



THE LAW SOCIETY  
OF NEW SOUTH WALES

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18 December 2023

Dr James Popple  
Chief Executive Officer  
Law Council of Australia  
PO Box 5350  
Braddon ACT 2612

By email: [john.farrell@lawcouncil.au](mailto:john.farrell@lawcouncil.au)

Dear Dr Popple,

### **Public sector whistleblowing stage 2 reforms – Public Consultation Questions**

Thank you for the opportunity to contribute to a Law Council submission on the second stage of reforms to the public sector whistleblowing scheme. This submission is informed by the Law Society's Public Law and Human Rights Committees.

In general terms, the Law Society supports an approach consistent with the Law Council's previous advocacy for measures that would promote open government, simplify the legislation and enhance whistleblower protections. The Law Society has had the benefit of reviewing the submission guide prepared by Transparency International Australia, the Human Rights Law Centre and Griffith University (**Submission Guide**), and generally agrees with the views set out in that document, which is attached for convenience.

Set out below are our responses to selected public consultation questions.

#### **1. Who should be protected for public sector whistleblowing under the *Public Interest Disclosure Act 2013 (Cth) (PID Act)*?**

Whistleblower protection should be afforded as widely as is practicable, including to all those involved in undertaking work or functions for or on behalf of the Commonwealth.

As previously advocated by the Law Council, we support the consolidation of federal whistleblower laws into a single Act that governs public interest disclosures in both the public and private sectors. Private and not-for-profit sector workers should be included in the new scheme, where they are disclosing public sector wrongdoing, whether or not the wrongdoing is related to a Commonwealth contract.

The Law Society also supports the establishment of a whistleblower protection authority (**WPA**), which should have jurisdiction over both public and private sector whistleblowing.

#### **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?**

It is noted that:

- it may not be obvious or practicable to identify an appropriate person to receive a disclosure within an organisation; and
- organisations (notably accounting, legal and other consultancies and not-for-profits), including some key service providers to the Commonwealth, may not be structured as a corporation and therefore may not be provided for under existing whistleblower pathways.

The WPA's functions should include the power to receive initial disclosures directly, in defined circumstances such as these. Under a 'no wrong door' approach, if practicable, the WPA should be able to refer a matter to the appropriate agency or organisation for action, or, in the absence of an identifiable or practicable referral point, should be empowered to carry out the functions of a disclosure recipient with regard to that matter.

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

The Robodebt Royal Commission highlighted that departmental secretaries, and other authorised disclosure recipients within an agency, may not be an appropriate recipient of a whistleblower disclosure.<sup>1</sup> In such circumstances, the WPA should be available to perform that role. The WPA should have the discretion to refer the matter to the agency without disclosing the identity of the whistleblower if appropriate, or to carry out the functions of disclosure recipient if it deems it more appropriate to do so.

In the absence of a WPA, we agree with the view set out in the Submission Guide that any disclosure by any whistleblower to any agency to whom they would logically report wrongdoing should automatically trigger public interest disclosure protections. We also agree with the view in the Submission Guide that agencies that receive disclosures should have the responsibility to themselves refer whistleblowers to the correct place.

### **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?**

Whistleblowers should be afforded protection to the greatest extent practicable, provided they have reasonable grounds to suspect the relevant conduct and have followed the prescribed procedures. As part of that process, to minimise unprotected disclosures, a disclosure recipient should be required to inform the whistleblower if they have formed an opinion that external disclosure would not be protected under the whistleblower framework.

Exceptions to protection under the external disclosure provisions, for example in relation to "intelligence information", national security and international relations, should be restricted to the minimum reasonably required and there should be safeguards against their over-use. For example, where a disclosure recipient has formed an opinion that a matter is covered by an exception, there should be a reasonably available independent review option within government, in relation to which the whistleblower is protected.

We also support the view set out in the Submission Guide that "intelligence information" should be restricted to information which is actually sensitive or carries unjustified risk if released, and that government agencies should not be entitled to claim public interest immunity in order to exclude evidence that a whistleblower reasonably seeks to rely on in support of a public interest defence.

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<sup>1</sup> Commonwealth, Royal Commission into the Robodebt Scheme (2023), Vol 2, 392-393.

We support the view set out in the Submission Guide that disclosures made reasonably to a relevant parliamentary committee should explicitly attract public interest disclosure protections (including if they contain intelligence or national security information). We also support the suggested amendments to definitions of “internal”, “external” and “public” disclosures in the PID Act as proposed in the Submission Guide.

The WPA is likely the most logical recipient of such disclosures, and should have suitably security-cleared personnel available to receive, review and make recommendations in relation to such disclosures.

In our view, there is merit in the approach suggested by the Submission Guide that grounds for third party (external) disclosure should be expanded:

- for disclosures to lawyers or other support persons, and for other circumstances where a disclosure has not been adequately dealt with, and
- to include any circumstances where internal or regulatory disclosure could not reasonably or safely be made.

We suggest that this change to the current scheme would be particularly important if a WPA is not established.

#### **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?**

We support the Law Council’s view, expressed in its submission to the Senate Standing Committee on Legal and Constitutional Affairs on the first tranche of reforms,<sup>2</sup> that consideration should be given to either:

- (1) removing the requirement for lawyers to have security clearance to advise whistleblowers, or
- (2) limiting the need for lawyers to hold security clearance to situations involving material that is categorised as either ‘secret’ or ‘top secret’.

The WPA should be tasked with providing a list of relevant professionals (including lawyers, if required) who can provide whistleblowers with appropriate advice and other support where needed.

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

Guidance should be published, in simple terms, on the application of the public interest test under s 26 of the PID Act, to help minimise the risk of unprotected disclosures.

#### **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?**

We suggest that mandatory training within agencies and organisations, and the establishment of a WPA and associated advice and support, will greatly assist in facilitating access to protections and remedies.

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<sup>2</sup> Law Council of Australia, “Public Interest Disclosure Amendment (Review) Bill 2022 (Cth)”, 14 February 2023.

In our view, dedicated legally aided assistance for whistleblowers should be available, both for advice and for taking action to secure remedies.

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

Consistent with the requirements for covered corporations, agencies and each of their contractors and respective sub-contractors should be required to have a whistleblower policy, and to ensure that it is made available to employees and the public. The policy should at least include:

- the procedures for disclosures,
- who can receive disclosures,
- where assistance is available (including the WPA),
- the protections available to whistleblowers, and
- how the agency or other organisation and the Commonwealth (if applicable) will support whistleblowers and protect them from detriment.

As is the case in NSW under the *Public Interest Disclosure Act 2022* (NSW), and consistent with the treatment of covered companies under the *Corporations Act 2001* (Cth), agencies should be held liable for damages if they fail to comply with their obligations to administer their policy and to take proactive steps to minimise the risk of detrimental action against a person as a result of a disclosure.

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

In our view, whistleblowers should be protected against liability for acquiring or accessing information which is the subject of their disclosure if:

- the conduct is no greater than is reasonably necessary to making a disclosure, and
- these acts do not constitute a criminal offence; and
- in the case of APS whistleblowers, provided the APS code of conduct is not breached.

If a whistleblower has concerns that certain conduct that is necessary to support a disclosure may constitute a criminal offence, then there must be an alternative path for referral of concerns to a trusted independent authority such as the WPA to determine whether and how to pursue the matter. As the McBride case and its aftermath has demonstrated, the opportunity to expose and bring to justice serious misconduct should not simply be lost due to fear of prosecution.

### **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?**

Whistleblowers should not bear the burden of proof of reprisals. Consistent with the provisions for corporations,<sup>3</sup> where a whistleblower provides evidence of a reasonable possibility that they have suffered detriment that was reasonably connected to their disclosure or contemplated disclosure, the burden should shift to the respondent to prove the disclosure was not a reason for their detrimental conduct. This would also be consistent with the approach in s 23 of the PID Act, which reverses the onus of proof in proceedings for claims of protection of disclosures.

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<sup>3</sup> Section 1317AD(2B), *Corporations Act 2001* (Cth).

Availability of remedies should not be limited to damage resulting from deliberate or knowing reprisals or intentional failure to protect a whistleblower. We agree with the view set out in the Submission Guide that civil remedies (including for detriment flowing from failure to fulfil a duty) should be available, for negligent or “collateral” damage that could and should have been prevented, regardless of intent or state of mind of any person or persons responsible.

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

If the PID Act operates as intended, and potential whistleblowers are encouraged to report matters with confidence that they will receive genuine protection and support as well as compensation for any harm caused in the event of detrimental action, there should be no need for additional financial or other rewards or incentives to be offered. Such additional incentives would send the wrong message about the role and motives of whistleblowers, could potentially complicate the process unnecessarily, and could increase the risk of spurious reports resulting in wasted resources or other unintended consequences. We note that this position differs from that set out in the Submission Guide.

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

As far as is reasonably practicable, whistleblowers in both the public and private sectors should receive equivalent protections and support regardless of the disclosure pathway. Apart from fairness, the key benefits of equivalency would be simplification, clarity and greater confidence in the whistleblower framework, fulfilling the objects of the PID Act including by promoting integrity and accountability as well as helping to deter disclosable conduct.

**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 gaps described in the Submission Guide would best be filled by the establishment of an independent WPA.

Thank you again for the opportunity to contribute. Questions at first instance may be directed to Vicky Kuek, Head of Social Justice and Public Law Reform, on 02 9926 0354 or [victoria.kuek@lawsociety.com.au](mailto:victoria.kuek@lawsociety.com.au).

Yours sincerely,



Cassandra Banks  
**President**

Encl.

## Submission Guide –

### Australian Government Whistleblowing Reforms: Public sector, Stage 2

#### Background

The Australian Government has released its long awaited consultation paper on its next stage of whistleblower protection reforms, with submissions due to the Attorney-General's Department by **Friday 22 December 2023**. Further information, including the consultation paper, is available on the Attorney-General's Department at [this link](#).<sup>1</sup>

We encourage individuals and organisations **from any and all sectors** to make submissions (short or long) on the consultation paper.

Even if only a short submission, we suggest you:

1. Welcome the proposals to overhaul and upgrade whistleblower protections for the federal public sector under the *Public Interest Disclosure Act 2013 (PID Act)*
2. Strongly support **all** the specific suggestions for improvement mentioned in the paper (See the *Appendix* below for detailed responses to the paper, where you wish to be more specific)
3. Call for these improved protections to also be made consistent for **all whistleblowers** under federal laws, through simplified, consolidated laws also for the **private and not-for-profit** sectors, and ask the Government to establish a clear process for this – noting the paper (p.7) flags this consultation will “identify lessons ... and inform future consultations or reviews for other federal whistleblowing frameworks” (see further detail below)
4. Endorse the need for a strong, properly resourced **whistleblower protection authority** to ensure support and enforcement of protections for **both public sector** whistleblowers (as proposed by the paper) and also **private and not-for-profit** sector whistleblowers – noting that separate enforcement mechanisms and authorities under different federal laws does not make sense. (See further suggested responses under Issue 4 in the *Appendix*).

#### Previous reports and submissions

You are welcome to draw on, or endorse, any of the points in our previous reports and submissions, including:

- [Protecting Australia's Whistleblowers: The Federal Roadmap](#) (A J Brown & Kieran Pender: Griffith University, Human Rights Law Centre and Transparency International Australia, November 2022 (updated June 2023)) (**Roadmap**).

*This report sets out most issues that improved protections need to address, and is cited in the Government's consultation paper. Relevant parts of the Roadmap are cross-referenced against the consultation questions in Appendix A below.*

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<sup>1</sup> <https://consultations.ag.gov.au/integrity/pswr-stage2/>

- [\*\*\*The Cost of Courage: Fixing Australia’s Whistleblower Protections\*\*\*](#)

Kieran Pender (Human Rights Law Centre, August 2023)

*Emphasises existing whistleblowing laws across public and private sectors have failed to deliver legal remedies in response to reprisals and repercussions, due to their complexity, inappropriate thresholds, lack of legal support, and absence of effective enforcement.*

- [\*\*\*Joint submission to Senate Legal and Constitutional Affairs Committee, PID reforms Stage 1\*\*\*](#) (February 2023)

- [\*\*\*Joint submission to Parliamentary Joint Committee on Corporations & Financial Services inquiry on Ethics and Professional Accountability in the Audit, Assurance and Consultancy Industry\*\*\*](#) (“Big 4”) (September 2023)

*These submissions emphasise the drawbacks of piecemeal approaches where different, sometimes inconsistent protections are provided in duplicate legislation for some sectors, while also leaving gaps in protection in other areas.*

*NB we have also made submissions to a review of the Aged Care Act 1997 (in September) and initial proposed reforms to the Taxation Administration Act 1953 in response to the PwC scandal (in October) – further highlighting the problem of multiple laws and multiple reviews.*

While the consultation paper responds mostly to recommendations of the 2016 Moss Review of the PID Act (public sector only), we encourage submitters to also refer to, and endorse, the more recent reports of these committees in support of a comprehensive approach:

- Parliamentary Joint Committee on Corporations & Financial Services, [\*\*\*Whistleblower Protections in the Corporate, Public and Not-for-Profit Sectors\*\*\*](#) (November 2017)

*Recommended:*

- (1) consistency between public and private sector whistleblowing laws;
- (2) a single whistleblowing law covering the private and not-for-profit sectors, alongside the PID Act;
- (3) improved protections in both laws;
- (4) a reward scheme for whistleblowers (for both public and private sector); and
- (5) a whistleblower protection authority (enforcing both public and private sector protections).

- [\*\*\*Joint Select Committee on National Anti-Corruption Commission Legislation\*\*\*](#) (November 2022, par. 1.369)

*Called for ‘the review of whistleblower laws [to] specifically consider the establishment of an independent Whistleblower Protection Commission’.*

## **Briefings / Q&A sessions to assist with submissions, as required**

If you would like help or have questions about issues relevant to your submission, please join us at either of the following times (noting these are repeat sessions), and we will do our best to help:

<b>Monday 11 December</b>	<b>1-2 p.m. AEDT</b> (12-1 pm AET/Brisbane) <a href="#"><u>Click here to join the meeting</u></a> Microsoft Teams Meeting ID: 477 257 484 859 Passcode: Q8dSYK	<b>4-5 p.m. AEDT</b> (3-4 pm AET/Brisbane) <a href="#"><u>Click here to join the meeting</u></a> Microsoft Teams Meeting ID: 467 791 721 65 Passcode: 7uW4hu
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Or contact us for a discussion at another time:

[a.j.brown@griffith.edu.au](mailto:a.j.brown@griffith.edu.au)  
[kieran.pender@hrlc.org.au](mailto:kieran.pender@hrlc.org.au)  
[clancy.moore@transparency.org.au](mailto:clancy.moore@transparency.org.au)

## APPENDIX

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
<b>Introduction &amp; Overview (pages 5-8)</b>		
<p>Page 7:</p> <p>“While the PID Act establishes a whistleblowing framework for the Commonwealth public sector, other frameworks exist at the federal level to provide whistleblower protections for other non-government sectors. These include:</p> <ul style="list-style-type: none"> <li>• Part 9.4AAA of the <i>Corporations Act 2001</i> (Cth) [under review from 2024]</li> <li>• Part IVD of the <i>Taxation Administration Act 1953</i> (Cth) [also under review from 2024]</li> <li>• Part 4A of the <i>Fair Work (Registered Organisations) Act 2009</i> (Cth), and</li> <li>• Part 4.1 of the <i>Aged Care Act 1997</i> (Cth) [currently under review].</li> </ul> <p>The second stage of reforms to the PID Act will include consideration of recent proposals to improve the private sector whistleblowing scheme in the Corporations Act, to ensure alignment between the schemes, where appropriate. Consultation on the public sector whistleblowing framework also provides an opportunity to identify lessons for whistleblowing frameworks more broadly and inform future consultations or reviews for other federal whistleblowing frameworks.”</p>	<p><i>Roadmap</i> details 12 key areas for reform – 7 of which apply to <b>all</b> sectors, public and/or private alike... not just the public sector (see pp.4-5)</p>	<ul style="list-style-type: none"> <li>• Public sector (PID Act) reform is vital, but improved whistleblower protection across <u>all</u> sectors also relies on a commitment to: <ul style="list-style-type: none"> <li>○ Maximum <b>consistency across sectors</b> (so duplicatory or different rules do not deter whistleblowers or confuse employers about whether or how protections apply; or cause employers to try and ‘game’ which ones apply, at great legal expense especially to whistleblowers)</li> <li>○ Elimination of <b>gaps</b> in coverage (e.g. for private sector employees including consultants, who blow the whistle on public sector wrongdoing, or vice versa) so no-one is in doubt that protections apply to them.</li> </ul> </li> <li>• Key reforms raised by the paper (including a reward scheme, a whistleblower protection authority (see esp. Qs 11, 14-18 below) are important but must be designed to <b>support all whistleblowing</b> (not just the public sector), as recommended by <a href="#">past parliamentary inquiries</a> and proposed by the then Labor Opposition in 2019.</li> <li>• It will be <b>easier, and more cost-efficient</b> for government and individual agencies and businesses, if simpler, consistent protections apply across the board, rather than in piecemeal or conflicting ways by different regulators who each lack sufficient resources.</li> <li>• The Government should make clear, in adopting improved public sector (PID Act) protections, that: <ul style="list-style-type: none"> <li>○ These provide the <b>new ‘model’ protections</b> which should also cover the private and NFP sectors,</li> <li>○ It supports consolidating the remaining non-government regimes into a <b>single, consistent regime</b>,</li> <li>○ Its proposed reward scheme will be open to <b>all</b> federal whistleblowing,</li> <li>○ It supports a whistleblower protection authority which can enforce <b>any whistleblower protections</b> (public <u>or</u> private sector), not simply those applying to the public sector.</li> </ul> </li> </ul>



Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
<b>Issue 1: Making a disclosure within government (pages 9-11)</b>		
1. Who should be protected for public sector whistleblowing under the PID Act?	<i>Roadmap</i> , p.7	<ul style="list-style-type: none"> <li>• <b>Parliamentary and ministerial staff</b> should be added as public officials, and receive full protection for reporting any wrongdoing covered by the PID Act (not piecemeal protection for specific types under other laws).</li> <li>• Broad categories of public service ‘insiders’ warranting protection in the PID Act should be aligned with the Corporations Act.</li> <li>• Public servants who internally disclose corrupt conduct <b>anywhere in the public sector</b> should attract PID protections (even if not ‘relating’ to their own agency or that to which they are disclosing) – which is a gap currently (e.g. a public servant who blows the whistle in their agency about corruption by their own Minister does not trigger PID protections, due to the complexity of the Act and the definition of ‘NACC disclosure’ (National Anti-Corruption Commission)).</li> <li>• <b>Private sector workers</b> who blow the whistle on public sector wrongdoing covered by the PID Act, and face detriment in their own employment, should be protected irrespective of whether the wrongdoing relates to a Commonwealth contract (currently it is only contractors, in respect of those contracts).</li> </ul>
<p>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?</p> <p>3. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure within government?</p>	<i>Roadmap</i> , p.7	<ul style="list-style-type: none"> <li>• Any disclosure by a whistleblower to <b>any agency to whom they would logically report</b> wrongdoing, should automatically trigger PID protections.</li> <li>• This should include all specific integrity agencies, as recommended by the Moss Review, and any agency (or internal officer or area) with a general function of investigating relevant matters.</li> <li>• Agencies who receive disclosures should have <b>a responsibility to themselves refer them</b> to the right place, rather than telling whistleblowers to shop around in the hope of finding someone appropriate.</li> <li>• Agencies (e.g. <b>even the NACC</b>) should not be able to ‘opt out’ or override basic principles in the PID Act, e.g. that disclosers are protected even if anonymous or do not explicitly identify their disclosure as a PID.</li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
<b>Issue 2: Pathways to make disclosures outside of government (pages 12-15)</b>		
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?	<i>Roadmap</i> p.16	<ul style="list-style-type: none"> <li>• The current extra <b>public interest test</b> should be massively simplified, or removed altogether, given that disclosure of wrongdoing is already in the public interest.</li> <li>• Grounds for third party (external) disclosure should be expanded: <ul style="list-style-type: none"> <li>○ for disclosures to <b>lawyers or other support persons</b>, and for <b>other circumstances where a disclosure has not been adequately dealt with</b>, as recommended by the Moss review</li> <li>○ to also include any circumstances where an internal or regulatory disclosure <b>could not reasonably or safely be made</b>.</li> </ul> </li> </ul>
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?	<i>Roadmap</i> p.16	<ul style="list-style-type: none"> <li>• 'Intelligence information' should be restricted to information which is actually sensitive or carries unjustified risk if released (not simply any information which has <b>ever originated in or been held by</b> an intelligence agency).</li> <li>• Government agencies should not be entitled to claim 'public interest immunity' in order to <b>exclude evidence</b> that a whistleblower reasonably seeks to rely on in support of an argued public interest defence.</li> </ul>
6. Do you have any other views on reforms for how a public sector whistleblower makes a disclosure outside government?		<ul style="list-style-type: none"> <li>• Disclosures made reasonably to a relevant <b>parliamentary committee</b> should explicitly attract PID protections (including if they contain intelligence or national security information).</li> <li>• Language of the PID Act should be overhauled to be <b>more intuitive</b> - e.g. so 'internal' disclosures are simply those made within an agency, 'external' disclosures are those made to a different government agency or regulator (currently also confusingly defined as 'internal'), and 'public' disclosures are those made to third parties including journalists or other non-government parties.</li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
<b>Issue 3: Protections and remedies under the PID Act (pages 16-19)</b>		
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?	<i>Roadmap</i> , pp.13-14	<ul style="list-style-type: none"> <li>• Yes, the <b>onus of proof</b> should revert onto the agency or individual allegedly responsible for detriment, when a whistleblower is seeking civil remedies such as compensation for detrimental treatment, (more akin to the Corporations Act).</li> <li>• The reverse onus should be <b>in line with international best practice</b> (not currently the case, even with the Corporations Act).</li> <li>• Yes, where detriment flows from <b>a failure to follow required procedures or to fulfil a duty to support or protect</b> a whistleblower, this alone should be sufficient grounds for civil remedies (compensation etc) – as now partly provided for in NSW, and <a href="#">recommended in Queensland</a>.</li> <li>• Dedicated <b>legal aid support</b> should be available for disclosers seeking legal advice or taking formal action to secure remedies.</li> </ul>
8. Should the Act prescribe additional statutory minimum requirements for agency procedures under the PID Act?		<ul style="list-style-type: none"> <li>• Yes, including not less than the Corporations Act requirements.</li> <li>• <b>Commonwealth contractors</b> also need to be required to have their own procedures, under which disclosures would automatically trigger the PID protections, unless or until private sector whistleblower protections are extended to ensure they apply (not currently the case).</li> </ul>
9. In what additional circumstances should protections and remedies be available to public sector whistleblowers, such as for preparatory acts?	<i>Roadmap</i> , p.12	<ul style="list-style-type: none"> <li>• Yes, protections should apply to <b>all necessary or reasonable actions relating to the disclosure</b>, including preparatory acts such as securing relevant information of which the discloser had become aware (as per the Richard Boyle case).</li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
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?	<i>Roadmap</i> , p.13	<ul style="list-style-type: none"> <li>• Yes, civil remedies (including for detriment flowing from failure to fulfil a duty) should be available <b>even for negligent or ‘collateral’ damage</b> that could and should have been prevented, irrespective of the intent or state of mind of any person(s) responsible – not simply deliberate or knowing reprisals or intentional failure to protect a whistleblower, as is currently the case. See <a href="#">recommended reforms in Queensland</a>, allowing for remedies wider than just ‘reprisal’.</li> </ul>
11. Should the PID Act establish other incentives for public sector whistleblowers, and if so, what form should such incentives take?	<i>Roadmap</i> , p.6	<ul style="list-style-type: none"> <li>• The Commonwealth should establish a reward (not incentive) scheme for whistleblowers <b>in any sector</b>, as unanimously recommended by the <a href="#">Joint Parliamentary Committee on Corporations and Financial Services</a> (Recommendations 11.1 &amp; 11.2). (Such a scheme can be designed to mitigate risks of perverse incentives, and provides a key option for ensuring justice and recognition for whistleblowers especially if compensation is not available – as recognised internationally and in detail by the Committee. Such a scheme was already promised by the then Labor Opposition in 2019.)</li> </ul>
12. What improvements should be made, if any, to the compensation scheme in the PID Act if a reward system is not established?	--	<ul style="list-style-type: none"> <li>• All the above improvements to the compensation regime are needed, <b>irrespective</b> of whether a reward system is also established.</li> </ul>
13. Are there benefits to better aligning the whistleblower protections available under the NACC Act?		<ul style="list-style-type: none"> <li>• The NACC Act currently also criminalises reprisals (duplicating the PID Act). Rather than further replicating other whistleblower protections (e.g. civil remedies) in the NACC Act, the full existing PID Act protections simply need to be <b>properly extended to all whistleblower disclosures of corrupt conduct</b> anywhere in the public sector, irrespective of by whom and to whom the disclosure is made, unlike the current complex situation (see also Question 1).</li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
<b>Issue 4: Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner (pages 20-23)</b>		
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?	<i>Roadmap</i> , p.6.	<ul style="list-style-type: none"> <li>• Yes, <b>major gaps</b>, especially because the Ombudsman: <ul style="list-style-type: none"> <li>○ does not have power or obligation to provide independent investigations of most alleged reprisals or detrimental actions against a whistleblower (especially as he cannot investigate ‘action taken in relation to... employment’ of a public official, as opposed to matters of administration: Ombudsman Act 1976, s.5(2)(d))</li> <li>○ does not have power to take legal action or make binding orders against individuals or agencies to enforce protections</li> <li>○ has a reactive complaint handling function</li> <li>○ does not have the staff capability or resources to undertake these functions, and other functions, including providing support, mediation or legal aid.</li> </ul> </li> </ul>
15. Do you have any other views on reforms to the functions performed by agencies or interactions between agencies?		<ul style="list-style-type: none"> <li>• A PID Act <b>Steering Committee</b>, as provided for in NSW and recommended in Queensland, could facilitate effective communication and coordination across integrity agencies (even if a Whistleblower Protection Authority is created).</li> </ul>
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?	<i>Roadmap</i> , p.6.	<ul style="list-style-type: none"> <li>• Yes, the Commonwealth should establish a <b>Whistleblower Protection Authority</b> (WPA) as unanimously recommended by the <a href="#">Joint Parliamentary Committee on Corporations and Financial Services</a> (Recommendation 12.1).</li> <li>• A full model for a federal Whistleblower Protection Commissioner was also already proposed in the <a href="#">National Integrity Commission Bill 2018</a> (Cathy McGowan MP) and <a href="#">Australian Federal Integrity Commission Bill 2021</a> (Helen Haines MP) (see s.14 and Part 9) which the then Labor Opposition supported in the Senate.</li> <li>• As recommended by the Parliamentary Joint Committee, the WPA should be able to enforce whistleblower protections applying <b>in any sector</b>, not just the public sector – which would justify an additional independent body.</li> <li>• <b>All the key purposes, functions and powers</b> set out in the consultation paper can and should be assigned to such an authority.</li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
17. If established, is there an existing agency where it might be appropriate for an additional independent body to be located?		<ul style="list-style-type: none"> <li>Probably not, if the WPA is properly established to enforce whistleblower protections applying <b>in any sector</b>, not just the public sector (as recommended by the 2017 Joint Parliamentary Committee).</li> <li>If established as part of an existing agency, that agency would need to itself be a fully independent integrity or regulatory agency at arm's length from government, and the function given to a <b>special, permanent statutory officer or commissioner supported by sufficient 'ring-fenced' budget and staff</b>, co-located with the host agency but not subject to its direction, nor redirection onto other functions.</li> </ul>
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?	<i>Roadmap</i> , p.6.	<ul style="list-style-type: none"> <li><b>Anyone</b> entitled to, or considering making a whistleblower disclosure (under the PID Act or other federal whistleblowing laws) should be able to seek advice or support from the WPA/commission.</li> <li>This includes, under the PID Act, any person employed by a Commonwealth contractor; and should include any person, wherever employed, who discloses wrongdoing covered by the PID Act (including corrupt conduct) and may be at risk of detrimental consequences in their employment.</li> <li>The WPA should act as a <b>clearinghouse</b> for receiving, referring and monitoring the progress of disclosures among other agencies, including investigatory agencies, as well as directly investigating (or mediating) alleged detriment or reprisals.</li> <li>Formal prosecution or legal action against persons who have made a PID should not be able to taken by agencies, <b>unless they can first demonstrate</b> to the WPA that the legal action is not linked in any way to the making of the PID.</li> </ul>
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 ...?		<ul style="list-style-type: none"> <li>See above. Further, 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.</li> <li><b>Risks are no greater than already</b> in a multi-agency system which relies on cooperation, communication, tracking, management and oversight of cases between more than one agency. The WPA will <b>ease the burden</b> on agencies without their own resources, expertise or independence to effectively manage and resolve cases.</li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
<b>Issue 5: Clarity of the PID Act (pages 24-26)</b>		
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?		<ul style="list-style-type: none"> <li>The current objects are sound, but the object of ensuring public officials ‘<b>are supported and are protected from adverse consequences</b>’ for making disclosures needs to be given higher, paramount priority (and is currently the least delivered).</li> </ul>
21. What changes could be made to the PID Act to make it less complex and easier to understand and comply with?		<ul style="list-style-type: none"> <li>See below</li> </ul>
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?		<ul style="list-style-type: none"> <li>Yes, the Act would be <b>massively enhanced</b> if rewritten taking a principles-based approach in which the Act was more clearly and simply structured (with fewer technical hurdles for establishing eligibility or accessing protections). Any risks would be outweighed by the advantages.</li> </ul>
23. What, if any, measures in the PID Act should remain prescriptive if a principles-based approach were to be adopted?		<ul style="list-style-type: none"> <li>Yes, where specific procedures were 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 Act – rather spelt out inflexibly in the Act itself.</li> </ul>
24. Do you have any other views on reforms to improve the clarity of the PID Act?		<ul style="list-style-type: none"> <li>Clarity of the purpose of the Act would be improved if it was renamed the <i>Public Interest Disclosure (Public Sector Whistleblower Protection) Act</i> or similar, so as to be less easily confused with other laws or misinterpreted as to its scope.</li> <li>Clarity, intelligibility and utility of the protections would also be ensured by: <ul style="list-style-type: none"> <li>greater consistency in whistleblower protections <b>across sectors</b>, so basic management and employee obligations are more common and more easily understood, irrespective of the specific workplace; and</li> <li><b>reduction in the multiplicity</b> of whistleblowing regimes applying to different sectors, to remove the duplication, confusion, time and cost involved in establishing what rules may or may not apply – as well as the disincentives for</li> </ul> </li> </ul>

Issues / questions in the consultation paper	Roadmap report	Key suggested matters to consider to assist with submissions in response
		<p>whistleblowers to come forward due to uncertainty as to whether they are covered or not, and the higher risks of legal cost or failures in protection.</p> <ul style="list-style-type: none"> <li>• These issues underscore why the Government should take a comprehensive approach to reform of federal whistleblower protections, setting out a clear, staged process for putting in place: <ul style="list-style-type: none"> <li>○ PID Act reforms that can act as <b>the model for new, consolidated, simplified protections</b> applying across all sectors, supported by:</li> <li>○ Remedies, a reward scheme and enforcement arrangements (Whistleblower Protection Authority) which are <b>fundamentally common</b> and therefore more recognisable to all organisations, employers, managers and potential whistleblowers, whatever their context.</li> </ul> </li> </ul>