making* a protected disclosure. It is

[25] *Applicant ACD13/2019 v Stefanic* [2019] FCA 548 at [17] per Griffiths J.
[26] See, for example, Royal Commission into Aged Care Quality and Safety Final Report, [14.4.8], 520; *Cost of Courage*, 4.
[27] [2023] SADC 27 [10]-[12]
[28] *Roadmap*, 12.

desirable to clarify in the legislation that a recipient of a protected disclosure is also immune from liability *for receipt* of a protected disclosure. This amendment is appropriate as we are concerned – as a result of our experience in practice – that recipients of protected disclosures may have allegations of inducement to breach confidentiality obligations and similar such claims levelled against them under the current *PID Act* regime (and other federal whistleblowing regimes), notwithstanding that such allegations may not be well-founded. It is doubtful that Parliament intended to facilitate this consequence through the operation of the *PID Act* scheme. Nonetheless, even if such a claim was defeated, the residual risk at the moment imposes a significant burden on groups (such as the Human Rights Law Centre) that need to receive legal practitioner disclosures. The *PID Act* should be amended to put beyond doubt that recipients, as well as disclosers, benefit from the law's immunity.

The importance of this reform is amplified in circumstances where categories of external recipients, aside from lawyers, is expanded (as we proposed above, and as the Commonwealth Government has proposed for tax-related whistleblowing in draft legislation presently before Parliament) to persons to which legal professional privilege would not apply. A recipient of a legal practitioner disclosure[29] would ordinarily be protected by legal professional privilege, which would limit the risk of proceedings commenced as a result of the disclosure's receipt. Expanding the categories of disclosure recipients where legal professional privilege will not apply will heighten the risk, underscoring the need for protection in the form of a clear immunity.

Expanding Categories of Eligible Recipients

The Human Rights Law Centre supports expanding the category of individuals and organisations who can receive disclosures under the *PID Act*, as detailed above and at Point 9 of our *Roadmap*. Whistleblowing is often a harrowing, isolating and lonely process and empowering whistleblowers to seek support that is expressly permissible, being from unions, professional bodies, and medical practitioners, is an important step (and any reform made to the *PID Act* in this regard should be mirrored in other whistleblowing laws).

Shifting the Evidentiary Burden for Civil Remedies

The *PID Act* should be amended to shift the burden of proof in respect of any reprisal claim in which the claimant seeks compensation. A form of reversal of the burden of proof to the respondent is present in the *Corporations Act*,[30] the *Taxation Administration Act*, and the *Public Interest Disclosures Act* (NSW),[31] respectively. This is not the position in the *PID Act*, which places the onus of proving the contravention of the *PID Act* on the claimant, as the Consultation Paper recognises.[32]

Similar to the *Corporations Act,*[33] the *PID Act* should be amended for greater clarity and consistency, to provide that, in a proceeding for compensation or other remedies for the taking of a reprisal, the person seeking the order (the applicant) bears the onus of providing evidence that suggests a 'reasonable possibility' of the detrimental

[29] See *PID Act*, section 26.
[30] *Corporations Act 2001* (Cth), section 1317AD (2B).
[31] See section 33(4) of the *Public Interest Disclosures Act 2022* (NSW) in relation to a prosecution for a detrimental action offence.
[32] Consultation Paper, 18.
[33] *Corporations Act 2001* (Cth), section 1317AD.

conduct being connected to their disclosure, and once that onus is discharged, the other person (the respondent) bears the onus of proving the claim is not made out.

We discuss this in greater detail in response to Consultation Question 10 below, and at Point 6 of our *Roadmap*.

> **Recommendation 5:** The *PID Act* should be amended in improve access to protection, including by: (i) clarifying the standard of proof in immunity proceedings; and (ii) providing immunity for the receipt of a disclosure.

Legal Aid Support

There is a stark power asymmetry between agencies, employers, and/or private organisations, and persons who wish to speak up against wrongdoing. There is also a significant public interest in ensuring that whistleblowers are properly and appropriately advised and represented.

Given the complexity of the law in this area and the typically limited resources of employees, even if the *PID Act* is amended to reduce its complexity, dedicated legal aid support should be available for disclosers seeking legal advice or wishing to take formal action to secure remedies. Whistleblowers are often unable to self-fund legal advice or representation and their actions already come with life-altering costs (legal and otherwise). The prevalence of self-represented litigants in the proceedings documented in the *Cost of Courage* Report highlights the inaccessibility of legal representation for many whistleblowers. The provision of government funding to allow whistleblowers to access legal support should be implemented once an appropriate model has been considered. A similar recommendation for a Discloser Support Scheme was under consideration by the Department of Premier and Cabinet in Victoria in 2018, which proposed per-person funding of $24,000 to be made available for the 'cost of seeking advice from a solicitor in relation to making a protected disclosure, participating in an investigation and any detrimental action proceedings', as well as up to $2,000 for 'career transition costs and welfare costs'. Notably, the objective of the Discloser Support Scheme was to, 'ensure that, so far as possible, a person is no worse off for making a protected disclosure complaint'[34]. It is not clear to us why the Victorian proposal did not proceed. We strongly endorse such a model and its objective, and we recommend a similar model be adopted by the Commonwealth Government.

More recently, a report arising from the Queensland Review recommended that the state Department of Justice and Attorney-General develop a pilot program to fund a legal assistance provider (for example, Legal Aid or a community legal centre) to provide legal advice and/or representation to a person seeking a remedy under the Act.[35] It recommended that the pilot program be operational for a period of five years, for its effectiveness to be evaluated and consideration given as to whether the program should then become permanent. We support a similar pilot program being introduced at the federal level if the Department is not inclined to adopt a more permanent program.

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[34] Victorian Government Department of Premier and Cabinet Discussion Paper: '*Designing a pilot for the Discloser Support Scheme'* (October 2018), 3.

[35] State of Queensland (Department of Justice and Attorney-General), *Final Report: Review of the Public Interest Disclosure Act 2010*', (June 2023) '212- 213.

Given the particular, specialised focus, it may be that such a scheme is best run in a standalone manner. Alternatively, there may be merit in it forming part of the wider delivery of legal services by community legal centres supported through the National Legal Assistance Partnership. We note Transparency International Australia's submission to the current independent review, in this respect.[36]

The Human Rights Law Centre has sought to fill the clear gap in the accessibility of legal support for Australian whistleblowers by providing a dedicated pro bono legal service. However, the responsibility to provide this support should be assumed by others beyond the Human Rights Law Centre to ensure there is sufficient legal support available. We therefore recommend the establishment of an appropriately-funded scheme to ensure whistleblowers can obtain access to legal support to seek advice in relation to their rights concerning potential or actual disclosures, and potential steps to vindicate their rights and seek remedies. This is consistent with our recommendation in the *Cost of Courage* Report to foster a wider, sustainable ecosystem to support whistleblowers.[37]

> **Recommendation 6:** A program should be established (with appropriate funding and legislative amendments as necessary) to ensure whistleblowers can obtain access to legal support (to an appropriate cap) to seek advice in relation to their rights concerning potential or actual disclosures, and potential steps to vindicate their rights and seek remedies, in addition to a smaller capped amount for associated costs such as welfare and career transition costs.

8. Should the Act prescribe additional statutory minimum requirements for agency procedures under the PID Act?

On one hand, it is desirable that there be clear, consistent minimum standards for agencies to follow in undertaking their responsibilities under the *PID Act*. The absence of clear requirements is likely to cause confusion and lead to inconsistent practices across agencies, possibly resulting in the adoption of poor practices when a disclosure is received.[38] This hinders the *PID Act*'s accessibility and effectiveness. On the other hand, as we explore further below, the prescriptiveness of the *PID Act* is a reason for its current inaccessibility and complexity.

In our view, it is desirable that core minimum procedural requirements should be incorporated into the *PID Act*, while more detailed, prescriptive standards can be determined by the Ombudsman (under existing powers, which could be enhanced) and by the WPA, as and when established. Additionally, a *PID Act* Steering Committee, as provided for in NSW and recommended in the Queensland Review, would facilitate effective communication and coordination across agencies. Amendments to the *PID Act* should include:

a. bringing all statutory minimum requirements for agencies at least in line with the prescribed minimum requirements in the *Corporations Act* in relation to company policies and procedures;[39]

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[36] Transparency International Australia, Submission to the Independent Review of the National Legal Assistance Partnership (2020-2025), 27 October 2023.
[37] *Cost of Courage*, 4, 9, 16.
[38] State of Queensland (Department of Justice and Attorney-General), *Final Report: Review of the Public Interest Disclosure Act 2010*', (June 2023) 108.
[39] *Corporations Act 2001* (Cth)*, s* 1317AI.

b. requiring agency procedures to reflect procedural fairness principles, as was recommended in the context of the Queensland whistleblowing legislation;[40]
c. clearly and expressly identifying all relevant integrity or regulatory agencies to whom whistleblowers are likely, and encouraged to directly approach, across the public sector (and corresponding reform should occur to legislation applicable to the private sector) to assist with co-ordination and appropriate referrals of disclosures where necessary;[41]
d. requiring Commonwealth contractors to have their own procedures which are compliant with the *PID Act* and under which disclosures would automatically trigger the *PID Act* protections, unless and until private sector whistleblower protections are extended to ensure that they apply to Commonwealth contractors, which is not presently the case;
e. requiring agencies to develop policies and procedures for managing alleged corrupt conduct when a person does not feel safe or sufficiently protected in the process of making such a disclosure (for example, when they propose to make, or have made, allegations about principal officers, chief executive officers, agency heads, or any other senior public officials in their own reporting line including officials who may also be typically be responsible for making determinations about whether internal disclosures should be investigated);
f. requiring agencies to take action to address any wrongdoing the subject of a substantiated public interest disclosure (including any related wrongdoing subsequently identified during investigation of the primary disclosure). Such an approach was recommended in the Queensland Review in respect of the state's whistleblowing legislation to ensure a non-prescriptive form of action is required in such circumstances;[42] and
g. introduce and maintain procedures to afford appropriate support to persons who make a public interest disclosure and to protect them from detriment, in coordination with a WPA, if established.

Recommendation 7: The *PID Act* should be amended to provide minimum standards for agencies in handling disclosures, with further guidance provided by the Commonwealth Ombudsman and/or a WPA.

9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?

Preparatory acts with the requisite nexus to the disclosure should receive protection under the *PID Act*. In practical terms, it is difficult, if not impossible, for whistleblowers to make a disclosure which is otherwise protected by the *PID Act* without taking any reasonably necessary steps in order to make the disclosure. In *Boyle*, Judge Kudelka determined that the immunity protects only the making of a disclosure and not any anterior conduct that is reasonably necessary for making a disclosure.[43] Therefore, on the current state of the law, the preparatory steps are not covered by the immunity under section 10 of the *PID Act* and that gap in the scope of

[40] State of Queensland (Department of Justice and Attorney-General), *Final Report: Review of the Public Interest Disclosure Act 2010*', (June 2023) 108.
[41] *Roadmap*, 7.
[42] State of Queensland (Department of Justice and Attorney-General), *Final Report: Review of the Public Interest Disclosure Act 2010*', (June 2023) 108.
[43] [2023] SADC 27 [195] – [237].

the protection can lead, and has led to, prosecution arising from preparatory acts taken by a whistleblower for the making of a disclosure.

The Court of Appeal of South Australia in the appeal from the *Boyle* decision is presently reserved. The Human Rights Law Centre was granted leave to participate in the appeal as *amicus curiae* and we appeared and made submissions in relation to the scope of section 10 of the *PID Act*. In broad summary, those submissions were:

- if a public interest disclosure is made, the immunity in s 10(1)(a) extends to acts which were reasonably necessary for the making of the public interest disclosure;
- the narrow construction adopted by the primary judge in *Boyle* is prone to lead to outcomes which are deleterious to the purpose and objects of the *PID Act*, including for example, bare or unsupported allegations and/or a "chilling effect" of discouraging potential meritorious disclosures; and
- the wider construction better serves the objects of the *PID Act*.

The necessity of protection for anterior, preparatory conduct is helpfully demonstrated by way of example.

Say a public servant becomes aware of wrongdoing that is likely to have a substantial and imminent danger to the natural environment. Under the *PID Act*, the public servant could make an emergency disclosure to a journalist (provided other requirements are satisfied). But, on the construction adopted in *Boyle*, the public servant is only protected – from criminal, civil or, perhaps most saliently, administrative liability, such as APS Code of Conduct proceedings – in relation to the bare making of the disclosure, the email sent to the journalist. Photocopying a document evidencing the environment risk, with the intention of giving it to the journalist, to prove the allegation, and then taking it from the office to a meeting with the journalist, would not be immune from liability (and may well give rise to prima facie breaches of the Code of Conduct, and criminal liability for theft of Commonwealth property). This absence of immunity is so even if in practical terms it would be impossible to adequately disclose the threat to the environment to the journalist without providing any supporting evidence – thereby defeating the purpose of providing for emergency disclosures in such circumstances.

As we submitted as amicus in the *Boyle* appeal, in our written submissions:

> the *PID Act* contemplates disclosures made outside the public service, where the provision of evidence will be all the more critical. The internal disclosure is not the only kind of valid public interest disclosure in s 26 … The recipient of an external disclosure, who will commonly be a Member of Parliament or a journalist, will not have the powers of investigation that an investigating agency does. It is unlikely that the recipient of an external disclosure would take a disclosure seriously, or take any action in respect of a disclosure, if they did not have any objective evidence in support. The narrow construction would stultify those critical avenues of disclosure. Similarly, a legal practitioner who receives a legal practitioner disclosure from a discloser seeking advice as to their rights

under the *PID Act* will be hamstrung in their ability to give advice if they are not able to see any supporting documentation.[44]

Given the uncertainty created by the *Boyle* judgment, we consider that it is necessary and appropriate for the broader scope of the immunity advanced in our submissions to be clarified and placed beyond doubt. We propose that section 10 of the *PID Act* be amended to expressly provide that the immunity protects the making of the disclosure and prior acts that are reasonably necessary for the making of the disclosure. Such an amendment to widen the scope of the immunity would provide whistleblowers with greater access to effective and appropriate protections under the *PID Act*, with the appropriate safeguard of requiring that the preparatory acts be 'reasonably necessary' to the making of a disclosure.

> **Recommendation 8:** The *PID Act* should be amended to expressly protect preparatory conduct which is reasonably necessary to the making of a disclosure.

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?

The current compensation provisions are inadequate, and have fallen behind the equivalent provisions in the *Corporations Act* (as amended in 2019), while also sharing defects which were nevertheless preserved in that *Act*. The compensation scheme in the *PID Act* should be amended to include provisions which address the following:

a) a suitably broad approach to 'detriment' which attracts compensation rights, independently of whether, if proven, it could or would amount to a criminal offence of 'reprisal';
b) a reversal of the burden of proof onto the respondent allegedly responsible for the detriment, to require the respondent to establish that the detrimental acts or omissions did not flow from the respondent's response to the disclosure; and
c) recognition of a respondent's failure to fulfil a duty to support or protect a whistleblower, or to prevent or limit detrimental acts or omissions, as an additional, specific basis for compensation.

The current context has overtaken the historical acknowledgment in the Moss Review (2016) regarding the need to address some of these issues when more evidence became available.[45] It is now clear from research and analysis undertaken that the present *PID Act* (and similar *Corporations Act*) compensation provisions are proving insufficiently workable or viable to fulfil their purposes as a means of seeking and delivering compensation or other remedies. For example, as noted above, the *Cost of Courage* Report revealed that there was only a single judgment in which the whistleblower was awarded compensation (of a modest amount) for facing detriment after making a disclosure, under all Australian whistleblowing laws.[46]

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[44] Human Rights Law Centre, 'Written Submissions of the Human Rights Law Centre (Amicus Curiae)', in *Boyle v Commonwealth Director of Public Prosecutions*, CIV-23-004375, 26 July 2023, 12.
[45] Moss Review, 146-154.
[46] *Cost of Courage*, 9.

Broader Approach to Detriment

In particular, it is now clear that civil remedies need to be available even for negligent or 'collateral' damage that could and should have been prevented, or limited, in the way that individuals and agencies respond (or fail to respond) to disclosures – irrespective of the intent or state of mind of any person(s) responsible.

This is quite distinct from the concept of 'reprisal' which must currently be satisfied in the *PID Act* and other similar Australian legislation. That concept presumes either deliberate or knowing retaliation, or an intentional or knowing failure to protect a whistleblower, even for civil, employment or administrative remedies. The PJC therefore recommended[47] that in *all* Commonwealth whistleblowing laws, the grounds for criminal reprisals (or victimisation) and the grounds for civil remedies should be separated, such that while the criminal offence may still require a subjective intent to cause detriment, it would be open to a tribunal to order employment or civil remedies where satisfied that the detriment flowed from the making of the disclosure, without necessarily requiring that de facto subjective intent.

A major advance in the reforms now recommended in Queensland, is to reformulate the current concept of 'reprisal' to expressly allow for remedies in circumstances wider than where a person deliberately or knowingly causes harm to another person in consequence of an actual or apprehended disclosure. As was said in the Queensland Review:[48]

> [76] The concept of reprisal should be reformulated into two distinct concepts: direct reprisal and collateral harm.
>
> - 'Direct reprisal' ought reflect the culpability of a person who deliberately causes, conspires or attempts to cause (including by inducing someone else to cause), detriment to another in the knowledge, belief or suspicion about the possible, actual or perceived involvement of a person in making a PID or in a proceeding under the PID legislation. The relevant knowledge, belief or suspicion should only need to be a contributing, not a substantial ground, for the detrimental conduct. Direct reprisal should be the basis of [both] a criminal offence and a civil tort of reprisal.
> - 'Collateral harm' should refer to harm suffered by a person 'because of' their involvement in making a PID, or a proceeding, including an investigation, under the *PID Act*. It should not require proof of a person's knowledge, belief or suspicion. Where a person sustains collateral harm because of a breach of the duty of care…, a person should be able to seek the civil and administrative remedies contemplated…..

We strongly support a similar change in the equivalent scheme at the federal level.

Currently, the required nexus between the disclosure and the detriment is uniquely and unjustifiably narrow, including in the *PID Act* and *Corporations Act*. All the relevant provisions concerning detriment require a tribunal to be satisfied that a respondent's 'belief or suspicion' that a disclosure was made, was a 'reason' for the detrimental conduct[49]. The table at **Appendix 2** to this submission sets out the

[47] See recommendations 10.1, 10.2.
[48] State of Queensland (Department of Justice and Attorney-General), *Final Report: Review of the Public Interest Disclosure Act 2010*', (June 2023) 188 (Recommendation 76).
[49] *PID Act* s.13(1); see also *Corporations Act* s.1317AD(1),(2A).

respective threshold/grounds for responses to detrimental acts or omissions at the Commonwealth level (as found in the *PID Act 2013, Fair Work (Registered Organisations) Act 2009* (as amended 2016), and the *Corporations Act* (as amended 2019), with reference to the provisions concerning what constitutes taking a reprisal including in respect of both the criminal offence and civil remedy provisions.

We have highlighted the elements which demonstrate the narrow nexus discussed above. It is clear that the 2013 (and 2019) provisions did not sufficiently rectify the situation as contained in the original 2004 *Corporations Act* whistleblowing provisions (which also remain today in the *Aged Care Act, NDIS Act* and elsewhere), where civil remedies were effectively only criminal injury compensation remedies, i.e. only available where a criminal reprisal was shown to have occurred.

In contrast, the table at **Appendix 3** to this submission shows that state and territory public interest disclosure laws from inception in Queensland in 1991, until 2022, often afforded a substantially wider basis on which the relevant court or tribunal may grant remedies to claimants – including where satisfied simply that the detriment occurred:

- '**on account of**' a disclosure having been made, or
- '**because**' a disclosure was made, or
- '**because *or* in the belief that**' a disclosure was made.

The nexus between the disclosure and the detriment is therefore potentially less narrow and restrictive in the state regimes, allowing a tribunal to make a finding of fact as to whether the detriment flowed from the making of the disclosure without necessarily needing to be satisfied that a specific respondent intentionally or knowingly (i.e. held a 'belief or suspicion') caused the detriment as a response to (i.e. for the 'reason' of) the disclosure.

Similarly, other Commonwealth workplace laws, such as the 'general protections' provision under s 340 of the *Fair Work Act 2009,* simply require that compensable adverse action must not be taken against another person '**because**' that person has or has exercised a workplace right (such as to disclose wrongdoing). They do not include a statutory requirement that the action was deliberately or knowingly intended to cause harm, as opposed to an action which, irrespective of intent, had adverse *effects*.[50]

Appendix 4 sets out key relevant employment, civil and administrative remedy provisions taken from legislation in the United Kingdom, Canada, Ireland and the United States. These provisions typically also contain simpler, wider thresholds for establishing the nexus between the disclosure and any detriment for which an employer or other party should be held liable for compensation. Importantly, these provisions tend to apply to civil remedies for retaliation and, unlike Australian laws, do not also try to include requirements that may need to be established for a criminal offence of reprisal.

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[50] NB although the Moss Review (2016, par 150) felt it might be 'appropriate' to retain a 'subjective intention to cause detriment' as an element of proving entitlement to civil remedies under the *PID Act*, it incorrectly reported that this intention was also required in the *Fair Work Act* (par 149). The Moss Review also reported that if this requirement was a problem, 'it may still be open to a person who has experienced detriment as a result of making a PID to seek a civil remedy under a common law cause of action, such as the general law of negligence' – but that logic is inconsistent with the 'no wrong doors' approach of comprehensive protection being clearly afforded by the *PID Act*.

While the state public interest disclosure laws have always provided a somewhat wider basis on which the relevant court or tribunal may grant remedies to claimants for detriment, they too have tended to classify everything under the concept of 'reprisal' (which tends to imply deliberate or knowing harm as direct payback or retaliation in response to a disclosure or potential disclosure). Hence, as recommended by the PJC (2017) and in Queensland (2023), it is time for serious reform to recognise the power imbalance in detriment proceedings, and the difficulty of a whistleblower making out the required state of mind on the part of individuals or agencies responsible for any detriment, by appropriately distinguishing between the elements of civil and criminal provisions in the *PID Act*.

Reversal of the Burden of Proof

We support previous arguments[51] that best practice in this area constitutes a requirement that a whistleblower to first establish a prima facie case for a remedial order by showing, with supporting evidence, that their disclosure was a 'contributing factor' in the detriment they experienced – essentially 'a relevance test', which should be satisfied if the whistleblowing affected a decision or outcome 'in any way'.

Once this *prima facie* case is made out, the burden of proof should then shift to the respondent to demonstrate by clear and convincing evidence that it would have taken the same action for independent, legitimate reasons in the absence of the relevant whistleblowing, in order to escape liability.

Example of such provisions in practice are located in the US provisions extracted in Appendix 4. Further, the European Union's *Whistleblower Protection Directive* provides that member states must pass laws which provide that after a presumption of detrimental action, the employer can only escape liability by 'proving that this measure was based on duly justified grounds'.[52] This is interpreted consistently with the 'relevance test' described above in that once the whistleblower has proven a prima facie case, the 'burden of proof should shift to the person who took the detrimental action, who should then demonstrate that the action was not linked in any way to the reporting or the public disclosure'.

Significantly, international best practice does not hinge on the requirement for de facto subjective intent to cause detriment as a prerequisite for any grant of civil or employment remedies to claimants, as just discussed. The *Corporations Act* provisions applicable to private sector whistleblowing, which partly reverses the onus of proof in compensation matters,[53] would represent an improvement on the current *PID Act*. However, simply copying the *Corporations Act* reverse onus is only one step closer to the international best practice described above.

Recognition of a Respondent's Failure to Fulfil a Duty as a Basis for Compensation

Best practice is also now to recognise that there should be general civil liability, and remedies should therefore be available for such liability, where detriment flows from a respondent's failure to fulfil a duty to support or protect a whistleblower, or to prevent or limit detrimental acts or omissions, irrespective of intent or whether any

[51] Government Accountability Project and International Bar Association report (GAP/IBA 2021, pp.25-26); OECD's Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation (Paris, 2011, p.11).
[52] Article 21, section 5.
[53] *Corporations Act 2001* (Cth), s 1317AD(2B).

individuals with direct responsibility for detrimental acts can be identified. Typically the respondent would be an agency or an employer, rather than an individual. This was Point 7 of our *Roadmap*.[54]

As noted in the Consultation Paper, this is now strongly reflected in the *Public Interest Disclosures Act 2022* (NSW) which strengthens the obligations held by public sector agencies and provides express grounds for compensation should these obligations not be met,[55] and is a recommended reform for the public interest disclosure regime in Queensland.[56]

Additionally, the *Fair Work (Registered Organisations) Act 2009* (Cth) provides that civil remedies may be ordered where (i) a protected disclosure was made or proposed to be made; (ii) the respondent was under a duty to prevent, refrain from, or take reasonable steps to ensure those under the respondent's control refrain from any act or omission likely to result in detriment to the discloser; and (iii) they failed in whole or in party to fulfil that duty, even in the absence of establishing the casual link between the disclosure and the detriment.[57] There is also a duty more indirectly recognised in the *Corporations Act*[58] as part of the suite of requirements for making an order for compensation or loss, damage or injury suffered as a result of detrimental conduct, if an employer can be shown to have failed to prevent a specific person from undertaking a deliberate or knowing reprisal.[59] While important in principle, this recognition of a duty to prevent reprisals is restricted and cumbersome in practice.

In order to sufficiently strengthen employers' duties to support and protect whistleblowers, the *PID Act* (and equivalent *Corporations Act* provisions) should be amended to:

- Remove the de facto requirement for subjective intent to cause detriment, in relation to employment, civil and administrative remedies as described above;
- Reverse the onus of proof for civil remedies consistently with international best practice, for example by requiring the respondent to demonstrate by clear and convincing evidence (meaning, it must be highly probable or reasonably certain) that:

    a) they would have taken the same actions (or made the same omissions) in relation to the claimant, in the absence of the disclosure, for independent and legitimate reasons; and

    b) a significant step had already been taken toward implementing any particular adverse action prior to the disclosure issue arising; and

    c) all duties to support and protect the claimant in respect of their whistleblowing were discharged, and none of the detriment suffered could have been prevented by the proper and reasonable fulfilment of the employer's duties;

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[54] *Roadmap*, 14.
[55] Sections 61, 62.
[56] State of Queensland (Department of Justice and Attorney-General), *Final Report: Review of the Public Interest Disclosure Act 2010*', (June 2023) 188 (Recommendation 76).
[57] Section 337BB.
[58] *Corporations Act 2001* (Cth), s 1317AD(2A)(d).
[59] *Corporations Act 2001* (Cth), s 1317AE.

- Provide a basis for administrative and employment remedies to be granted where an agency or appellate tribunal are satisfied that a whistleblower has suffered personal costs or other adverse consequences for making a disclosure, through no fault of their own, which in all the circumstances are unjust. This would be an important step towards ensuring the *PID Act* regime leaves whistleblowers 'no worse off'.

In this regard, in our response to Consultation Question 20 below, we note that the relevant statutory objective in section 6(c) of the *PID Act* is one of ensuring whistleblowers are supported and protected from 'adverse consequences' – a significantly broader concept than remedies for detriment arising from either reprisal or failures to fulfil a duty of care. The redrafted remedies provisions should seek to fully implement this objective.

As noted below, all of the above improvements to the compensation regime in the *PID Act* (and in the *Corporations Act*) are needed and recommended, irrespective of whether a reward system is also established.

> **Recommendation 9:** The *PID Act* should be amended to: (i) adopt a wider approach to making civil, employment and administrative remedies available for 'detriment', as opposed to simply 'reprisal'; (ii) reverse the burden of proof, consistently with international best practice; and (iii) provide a specific right to remedies where an agency fails to fulfil its duties to protect and support whistleblowers and prevent detriment.

11. Should the PID Act establish other incentives for public sector whistleblowers, and if so, what form should such incentives take?

A reward scheme should be established for public sector whistleblowers, consistent with the recommendations of the PJC.[60] This scheme should be based on a proportion of penalties, financial savings or other income derived by the Commonwealth as a result of whistleblower disclosures. A WPA, as proposed below, would be the logical body to oversee and administer this scheme. As we discussed in our *Cost of Courage* Report:

> In the United States, and, increasingly, in other jurisdictions, reward schemes provide financial incentives for whistleblowers (and their lawyers) to speak up. These schemes have been very effective in encouraging legitimate public interest whistleblowing which leads to successful regulatory enforcement action, with rewards often paid as a percentage of the sum recovered in penalties etc. The US Securities and Exchange Commission's Whistleblower Program, for example, has led to enforcement action resulting in almost A$10 billion in sanctions, with about A$2 billion paid out to 328 whistleblowers, since the scheme was established a decade ago.
>
> Rewards schemes recognise that a compensation-only model (as with current Australian protections) does not adequately address the career-long effects of the stigma, industry-wide backlisting and mental health impact of whistleblowing. Rewards schemes also provide an economic model for lawyers

[60] Parliamentary Joint Committee on Corporations and Financial Services, 'Whistleblower Protections' (September 2017) (**PJC Report**) Recommendation 11.1 and Recommendation 11.2

> to assist whistleblowers on a no-win, no-fee basis, with fees paid out of any ultimate reward.[61]

A reward scheme should be established alongside improvements to the compensation scheme in the *PID Act* recommended below.

Another element of the successful American approach to whistleblower protections is the *qui tam* mechanism in the *False Claims Act* and state equivalents. These allow a whistleblower who knows about fraud in government contracting to commence proceedings on behalf of the government – which can then take over the claim, or allow the whistleblower to continue it. In either event, the whistleblower is entitled to a percentage of any penalty or settlement amount. As we explained in the *Cost of Courage* Report:

> These provisions have been extraordinarily successful in the United States, by deputising (and incentivising) whistleblowers and their lawyers to become anti-corruption fighters. Since 1986, over A$100 billion had been recovered for the government – for fraud which might not have come to light in the absence of courageous whistleblowers. Consideration should be given to establishing an equivalent qui tam law in Australia, given the financial incentive it provides for law firms to assist whistleblowers in addressing fraud against the taxpayer.[62]

While the whistleblower typically taking advantage of such a scheme would be a private sector employee or contractor, rather than a public servant, there will be circumstances where a *PID Act*-covered whistleblower may elect to pursue a *qui tam* remedy (such as the employee of a government contractor). This underscores the need for comprehensive, uniform reform across the public and private sector.

> **Recommendation 10:** A rewards scheme should be established under the *PID Act*, to be administered by a WPA. Consideration should also be given to establishing a *qui tam* mechanism under Australian law.

12. What improvements should be made, if any, to the compensation scheme in the PID Act if a reward system is not established?

Even if a reward system were established, there is a compelling need to update and improve the compensation provisions in the *PID Act*, to ensure that they reflect best practice – as submitted above in response to Consultation Question 10.

Additionally, consideration should be given to making the current scheme more accessible, including potentially vesting jurisdiction with the Fair Work Commission to determine detriment claims, to the extent constitutionally permissible. One reason for the limited federal case law identified in the *Cost of Courage* Report, we suspect, is the significant barriers to accessing the federal court system.

As we outlined at Point 8 in our *Roadmap*:

> Another reason why civil remedies have not flowed under federal laws is the difficulty in accessing federal courts – the primary avenue provided by the *PID Act*, and only avenue under the *Corporations Act*. As courts of law, federal courts have strict rules of evidence, expensive filing fees, and limited scope to help whistleblowers who represent themselves. Access to federal courts at any

[61] *Cost of Courage*, 17.
[62] *Cost of Courage*, 17.

stage is vital on questions of law, to obtain binding orders, or to award remedies against a non-employer. But in most cases, whistleblowers who seek legal remedies need a more suitable independent tribunal.

For federal public servants, the *PID Act* also makes whistleblowing a workplace right, allowing them to seek general protections under the *Fair Work Act 2009*. However, the special considerations and safeguards of the *PID Act* do not 'carry-over' to *Fair Work* proceedings. This may include protections against adverse costs, but more importantly, includes the risk that detrimental acts against whistleblowers will be treated like a mere workplace dispute, rather than being seen as a threat to public integrity and accountability itself. A conventional industrial relations approach can cause problems, as seen in Queensland and the United Kingdom.

The Fair Work Commission needs to be given its own jurisdiction to hear whistleblower protection claims, taking these special considerations into account. With proper resourcing and expertise, the FWC can significantly improve access to justice for whistleblowers as well as quicker resolution for employers, whether a new whistleblower protection authority is involved or not. Where conciliation is unsuccessful or arbitration by consent is refused, or orders are not constitutionally available, proceedings could still be commenced in the federal courts.

Private sector whistleblowers also deserve the same ease of access to remedies. In addition, the *Corporations Act* requires amendment to ensure the new protections enacted in 2019 are available to all corporate whistleblowers, fixing a loophole arising from the Federal Court's decision in *Alexiou v Australia and New Zealand Banking Group Limited* (2020).[63]

13. Are there benefits to better aligning the whistleblower protections available under the NACC Act?

Presently, the *NACC Act* contains its own criminal reprisal provisions, and integrates with the *PID Act* through NACC-specific disclosures. We would recommend against further replicating other whistleblower protections (such as civil remedies) in the *NACC Act* or otherwise apply differential treatment to NACC disclosures, in order to maintain and restore the *PID Act* as the overarching, comprehensive framework for the standards and processes of protection that apply to all public interest whistleblowing. In our view, it would be better to properly integrate into the *PID Act* all whistleblower disclosures of corrupt conduct, anywhere in the public sector, irrespective of by whom and to whom the disclosure is made.

[63] *Roadmap*, 14.

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?

The oversight and whistleblower protection functions in Australia's whistleblower protection system are fragmented and complex. There are significant and concerning gaps in the current oversight and protection functions of existing institutions, as outlined below. Naturally, any gaps in the system amplify the vulnerabilities of whistleblowers.

These gaps demonstrate the need for the long-recommended WPA. A WPA is the most appropriate agency to assume responsibilities with respect to whistleblower protection across the public, not-for-profit, and private sectors. In our view, it is not sufficient to simply expand the responsibilities of the Commonwealth Ombudsman, by way of example, to address such substantial gaps in the whistleblower protection scheme. For accessible and effective protections, it is most desirable and appropriate for the responsibilities and powers to be held by a WPA, in accordance with recommendations made in previous reviews and inquiries.[64]

These gaps are explored in more detail in Griffith University's submission to the present review. As noted at the outset, we have also been pleased to jointly develop the Draft Design Principles for a WPA, provided with Transparency International Australia's submission. The Draft Design Principles are wholly endorsed by the Human Rights Law Centre and have been developed with input from whistleblowers with lived experience of making disclosures under Australia's current whistleblower protection laws.

15. Do you have any other views on reforms to the functions performed by agencies or interactions between agencies?

As below, we believe that the establishment of a WPA will play a significant role in facilitating improved interactions between agencies under the *PID Act*. Additionally, a *PID Act* Steering Committee, as discussed above, could facilitate effective communication and coordination across integrity agencies.

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[64] Report of the Senate Select Committee on Public Interest Whistleblowing (August 1994) (**SSC Report**) <ParlInfo - Public Interest Whistleblowing - Senate Select Committee - Report - In the public interest - Report (including the committee's consideration of the Whistleblowers Protection Bill 1993), August 1994 (aph.gov.au) See [7.34], [7.35], and [7.47].; Parliamentary Joint Committee on Corporations and Financial Services, 'Whistleblower Protections' (September 2017) (**PJC Report**) Recommendations 3.1, 7.1. https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report [12.7], (Recommendation 12.1);

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?

The Human Rights Law Centre firmly endorses the establishment of a new, standalone, and independent body to protect whistleblowers be established. A WPA has been recommended for decades and is well overdue. The Senate Select Committee on Public Interest Whistleblowing (1994) (**SSC**) first unanimously recommended the creation of an independent national Public Interest Disclosures Agency along with the introduction of legislation for protecting public and private sector whistleblowers.[65]

In 2017, the PJC made several key recommendations, including a unanimous recommendation for the creation of an independent WPA with powers to set standards for disclosure procedures in the public and private sectors.[66] Ahead of the 2019 election, the then-Shadow Attorney-General Mark Dreyfus KC MP committed to the establishment of a WPA if elected, which was described as a:

> one-stop-shop to support and protect whistleblowers. The Authority will have dedicated staff to advise whistleblowers on their rights, assist them through the disclosure process and help them access compensation if they face reprisals.[67]

It was for these reasons that we listed the establishment of a WPA to oversee and enforce whistleblower protection laws and support Australian whistleblowers as the top priority in our *Roadmap*.[68] Such an independent body should be established as a priority to ensure an effective, comprehensive approach to the federal whistleblowing framework is adopted and for improved and accessible protections for whistleblowers in the public, not-for-profit and private sectors.

The WPA should be a specialised Commonwealth statutory agency, independent of and further to present oversight or integrity bodies throughout Australia. The HRLC recommends that the WPA be granted powers in relation to the protection of, and support for, whistleblowers in *all* sectors, in accordance with the Draft Design Principles.

The core purpose of the WPA should be a protection-driven approach, comprised of the following core functions:

a) the enforcement of public interest whistleblower protections in federal laws;
b) the provision of support, information and assistance to current, former, and prospective whistleblowers;
c) to investigate and provide alternative dispute resolution services, and other recommendations and remedies, in response to alleged detrimental treatment of whistleblowers; and

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[65] Report of the Senate Select Committee on Public Interest Whistleblowing (August 1994) (**SSC Report**) <ParlInfo - Public Interest Whistleblowing - Senate Select Committee - Report - In the public interest - Report (including the committee's consideration of the Whistleblowers Protection Bill 1993), August 1994 (aph.gov.au) > See [7.34], [7.35], and [7.47].
[66] PJC Report 12.7
[67] Mark Dreyfus KC MP, 'Labor Will Protect And Reward Banking Whistleblowers', 3 February 2019, <https://www.markdreyfus.com/media/media-releases/labor-will-protect-and-reward-banking-whistleblowers-mark-dreyfus-qc-mp/>.
[68] *Roadmap*, 6.

d) the provision of support to other federal integrity and regulatory agencies, and relevant state-based authorities, in the receipt, assessment, referral, coordination and effective management of whistleblowing disclosures.

There is a significant shortfall in the powers and responsibilities of existing agencies, which presently 'administer' whistleblowing regimes in different Australian jurisdictions, including by issuing guidance to agencies or companies, ensuring agencies or companies have the required whistleblowing procedures, supervising time limits on responses, and other administrative requirements. Further, no agencies have clear mandates and duties to investigate *prima facie* cases of detrimental treatment of whistleblowers, or to prevent and resolve detrimental treatment of whistleblowers as a core function, and this underscores the need for such powers and responsibilities to be introduced and granted to a standalone and independent WPA.

> **Recommendation 11:** A WPA should be established, with appropriate functions, resourcing and independence, to oversee and enforce federal whistleblower protections and support whistleblowers.

Comparative Models

There are a number of comparative models in established WPAs overseas from which the Department can draw for guidance for the establishment of a standalone WPA in Australia.

The most well-established and ideal model from which to draw is the model adopted in the United States, in which the U.S. Office of Special Counsel (**OSC**) and the Office of Inspector General (**OIG**) together serve functions similar to the WPA proposed in the Draft Design Principles. The OSC and OIG, alongside other entities, assist and safeguard federal whistleblowers. The OSC is an independent federal investigative and prosecutorial agency. The OSC's primary mission is to safeguard the 'merit system' by protecting federal employees from prohibited personnel practices, including reprisals taken against whistleblowers. Where a complaint is submitted to the OIG, the OIG reviews the complaint and provides guidance on whether it is appropriate for either the OIG to investigate, or whether it should be referred to OSC or another entity. The OIG also holds training and educational responsibilities (this is consistent with Draft Design Principles, Principle 3.c.).

The OSC in the United States has the independence and security of tenure which lies at the core of the proposed WPA (see Draft Design Principles, Principle 10). Under the *Whistle-blower Protection Act 1989*, the OSC is an independent agency within the executive branch. The head of the OSC, deemed the 'Special Counsel' is appointed by the President, with advice and consent from the Senate. Unlike most agency heads, the Special Counsel does not serve at the pleasure of the President. By statute, the Special Counsel serves a 5-year term and 'may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office'.

The House of the Whistleblower (the House) in the Netherlands functions as a central and autonomous administrative authority. The House advises the government about improving the current procedures and legislation regarding whistleblowers and whistleblowing procedures. In addition to providing legal and academic know-how, the House has obtained substantial practical experience over time in its advisory role to employees and employers. As a result, the House is recognised as the ideal organisation to advise the legislature in relation to updates and improvements to Dutch whistleblowing law.

While the House is a leading example, it represents part of a wider trend in the European Union. The landmark *EU Whistleblowing Directive* anticipates that member states will have a designated public authority to oversee the protections and receive disclosures from whistleblowers. This body must have dedicated, specially trained staff for receiving disclosures, providing information to whistleblowers and maintaining contact with whistleblowers, and provide effective assistance to whistleblowers. WPA-equivalent bodies (with varying functions) have been established in countries including Ireland and Finland, while relevant functions have been given to other authorities in member states including Bulgaria, Hungary and Romania. In Slovakia, the Slovak Republic Whistleblower Protection Office has been recognised across the EU as a model of best practice. As was explained in a recent report on whistleblowing in Eastern Europe:[69]

> The body works to protect whistleblowers, assist them during the process, intervene in retaliation cases, raise awareness about protections and best practice and oversee the wider regime. It has powers to order temporary relief to whistleblowers facing reprisal, to direct disclosures to the appropriate investigative body, to assist organisations in establishing their internal whistleblower programs and to issue sanctions in certain cases. The body has also worked to promote whistleblower protections and the importance of whistleblowing across Slovakian society, including through media, advertising, and advocacy.

In recent years the Human Rights Law Centre has been in contact with senior leaders at the OSC, the House, the Slovak Republic Whistleblower Protection Office and other similar bodies across the world, and would be pleased to assist the Department in connecting with these counterparts if helpful.

Parliamentary Whistleblowing Office

As we discussed in our *Cost of Courage* Report, there would also be merit in exploring greater support for whistleblowers in making disclosures to Members of Parliaments and Senators, and ensuring the parliamentary officers have the necessary training and processes for receiving these disclosures.[70] In the United States House of Representatives, the Office of the Whistleblower Ombuds helps congresspeople and committees in their dealings with whistleblowers, including through training and best-practice intake procedures. Members of Parliament and Senators play an important role in receiving whistleblower disclosures, and in some cases raising them in Parliament with the protection of parliamentary privilege – this role is explicitly recognised in the *Corporations Act* protections, and in practice parliamentary disclosures are a common avenue for external or emergency disclosures under the *PID Act*. We recommend consideration be given to the establishment of a Parliamentary Whistleblowing Office – either as its own body, part of the foreshadowed Parliamentary Standards Commission, or as part of the proposed WPA.

> **Recommendation 12:** Consideration should be given to the establishment of a Parliamentary Whistleblowing Office.

[69] CEELI Institute, *Beyond Paper Rights: Implementing Whistleblower Protections in Central and Eastern Europe* (November 2023) 19.
[70] *Cost of Courage*, 14.

17. If established, is there an existing agency where it might be appropriate for an additional independent body to be located?

In light of the analysis outlined above and detailed in the Griffith University submission, there is no existing agency that would be an appropriate location for an additional independent body to be established.

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?

The operation of the independent body and the recommended WPA in particular should be in accordance with the Draft Design Principles.

As to the operation of the WPA, we consider that any person who proposes to, or has made, a disclosure (whether that be under the *PID Act* or other federal whistleblowing laws, noting that there are instances where there may be overlap between federal laws) should be entitled to access advice and/or support from the WPA. This extends to any person employed by Commonwealth contractors and *any person* who discloses wrongdoing covered by the *PID Act* (including corrupt conduct) who may be at risk of detrimental consequences arising in their employment as a result.

As noted in our response to Consultation Question 2, the WPA should be designed to operate as a clearing house, with operations that are comprised of the receipt of disclosures, any necessary referrals arising, monitoring and coordination with referral agencies, and taking any necessary remedial or enforcement action. The 'referral pathways' should operate with a 'no wrong doors' intake and referral approach by the WPA. In practice, the *PID Act* protections would be triggered upon the making of the disclosure to the WPA. Upon receipt of the disclosure, the WPA would conduct a *prima facie* assessment of the intake only to the extent necessary in order to make a referral for a response, action or for investigations to be taken by other agencies, with all necessary cooperation to be exercised among integrity and regulatory agencies and organisations. The WPA would also conduct monitoring in relation to the handling of the referral.

In relation to the external disclosures process, the support operations of the WPA would involve the provision of case worker-style advice and support to actual whistleblowers, on both legal and non-legal aspects of whistleblowing – including referrals to and funding for relevant legal, career, health and other personal support services with respect to external disclosures.

In relation to operations concerning remedies, the WPA should be designed with the remedial powers in accordance with the Draft Design Principles, being:

> a. preventative action in relation to anticipated detrimental acts, omissions, failures to support, or agency non-compliance with disclosure-handling obligations, and
>
> b. investigation, reporting, recommendations and enforcement action in respect of past detrimental treatment, including but not limited to direct or knowing reprisal.

It should be a requirement that the WPA is consulted by any federal public agency proposing to take legal action against a whistleblower as to the reasonableness of that action.

Careful consideration would need to be given to separate any support/advice aspects of the WPA with its remedial action arm. We are confident that this separation could be achieved successfully given the operation of the international examples to which we refer in our response to Consultation Question 16.

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?

The role of the WPA would not be to investigate primary wrongdoing allegations (other than to assess that the discloser is entitled to protections) which would remain the role of existing oversight agencies.

Risks are no greater than already occur in a multi-agency system which relies on cooperation and coordination in the management and oversight of cases, if it is to work well. The WPA will ease the burden on agencies without their own resources, expertise or independence to effectively manage and resolve cases. The 'no wrong doors' approach to the receipt of disclosures would also reduce the complexity and confusion inherent in the current multi-agency system.

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?

The overarching purpose of the *PID Act* should be to ensure public servants can speak up about wrongdoing, have such disclosures properly investigated and addressed, and face no adverse consequences for doing so. Section 6 of the *PID Act* presently provides four objectives, which can be summarised as: (a) promoting integrity and accountability within the federal government; (b) promoting and facilitating whistleblowing; (c) ensuring whistleblowers are supported and protected from adverse consequences; and (d) ensuring disclosures are properly investigated.

These objects are sound. However, presently (c) is the least-delivered – we consider that, given the primacy of whistleblower protection to the fulfilment of the other objectives, it should be elevated and recognised as the paramount priority. The lack of protection for whistleblowers undermines integrity and accountability, hinders whistleblowing and prevents disclosures from being properly investigated. Unless and until there is confidence that whistleblowers are protected, in practice, the other objectives will remain unfulfilled. Ensuring just outcomes for those who report wrongdoing, in the public interest, is also not just a means to an end, but an important object in its own right.

One way in which the overarching purpose of the *PID Act* can be appropriately recognised would be in revising the nomenclature of the legislation. This would also improve accessibility and ensure the *PID Act* is less easily confused with other laws or misinterpreted as to its scope. Potential names might include *Public Interest Disclosure (Whistleblower Protection) Act* – as proposed in the private members bill introduced by Andrew Wilkie MP in 2012 – or *Public Interest Disclosure (Protecting Whistleblowers) Act*.

> **Recommendation 13:** The title and objects of the *PID Act* be revised to underscore the paramount importance of protecting whistleblowers.

21. What changes could be made to the PID Act to make it less complex and easier to understand and comply with?

The *PID Act* needs to be accessible to those who seek to access it: public servants, many of whom lack a legal background and may not have the opportunity to seek legal advice prior to utilising the law. A notable consequence of the current complexity of the *PID Act* is that those who may wish to speak up about wrongdoing are afraid to do so, do not have adequate support, and face uncertainty and risk despite their courageous conduct. We outline our views in relation to reducing the law's complexity below. Improving the support available to whistleblowers, including by establishing a WPA, will also assist with making the *PID Act* easier to navigate.

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?

We consider that the *PID Act* would be significantly enhanced if it was rewritten with a principles-based approach. This would see the *PID Act* be more clearly and simply structured, with fewer technical hurdles, for example for establishing eligibility and

accessing protections. We firmly believe that any risks associated with a principles-based approach would be outweighed by the significant advantages of clarity and accessibility.

> **Recommendation 14:** The *PID Act* should be redrafted with a principles-based approach to ensure accessibility and clarity.

23. What, if any, measures in the PID Act should remain prescriptive if a principles-based approach were to be adopted?

Where specific procedures are still needed for referral, coordination and oversight of individual cases, these could be provided by way of regulation or statutory guidance or rules under the *PID Act* – rather spelt out inflexibly in the primary legislation itself.

24. Do you have any other views on reforms to improve the clarity of the PID Act?

In addition to this redrafting, an ongoing commitment to education and training – both for agencies and individual public servants – is essential. We welcome the government's implementation of recommendation 22 of the Moss Review in the first phase of *PID Act* reform, introducing a positive obligation on principal officers to provide ongoing training and education to public officials about integrity and accountability. However, this obligation must be accompanied by sufficient resourcing. Effective ongoing training is an important element of maintaining and improving an APS culture that supports transparency and accountability, and where an understanding of the operation and utility of the *PID Act* is pervasive. Accordingly, we recommend that the government provide ongoing funding for agencies and oversight bodies to prioritise education and training – pursuant to Point 3 of our *Roadmap*.[71]

The clarity, intelligibility and utility of the *PID Act* would also be ensured by greater consistency in whistleblower protections across sectors, so basic management and employee obligations are more common and more easily understood, irrespective of the specific workplace. This is why it is so important for the government to commit to comprehensive reform of all federal whistleblower protections, not only the *PID Act* – as those reforms will improve the effectiveness of the *PID Act* and vice versa. The following, final section provides more detail.

[71] *Roadmap*, 8.

3. Way Forward

Australia's whistleblower protection framework is in dire need of reform. But the present Stage 2 public sector reforms must be the beginning, not the end, of a comprehensive, consolidated reform agenda. There are currently at least eight federal legislative regimes containing some form of whistleblower protections.

1. *Public Interest Disclosure Act 2013 (Cth)*
2. *Corporations Act 2001 (Cth)*
3. *Taxation Administration Act 1953 (Cth)*
4. *Fair Work (Registered Organisations) Act 2009 (Cth)*
5. *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)*
6. *Aged Care Act 1997 (Cth)*
7. *National Disability Insurance Scheme Act 2013 (Cth)*
8. *National Anti-Corruption Commission Act 2022* (Cth)

We say 'at least' because it is possible other 'zombie' provisions exist in other legislation. With these eight regimes, there is significant overlap and inconsistency. A private company operating in the aged care and disability sectors, including conducting some work under contract for the Commonwealth Government, could be simultaneously subject to four different whistleblowing regimes. That is an undesirable state of affairs. There are also distinct laws protecting public sector whistleblowers in every state and territory.

The *PID Act* was subject to initial amendments in 2022, and now this current reform process. The *Corporations Act* protections will also be subject to review this year, as required by the legislation. In recent months, parliamentary or departmental reviews have considered the adequacy of protections in the *Aged Care Act* and the *Taxation Administration Act*. The protections in the *National Disability Insurance Scheme Act* may be revised as part of the legislative response to the recent independent review into the National Disability Insurance Scheme.

The Australian Government how has the opportunity to move forward in a consistent, uniform way, rather than proceeding with piecemeal changes to different regimes that only amplifies the current inconsistencies and gaps. Accordingly, when determining how to progress immediate *PID Act* reforms, we call on the Government to commit to a clear process for the next stages for achieving comprehensive, timely reform across the wider landscape. The need for consistent, enhanced whistleblowing processes and protections in all sectors is clear and overdue. We also note and endorse Transparency International Australia's submission regarding specific gaps and overlaps in the protections currently applying to reporting of public sector corruption.

Apart from reducing legal cost and uncertainty for whistleblowers, we believe it is imperative that new, consolidated, simplified protections be made more recognisable to all organisations, employers, managers and potential whistleblowers, whatever their context, in order to convert theory and rhetoric of whistleblower protection into lived practice in organisations – public and private alike. We therefore urge that the *PID Act* reform serve as the model for applying across all sectors, supported by remedies, a reward scheme and enforcement arrangements (including a WPA) which

are fundamentally common across the different regimes. A single law covering all non-public sector whistleblowers was a key recommendation of our *Roadmap*, at Point 4.[72]

For these reasons we make the following overarching recommendation:

> **Recommendation 15**: That the Government pursue a comprehensive, consistent approach to whistleblower protections, including by:
>
> - Explicitly designing the proposed best practice *PID Act* reforms as a suitable model with which to also update protections for the private and not-for-profit sections to the maximum extent possible;
> - Establishing a standalone and independent WPA with jurisdiction, ultimately, to oversee and enforce both public sector and private sector protections;
> - Enacting a single Whistleblower Protection Act covering all non-government entities and employers, alongside the *PID Act*; and
> - Maintaining ongoing consistency and symmetry between the Whistleblower Protection Act and the *PID Act*, as reformed, by aligning statutory review provisions to ensure these are updated together as needed in the future, rather than as separate exercises.

[72] *Roadmap*, 9.

4. Appendices

1. *The Cost of Courage: Fixing Australia's Whistleblower Protections* (August 2023)

2. Commonwealth – threshold/grounds for responses to detrimental acts or omissions

3. Australian State whistleblowing laws – threshold/grounds for responses to detrimental acts or omissions

4. Relevant international thresholds – United Kingdom, Canada, Ireland, United States