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Hon Mark Dreyfus KC, MP
Attorney General's Department
3–5 National Circuit
BARTON ACT 2600

Dear Attorney-General

Justice is calling: key research lessons for a fit-for-purpose Commonwealth whistleblowing regime

Thank you for the opportunity to contribute the attached submission to your Department's consultation on Stage 2 of the government's public sector whistleblowing reforms.

Much has happened in the 15 years since we first met at Senator John Faulkner's launch of *Whistleblowing in the Australian Public Sector* (2008) – followed by the first hearings of your House of Representatives Committee inquiry, then your landmark report *Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector* (2009) and eventually, the *Public Interest Disclosure Act 2013 (Cth).*

I think we can all look back on the original *PID Act* as an important, overdue but difficult achievement. Now, with the benefit of your tenacity in achieving that Act in the first place, and your many more recent, historic integrity reforms including the National Anti-Corruption Commission, we look forward to helping finally make a reformed *PID Act* the exemplar whistleblower protection regime it was always intended to be.

Research and knowledge on what is needed have not stood still since 2009, however.

Our submission is focused on the **three most important lessons** from whistleblowing research in the intervening period, which we hope you will embrace. These reinforce the original goals of the PID Act, but point to substantial shifts in what is needed to now achieve a fit-for-purpose Commonwealth whistleblower protection regime.

1. Reforming legal remedies to support substantive justice for whistleblowers

First, we strongly support redrafting the PID Act to fully achieve the original, principles-based approach to whistleblower protection. However this now needs to be driven by a far clearer focus on justice for whistleblowers – including the basic principle that **no employee should be left worse off** for blowing the whistle – over and above the current, continuing reliance on largely symbolic criminal prohibitions against reprisals.

In support of this, we hope you will embrace the lessons from *Clean as a whistle: A five step guide to better whistleblowing policy and practice in business and government* (2019) (**Appendix 1**). This, second Australian Research Council Whistling While They Work project was not only more recent, but twice the size, broader and deeper than our original research which helped inform your 2009 committee report.

2. Comprehensive, seamless embedding of whistleblower protection obligations

A major strength of your original vision was its comprehensiveness – so the first principles of whistleblower protection are applied to all public interest concerns across the entire federal public sector. Today, this requires smarter, clearer ways of embedding these principles in the day-to-day governance standards and processes, not just of public agencies, but the wider Commonwealth-funded sector and organisations in general. The research supports:

- serious re-appraisal of the actual substantive protection needs across government, with our research indicating the current PID scheme is failing to detect, let alone support more than a small fraction – at most, perhaps **10%** – of whistleblowers in need;
- embracing the seamless approach for embedding the whistleblowing obligations of organisations that was recommended by the Parliamentary Joint Committee on Corporations and Financial Services (2017), including ensuring these stage 2 public sector reforms are used to drive a clear plan for achieving simpler, consistent standards of whistleblower protection across *all* sectors.

To this end, we were very pleased to see your consultation paper reference our joint report, *Protecting Australia's whistleblowers: The federal roadmap* (2022). We attach this again (**Appendix 2**) as relevant not only to specific issues in stage 2, but how the government as a whole plans to proceed with its imminent reviews of protections across all sectors.

3. Effective, well-resourced institutional arrangements

Our submission sets out new research on the gaps in whistleblower protection oversight and enforcement, giving rise to recent arguments for a whistleblower protection authority. Even for the public sector, **only 4 out of the 15 key functions** are currently effectively provided for, with 7 substantial gaps and 4 total gaps – especially those related to enforcement.

Achieving the goal of making it genuinely safe to speak up about wrongdoing, requires a quantum shift in the purposes and resourcing of this basic machinery. The need also clearly extends to ensuring private sector whistleblowers (including Commonwealth contractors) are properly protected for speaking up about public corruption and wrongdoing, even before thinking about private sector whistleblowing more generally.

Our analysis of these needs has also already informed the **Draft Design Principles for a Whistleblower Protection Authority** in Transparency International Australia's submission. We know you will give these serious consideration. including, again, thinking about what is needed not only for the core public sector but for the wider system.

Finally, I attach my most recent article on these issues: 'The last great opportunity? Penetrating the politics of whistleblower protection' (*Australian Quarterly,* Jan 2024, **Appendix 3**). Looking back, the present reform opportunity is now even more important than the original one in 2009-2013. We hope to again be able to assist you to make the most of it.

Yours sincerely

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Justice is calling: key research lessons for a fit-for-purpose Commonwealth whistleblowing regime

Submission to the Attorney-General's Department consultation paper on public sector whistleblowing reforms (stage 2)

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Dr A J Brown AM is Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University. He has been a boardmember of Transparency International Australia since 2010, and served as a global boardmember from 2017-2023. Formerly a Senior Investigation Officer with the Commonwealth Ombudsman, he was a Member of the Commonwealth Ministerial Expert Panel on Whistleblower Protection (2017-2019). He was project leader for both Australian Research Council-funded *Whistling While They Work* projects (1 and 2) as well as a member of the Standards Australia and ISO Expert Technical Group. He is a Fellow of the Australian Academy of Law and the Academy of Social Sciences in Australia.

Centre for Governance and Public Policy

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Contents

1. Introduction

We are pleased to contribute a submission in response to the Albanese Government's consultation paper (November 2023) on stage 2 of Commonwealth public sector whistleblowing reforms.

Our submission underscores the vital opportunity open to the Government to transform Commonwealth whistleblower protection laws into ones that are fit for purpose. At present, these laws, while symbolic, are cumbersome to administer and remain substantially under-implemented (if not unimplementable) due to their complexity, inconsistencies and lack of enforcement.

We broadly support all suggestions for reform in the consultation paper. The key priority for the Government should be to use these suggestions to comprehensively overhaul both the *Public Interest Disclosure Act* and other federal whistleblower protection laws, rather than simply further tweak just one part of an already overly fragmented, largely dysfunctional scheme.

This submission is focused on lessons from whistleblowing-related research of greatest relevance to the current reform proposals. It addresses evidence on three crucial issues:

- **Reforming legal remedies to support substantive justice for whistleblowers**

  Section 2 sets out key research evidence identifying **the types of detriment that need to be more effectively addressed** in the design of the legal remedies provided by the PID Act (and other Australian legislation) for these to achieve the primary objectives of a principles-based approach: safety and justice for whistleblowers.

  This section particularly addresses **Questions 7, 8, 10 and 20-23** in the consultation paper.

- **Comprehensive, seamless embedding of whistleblower protection obligations**

  Section 3 sets out indicate evidence of the **real unmet whistleblower protection needs of the Commonwealth,** including the extent to which the present PID scheme is failing to detect and support more than a small fraction (at most perhaps 10%) of Commonwealth public sector whistleblowers in likely need. This is a crucial starting point for identifying how best to embed protection approaches under Commonwealth laws, including but not limited to the public sector, as well as the real workload involved in implementation and enforcement.

  This section particularly addresses **Questions 1, 2, 6, 13, 22 and 24** in the consultation paper.

- **Effective, well-resourced institutional arrangements**

  Section 4 sets out analysis of the **gaps in current institutional oversight arrangements** for federal whistleblower protection in the public and private sectors, which are imperative to address if theoretical legal protections are to be converted into actual just outcomes.

  This section particularly addresses **Questions 14-19 and 11** in the consultation paper.

The analysis here builds on the contribution made by our first Australian Research Council project, *Whistling While They Work* (2005-2009) to the *Public Interest Disclosure Act 2013*. That project was the first to systematically analyse levels and experiences of whistleblowing across the public sector, surveying 7,663 public employees from 118 agencies, with the support of federal and state integrity bodies. Its contribution was particularly acknowledged by the Chair of the House of Representatives Standing Committee on Legal and Constitutional Affairs, **Mark Dreyfus QC MP**, in the Foreword to the original report, W*histleblower protection: A comprehensive scheme for the Commonwealth public sector* (2009, *x*).

The main reports of the WWTW1 project can be found at:

- https://press.anu.edu.au/publications/series/anzsog/whistleblowing-australian-public-sector (Brown (ed), *Whistleblowing in the Australian Public Sector,* 2008)
- https://press.anu.edu.au/publications/series/anzsog/whistling-while-they-work (Roberts, Brown & Olsen, *Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations,* 2011).

A decade later, our Australian Research Council project, *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations* (2016-2019), was the first to systematically analyse organisational responses to whistleblowing in both the public and private sectors. Supported by 23 partner organisations, it surveyed 17,779 individuals across 46 Australian and New Zealand public and private bodies. Over twice the size, and delving much deeper than the original project, this project also found no significant differences in organisational dynamics and outcomes between the sectors, as discussed in section 3.

Findings have informed the Parliamentary Joint Committee on Corporations and Financial Services report on *Whistleblower Protections* (2017); the *Treasury Laws (Enhancing Whistleblowing Protections) Amendment Act 2019*; and recommendations of the Review of Queensland's Public Interest Disclosure Act by the Hon Alan Wilson KC (2023). The main report of the WWTW2 project is: Brown, A J (ed), *Clean as a whistle: A five step guide to better whistleblowing policy and practice in business and government,* Griffith University, 2019 (**Appendix 1**).

As reflected throughout our submission, we welcome the advice that stage 2 of the PID Act reforms will aim to harmonise the public sector scheme with recent and proposed enhancements to the private sector whistleblowing scheme in the *Corporations Act 2001* (Cth), and identify lessons for federal whistleblowing frameworks more broadly. As especially discussed in section 3 below, research reinforces that consistency and simplicity are crucial to the effective embedding of whistleblower protections in any sector.

In addition, we appreciate the consultation paper's references to our joint report, *Protecting Australia's whistleblowers: The federal roadmap* (Brown & Pender, 2022) – and attach that again (**Appendix 2**) for its continued relevance for ensuring:

- All specific issues in that report are addressed in the PID Act Stage 2 reforms, and
- The government addresses the wider question of how, as a whole, it will proceed with strengthening whistleblower protections across all sectors, given the review processes that are imminent or already underway for other federal laws, including the *Corporations Act*.

Finally, in addition to these submissions, we support and endorse the comprehensive submission of the Human Rights Law Centre on specific reforms needed to achieve these goals; and have been pleased to contribute to the **draft design principles for a Whistleblower Protection Authority** provided in Transparency International Australia's submission, which we also support.

2. Reforming legal remedies to support substantive justice for whistleblowers

2.1. Approach to reform

We strongly support redrafting the PID Act to fully achieve the comprehensive, principles-based approach to whistleblower protection intended under the original Dreyfus report (W*histleblower protection: A comprehensive scheme for the Commonwealth public sector*, 2009) (see consultation paper Issue 5, **Questions 20-23**).

However, this requires clarity about the key principles that the Act is intended to serve – and in particular, whether it is intended primarily to:

- *Facilitate and manage* whistleblowing disclosures, including by making officials feel safe to disclose under current, symbolic protections against 'reprisal' (s. 13) – irrespective of whether they are *actually* protected from detriment they may confront; or
- Provide *actual protection* for whistleblowers against 'adverse consequences' that might flow from their reporting (s. 6), including proactive support and protection to prevent or minimise such consequences and just outcomes via remedies and compensation if negative consequences in fact occur.

From the outset, reform needs to address the huge tension between this broad statutory object of supporting and protecting whistleblowers against any 'adverse consequences' (s.6) – supported by the broad definition of 'detriment' against which whistleblowers are ostensibly protected under s.13(2) of the Act, as expanded in 2022 – and the unworkably narrow legal concept of reprisal which defines the actual application of the PID Act, in reality.

In restoring a principles-based approach, it is important to recognise that the primary purpose of the PID Act – as distinct from other integrity and legislative requirements – is to protect those who report serious wrongdoing from detriment. Consequential requirements on agencies should therefore be primarily about creating a safe culture for raising concerns, preventing *any* harm to those who do, and *remedying* any detriment that does occur.

Unfortunately, the current, narrow reality is that legal protections only flow if detriment is caused through 'reprisal' (s.13(1)). Research and experience confirm that this unresolved tension, and restrictive implications of this concept, are a major reason why the Act has proved incapable of delivering or driving effective protection in practice.

The focus of this section is therefore on the following two important questions (Issue 3):

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?**
10. **[A]ny other views on reforms for protecting public sector whistleblowers… and remedies for when protections fail?**

2.2. The nature of (unremedied) detriment faced by whistleblowers

What is the extent and nature of the problem the PID Act is really trying to address?

Overall, in 2006-07, our first research reported in *Whistleblowing in the Australian Public Sector* found a quarter to one third of public employees felt mistreated by or within their organisation, if they blew the whistle in public interest matters – with many more experiencing a range of negative career and personal impacts from the experience, even if they did not feel actively mistreated.[1]

A decade later, in 2016-2017, the *Whistling While They Work 2* project detected no change in this overall result (**Appendix 1**).[2]

For the most reliable known picture of current outcomes for public interest whistleblowers in organisations, **Figure 1** below presents the most objective available evidence which come not only from *whistleblowers* themselves, but from *managers and governance professionals* who observed or dealt with whistleblowing cases in our research.

We surveyed 3,500 of these across 46 public and private sector bodies, and to be certain as to the outcomes, we drilled down to only those cases, for which we had complete data, where managers and governance observers agreed that:

- the whistleblowing was in the public interest (not just a personal or workplace grievance)
- the disclosure was correct
- the whistleblower deserved the organisation's support; and
- any repercussions (adverse consequences) were serious, as opposed to only minor.

These results are also found at p.19 of Appendix 2.

Two major findings flow from this research.

First, is confirmation of the extent of whistleblower detriment that continues to go unremedied in public and private sector organisations, even in these deserving cases. Even in these cases, 29% of whistleblowers suffered serious direct harm including adverse employment actions, harassment or intimidation, with another 26% (total 56%) suffering serious indirect or collateral damage, as discussed further below.

Where any remedies were provided in response to these outcomes, they were confirmed to make a positive difference. If at least some type of remedy was provided to the whistleblower, management and governance professionals assessed them as having been treated 'quite' or 'very well' by management in 50% of cases, compared to only 30% of cases where the whistleblowers received no remedy.

However, only half (49%) of the whistleblowers who suffered this serious damage were observed as having received any remedy, of any kind. Less than 6% received any compensation for serious employment, health, personal or financial impacts. Remedies, including by way of compensation, were also less likely to flow in cases of more serious observed detriment, than less serious ones, confirming that luck or other factors – not justice – are currently determining these outcomes.

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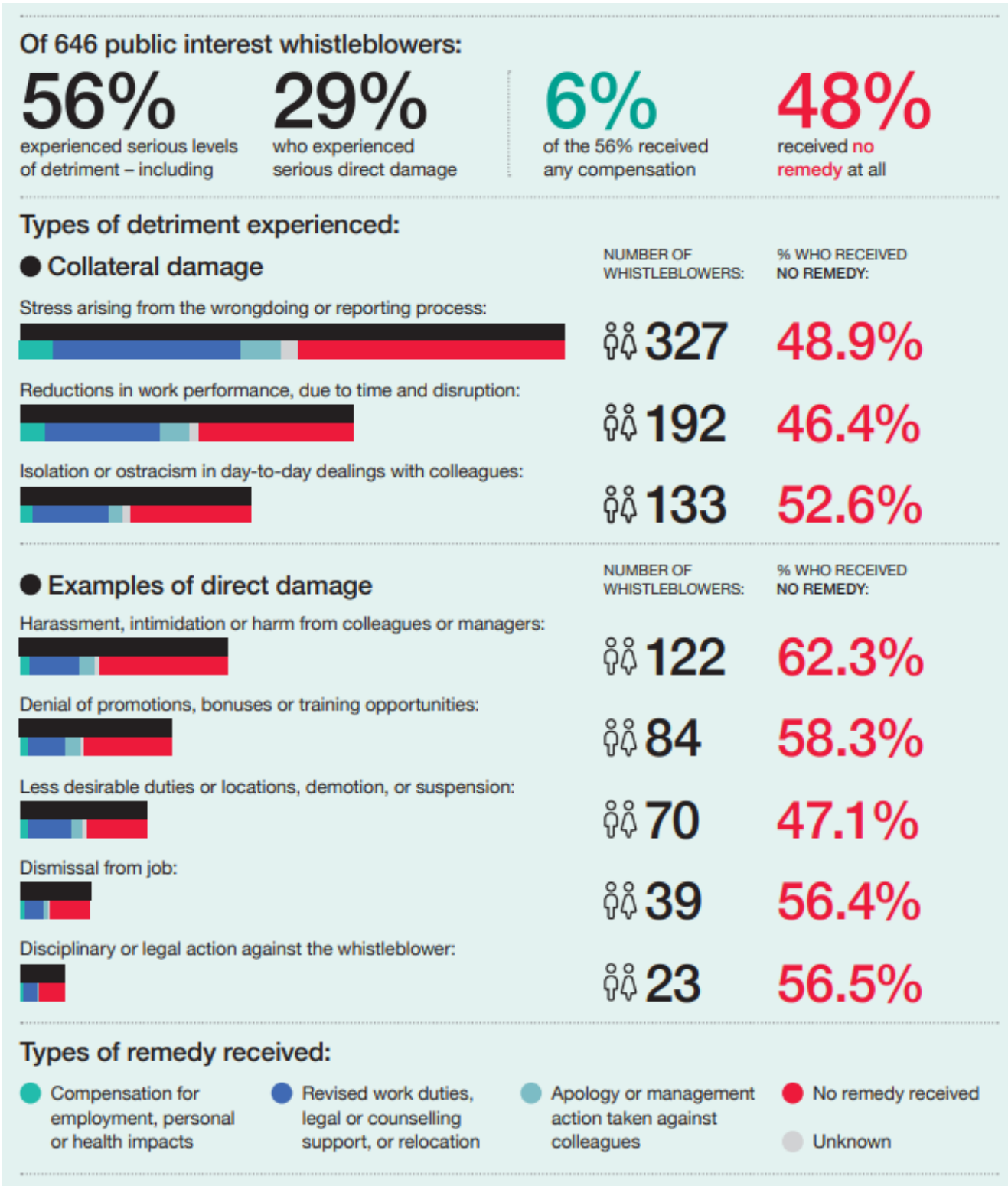
[1] Brown, A J (ed.), 2008, *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, ANU E Press.

[2] See also Brown A J, Olsen, J, Lawrence, S, 2018, Why protect whistleblowers? Importance versus treatment in the public and private sectors, in *Whistleblowing: New rules, new policies, new vision*, Griffith University.

Figure 1.
Detriment vs remedy – observed public interest whistleblowing cases (WWTW2)[3]



[3] Manager and governance respondents from 33 Australian and New Zealand organisations with 5+% response rates (n=2672), describing repercussions and remedies where known for the most significant whistleblowing case dealt with or observed by them (n=1322) and assessed to be (a) not solely a personal or workplace grievance, (b) correct and (c) deserving of the organisation's support (n=646). First reported by Brown, AJ & Olsen, J, 'How well have Australian whistleblowing laws worked to date? Repercussions and remedies for Australasian whistleblowers', *3rd Australian National Whistleblowing Symposium*, 11 November 2021. See more broadly **Appendix 1**.

The second major finding is confirmation that direct, 'reprisal' type harms are only one part of the overall detriment suffered by whistleblowers – and not necessarily the most important focus for effective support, protection and remedies. Support, protection and remedial needs go far wider than just those circumstances.

Across the board, our research from the perspective of *whistleblowers themselves* indicates that the vast bulk – up to 82% – suffer indirect or 'collateral' damage of unmanaged stress, lost time, ostracism, impacted performance and alienation produced by the whistleblowing process, at some level. This is irrespective of whether they also consider themselves to have suffered *direct e.g.* deliberate or knowing mistreatment or reprisals (Appendix 1, pp.23-24). Even if serious when it occurs, such direct mistreatment is less frequent, as well as being notoriously difficult to prove to required legal standards, as discussed below.

Importantly, experience also suggests a direct relationship in which perceived direct mistreatment (reprisals) flows from original failures to support; or occurs as a means of trying to resolve or cover up the results of failures to manage wrongdoing or disclosures properly – for example, where an employee ends up being reassigned, disciplined or pushed out of their job for 'underperformance' resulting from the cumulative effects of stress, lost time, isolation or loss of workplace trust.

In short, irrespective of whether or when any direct reprisal also occurs, it is often the failure to apprehend, offset or compensate for the many types of 'collateral' impacts that attach to the whistleblowing experience, which commence the downward spiral for whistleblowers. These are impacts which organisations can influence, minimise or remedy – but often do not. Management failures to intervene to address these informal or 'collateral' impacts, as well as any more direct reprisal risks, thus have serious, predictable, career destroying consequences, including:

- unjustified and unfair resignations or terminations;
- allowing environments of conflict and mistrust in which more serious, direct retaliation is also allowed to occur, or is made easier to conceal and harder to rectify; and
- perceptions of reprisal, then agitated at significant cost to whistleblowers and agencies, for which the root cause is actually simply a compounding organisational failure to protect individuals' welfare.

A simple failure to 'stand up' for employees who report, in complex workplace situations, can be enough to lead to these impacts taking an irreparable and expensive toll.

These findings now make it important to revisit fundamental assumptions about the primary risks to whistleblowers, along with the types of remedies that need to be driven by the legislative protections now under review.

2.3. The failure to date of 'anti-reprisal' protections

Against the above picture, the Commonwealth PID Act joined most state whistleblowing laws in affording legal protections only against detrimental conduct which amounts to 'reprisal' – attracting either criminal prosecution for the offence of reprisal (s. 19), or liability for civil remedies (ss. 14-16), or both.

The result has been the failure of the PID Act, like most state laws to provide a feasible avenue for the remedies that are really needed, for multiple reasons:

- While **criminal prosecutions for reprisal** are theoretically possible, where detrimental conduct is sufficiently deliberate and severe, sufficient evidence of it can be secured, and

responsibility to investigate and prosecute is clear – in fact these are rare and unlikely circumstances which are yet to come to pass in Australian experience.

We are aware of only six reprisal-type offences ever prosecuted in Australia – all in NSW under the then *Public Interest Disclosures Act 1994* (NSW), the former *Protected Disclosures Act 1994* (NSW) or the *Police Act 1990* (NSW). All six prosecutions failed, either because of evidentiary difficulties in confirming the motivation for the detrimental action, or on other technical grounds.[4] No known criminal prosecutions have been initiated under the PID Act.

- While **civil liability** for detrimental acts or omissions is also theoretically possible under the PID Act without criminal liability being established, this is effectively precluded by:
    - The **basic concept of 'reprisal'** itself, interpreted by the NSW District Court as 'denoting an act of revenge or retribution from an action of another',[5] with elements of deliberate or knowing retaliation implicit in the term irrespective of the breadth of types of harm that might otherwise give rise to remedies under s.13(2) of the PID Act;
    - The requirements of s.13(1) of the PID Act, that a person's 'belief or suspicion' that a public interest disclosure was made must still be **positively established** as the motivating 'reason, or part of the reason' for the detrimental conduct against a whistleblower – which, apart from usually being difficult or impossible to prove, does not allow for most of the types of omissions, negligence or failures of individuals or agencies giving rise to the important harms above.
- **Administrative remedies** for unfair or detrimental treatment (including for purely collateral damage) are also theoretically possible, for example if any agency, or a central integrity agency finds that agency or individual responses to a disclosure caused harm which deserved a remedy.

  However, this is not known to have ever occurred under the PID Act. The Commonwealth Ombudsman's reports show that some whistleblowers do make at least some claims of reprisal (e.g. 52 claims in 2021-22, and 24 claims in 2022-2023). As further discussed in section 3, this is likely to be a massively under-reported number. But in any event, no agency against which such a claim has been made has substantiated it.

  An obvious issue is the lack of any oversight agency with responsibility to independently investigate such claims (see section 4). However, there are doubts as to what they could conclude, even if there was. Under state laws, cases where an oversight agency has succeeded in intervening to cause agencies to compensate a whistleblower for the mishandling of a disclosure are extremely rare.[6] Experience across all jurisdictions suggests that the laws' anti-reprisal focus works against the ability to make administrative findings in favour of a whistleblower, without the same, almost impossible level of intent and evidence that is required to conclude that the harm constituted 'reprisal', as opposed to other detrimental omissions or acts.

  The fact a reprisal is also a criminal offence works naturally against the ability to establish that detrimental conduct occurred at a lower, disciplinary or administrative threshold.

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[4] NSW Ombudsman, 2016, *Submission to the Review of the Public Interest Disclosures Act 1994* by the Joint Parliamentary Committee on the Ombudsman, the Police Integrity Commission and the Crime Commission.

[5] *DPP v Murray Kear*, unpublished decision, District Court of NSW, 16 March 2016 at 12.

[6] For one of few known cases, see Ombudsman Victoria, *Annual Report 2008-09,* p.61.

2.4. Progress towards broader bases for remedies

To address this, the Commonwealth now has the advantage that other shifts are already underway to recast the approach to remedies provided in PID legislation – along with other, administrative solutions to cases of unfair or detrimental treatment through more effective oversight and enforcement (section 4).

First, it should be noted that most overseas whistleblowing laws which have any track record of success – such as US laws since reformed in the 1990s, and the UK Public Interest Disclosure Act 1998 – never suffered as badly from the above problems, in the first place. This is because they provided civil and employment remedies *only*, without also simultaneously criminalising the same reprisals or envisaging compensation as flowing from a criminal act. Hence these regimes have always allowed more latitude for establishing when an employer should remedy damage.

Second, it is now more widely accepted internationally that the harms for which organisations should compensate whistleblowers are not limited to direct 'reprisal' or 'retaliation'. For example, the International Standard for Whistleblowing Management Systems for Organisations *(ISO 37002: 2021)*, adopted unanimously by all the world's national standard bodies in 2021, defines 'detrimental conduct' as:

> *… threatened, proposed or actual, direct **or indirect** act **or omission** that can result in harm to a whistleblower or other relevant interested party, related to whistleblowing…*
>
> *Note 2: Detrimental conduct includes retaliation, reprisal, retribution, deliberate action or omissions done knowingly or recklessly to cause harm to a whistleblower or other relevant parties.*
>
> *Note 3: Detrimental conduct also includes the failure to prevent or to minimize harm by fulfilling a reasonable standard of care at any step of the whistleblowing process.*[7]

Third, as noted above, s.13(2) of the PID Act was already amended in 2022 to reflect a wide set of examples of what may constitute compensable detriment, consistently with the *Corporations Act*. These include not only direct employment decisions as was previously the case, but any form of 'harm or injury to a person, including psychological harm', or damage to a person's reputation, business or financial position. These examples of harm are not dependent on any direct intention of a person to deliberately or knowingly cause them.

Fourth, at least one other Australian jurisdiction (Queensland) now proposes to fully reformulate the remedies provisions in its whistleblowing law (*Public Interest Disclosure Act 2010 (Qld)*), to replace the concept of 'reprisal' with 'two distinct concepts: direct reprisal and collateral harm'.[8]

Under this proposal, while direct reprisal would remain subject to both criminal liability and a right to compensation, 'collateral harm' would include any harm 'suffered by a person "because of" their involvement in making a PID, or a proceeding, including an investigation, under the PID Act', without requiring proof that any person intentionally or knowingly caused the harm. This visionary move towards a 'no fault' basis for compensation in appropriate circumstances stands to set an important new national and international standard for protection.

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[7] For a quick video guide about the *International Standard on Whistleblowing Management Systems –Guidelines*, see https://www.youtube.com/watch?v=h1vBwwR9J9w.

[8] Review by Hon Alan Wilson AO KC, *Final Report: Review of the Public Interest Disclosure Act 2010*, June 2023, p.188 (Recommendation 76).

Fifth, the Parliamentary Joint Committee on Corporations and Financial Services (2017) has already recommended that the bases for criminal and civil remedies be separated in federal whistleblowing laws, to make clear that the current requirements of motive and evidence needed to establish a criminal reprisal should not also constrain the feasibility of civil remedies.

It should be noted that in general, Commonwealth whistleblowing laws have remained the worst offenders in respect of this problem, ever since the first dedicated whistleblower protections (*Corporations Act,* Part 9.4AAA as introduced in 2004) provided for civil remedies *only if* a criminal offence was first proven. Despite reforms to some laws, these retrograde provisions remain in several Commonwealth laws, right through to the present day (see *Roadmap* report at **Appendix 2**, Figure 2, pp.10-11).

Achieving the type of facility for obtaining civil, employment and administrative remedies *entirely free* of requirements for establishing individual or criminal culpability, as recommended for Queensland, is now the key way forward for the Commonwealth.

However, it should also be noted that even in the 2019 reforms of the *Corporations Act*, this was not yet achieved. Those reforms partially separated the criminal offence of 'victimisation', from a wider concept of civil liability for 'detrimental conduct'. However ss. 1317AC(1) and 1317AD(1) of the *Corporations Act* continue to copy s.13(1) of the PID Act in requiring a person's 'belief or suspicion' that a public interest disclosure was made, as the motivating 'reason, or part of the reason' for detrimental conduct before civil liability can be found. This is a key reason why the *Corporations Act* should not be treated as a model for the necessary remedies provisions, and itself needs reform to achieve prospective best practice. This is relevant for the government's overall reform approach, discussed further in sections 3 and 4.

2.5. Enforceable agency duties to support and protect

A sixth, important development towards more accessible remedies is the granting of express rights to civil or administrative remedies for detriment caused, if an agency fails to follow required procedures or fulfil identifiable duties to support or protect a whistleblower, without direct or deliberate reprisal needing to be proved to a criminal or any other standard of proof.

The consultation paper (p.18) notes the most recent advance, in the form of NSW *Public Interest Disclosure Act 2022* provisions that agencies are liable for damages if they fail to comply with their obligation to take proactive steps to minimise risks of detrimental action. The same approach has been recommended in Queensland.

In our submission, the Commonwealth PID Act should take a similar approach – especially as a direct legal driver for agencies to have, and implement, quality internal policies and procedures for properly supporting whistleblowers. Currently, simple legislative requirements for minimum procedures are entirely dependent on audit, monitoring and oversight, without the incentive generated by agencies' direct exposure to potential liability for compensation if sufficient procedures do not exist, are not followed, or are not actually fit for purpose.

Some precedent also exists in the *Fair Work (Registered Organisations) Act 2016* and *Corporations Act* 2019 amendments, which also contemplate circumstances where organisations may be held liable for civil remedies if detriment flows from a failure to fufil a duty to prevent a person from undertaking a reprisal. However, while important, these fall short of extending effective enforceable duties, not only because they are vague as what duty is involved, but remain limited to prevention of specific, identified, deliberate or knowing detrimental conduct – as opposed to any

detriment flowing from failures to follow basic protection obligations, which is far broader. On this issue, again, the *Corporations Act* thus does not provide a model and requires its own reform.

Significantly, the original PID Act (2013, s.59) was one of the first to follow the ACT precedent (2012) of requiring agencies to have procedures for assessing risks to a whistleblower, associated with the disclosure. These and other agency duties were already expanded in the PID Act stage 1 reforms (2022).

The next step is therefore to build on the NSW approach by making these agency duties enforceable, via an entitlement to remedies for even negligent or purely 'collateral' damage flowing from an agencies failure to fulfil key obligations. We suggest the key obligations are:

- to ensure that the workplace (including at managerial levels) is educated to understand what should happen when public interest concerns are raised;
- to provide appropriate support to employees who speak up;
- to assess all risks of detriment, indirect or direct, when a disclosure is made;
- to act to minimise or mitigate those risks;
- to take action to identify and deal with employees (including managers) who fail to act appropriately or exercise appropriate judgment in response to employees who speak up;
- to acknowledge and take responsibility for any mistakes in the handling of disclosures; and
- to take all reasonable steps to ensure that employees are able to continue their careers, or if necessary an equivalent alternative career, having suffered the least possible disadvantage as a result of having spoken up.

Section 3 discusses further, what is required to properly embed these obligations in the governance systems and processes of Commonwealth and federally-regulated organisations.

The importance of backing these obligations up with enforceable remedies is the direct incentives this provides for employers to take on these obligations.

In many respects, these enhanced remedies will be simply a streamlined way of codifying key employer obligations that already have support in general employment law, as well as, increasingly, workplace health and safety (WH&S) legislation and, more recently, sex discrimination legislation stemming from the landmark Respect@Work report.[9] In NSW common law employment decisions, for example, whistleblowers have successfully obtained compensation for failures to fulfil exactly these types of duties. Examples include:

- *Wheadon v NSW* (NSW District Court, 2001) requiring the NSW Police Service to pay $664,270 in damages for failing in its duty of care to an officer who reported suspected corrupt conduct, including by: failing to give support and guidance to the officer; failing to provide the officer with a system of protection (including active steps to prevent or stop harassment and persecution); failing to properly investigate the officer's allegation; and failing to assure the officer that he had done the right thing by reporting corruption.[10]
- *Sneddon v The Speaker of the Legislative Assembly* (NSW Supreme Court, 2011) where the NSW Parliament was ordered to pay $429,166 in damages for failures in the Speaker's office handling of criminal allegations made by an electorate officer to the police against the

[9] Australian Human Rights Commission, 2020, *Respect@Work: Sexual harassment national inquiry report*.
[10] *Wheadon v State of NSW*, unreported, District Court of New South Wales, No. 7322 of 1998 [2 February 2001] per Cooper J. See Brown, A J (ed.), 2007, *Whistleblowing in the Australian public sector*, ANU Press, pp.273-4.

Member of Parliament that she worked for, including breach of a duty of care to take all reasonable steps to ensure the officer's psychiatric illness was not exacerbated (which had been triggered in part by her disclosures).[11]

As with overseas awards, but unlike the PID Act and other whistleblowing laws in Australia to date, such awards provide insights into the extent of damages that public agencies and other organisations can and should expect, if they fail in their obligations. A fundamental objective of the PID Act should be to make such remedies readily accessible for those who have disclosed wrongdoing in the public interest, rather than requiring them to fight out their case under general employment law. In fact, it is increasingly embarrassing that whistleblower protection laws, themselves, have remained so symbolic, and not previously proved relevant to ensuring the type of relief that more complex and expensive common law litigation has delivered in the past.

2.6. Content and location of agency whistleblowing procedures

On a related issue, the consultation paper asks:

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

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

In returning to a principles-based approach, the Act should support the availability of effective remedies by making clear what the fundamental protection obligations of agencies are – as set out above – in the way that the Act is refocused.

It should be remembered that, despite their flaws, Australia's public sector whistleblowing laws have led the way globally since 1994 in requiring agencies to internalise whistleblower protection by establishing procedures for facilitating, dealing with and protecting employee disclosures.[12] It has taken many years for other countries to catch up, most notably since the European Union's 2019 Whistleblowing Directive requiring employer whistleblowing policies in all member states.

In stripping back the PID Act to a more principles-based approach, the required content of these procedures becomes only more important. Many of the cumbersome administrative provisions in the Act governing referral, allocation, notification and coordination of disclosures can be moved from the Act into other statutory guidance, as discussed in section 3. It is important, however, that the Act retain clear if simplified minimum requirements for the content of agency whistleblowing procedures, also supported by rules or guidance from oversight agencies. This is because:

- These basic obligations, such as listed earlier, need to be understood and appreciated by anyone in an agency, including all managers and potential whistleblowers, not simply those with technical administrative responsibilities under the Act; and
- Their enforceability, in terms of providing grounds for liability if detriment flows from them not being followed (as above), also relies on them being given priority in the Act.

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[11] *Sneddon v The Speaker of the Legislative Assembly* [2011] NSWSC 508 per Price J.

[12] Brown, A J, 2013, Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience, *E-Journal of International and Comparative Labour Studies*, 2(3), 153–182.

As set out in section 3, we also know it is both feasible and important for these minimum obligations to be as simple and common as possible across all types of organisations, whether located in the public or private sectors. The most effective approach would therefore be a statement of minimum agency obligations and content for procedures which replaces the current s.59 of the PID Act, but also forms a suitable replacement for the statutory requirement for minimum company procedures in s.1317AI(5) of the *Corporations Act.*

Whereas the *Corporations Act* requires procedures to set out 'how the company will support whistleblowers and protect them from detriment', it is noteworthy that even as amended in stage 1 (2022), the PID Act requirements for agencies retain a more restricted and reactive focus – still only requiring procedures for assessing risks of, and protecting staff against, 'reprisals' as defined narrowly by the Act, rather than detriment as a wider concept.

The replacement PID Act provision could have much of the simplicity and content of the *Corporation Act* provision, while incorporating all the key obligations we list above, and any other core concepts already contained in s.59, suitably broadened. While other rules and legislation will continue to govern many aspects of how disclosures should be managed and investigated, the primary purpose of the PID Act – whistleblower safety, support and welfare – dictates these core protection obligations must be not only retained, but made clearer and more logical in the Act.

2.7. A clearer, justice-focused 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? [and title?]

All the above submissions reinforce that it is time to restore the Act's focus on the first principles of whistleblower protection, rather than on the role of the Act as a technical administrative framework for managing disclosures once made.

While the objects of the Act are sound, our research indicates that the key object (s.6(c)) of ensuring that whistleblowers 'are supported and are protected from adverse consequences' is the least well fulfilled, in practice. This object should be prioritised as well as fully implemented in the Act, through the reforms outlined above.

We also support reincluding the terms 'whistleblower protection' or 'whistleblowing' in the title of the Act, to assist public officials, agencies, and the general public to understand its nature and primary purpose. While we once preferred replacing 'Whistleblower Protection Acts' with 'Public Interest Disclosure Acts' due to the level of misunderstanding of, and stigma against, the concept of whistleblowing, much has changed since that time. In our view, the advantages of using the term 'whistleblower' now outweigh the disadvantages, including relative to the clunky and inaccessible terminology that has grown up around 'public interest disclosers'.

Updated titles could include:

- Public Interest Disclosure (Whistleblower Protection) Act; or
- Public Interest Reporting (Whistleblower Protection) Act.

Part 9.4AAA of the *Corporations Act 2001* (Cth), as reformed in 2019, not only retained 'Whistleblower Protections' in its title, but introduced the statutory term 'eligible whistleblower' to describe those whose relevant disclosures trigger the Act's protections. (The term 'eligible' is better replaced, as it can encourage the idea that this is a status for which a person can 'apply', but the term 'whistleblower' itself has proved clear and effective as a statutory term.)

However, the entire term ‘whistleblower protection’ should only be adopted if the Act itself is fully updated to include the improved protections recommended above and below, or the risk will remain of the Act providing false promises of protection that it does not actually deliver.

Overall, we urge the government to see this as an opportunity for a paradigm shift, back in the direction of an Act whose square focus is on making it safe for officials and employees to blow the whistle, including by ensuring that if unfair, adverse consequences cannot be prevented or limited, these are fully and efficiently remedied, at least cost to the whistleblower.

The reforms also need to support administrative remedies for whistleblowers, including on a ‘no fault’ basis, so that agency restitution is provided to employees who suffer disadvantage from their role in the reporting process, without individual damage or conflict first needing to reach the scale of civil litigation, at unnecessary cost to whistleblowers, agencies and public confidence alike.

A suitable renewed first principle for a more effective Act would thus be an objective that **no employee should be left worse off** for blowing the whistle, in line with the existing language of ‘adverse consequences’. Above all, it is time to move well beyond the current over-reliance on symbolic but largely unhelpful criminal prohibitions against direct reprisals, as the focus of whistleblower protection, if the Act is to be re-established as one of the Commonwealth’s strongest bulwarks of accountability and integrity.

3. Comprehensive, seamless embedding of whistleblower protection obligations

3.1. Approach to reform

The title of the consultation paper emphasises further important objectives: *reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*.

We strongly support these objectives as recognising the aim is not simply 'best practice' legal protections on paper (including the fit for purpose remedies in section 2), but a framework capable of actually being operationalised in the day-to-day life of the public sector, including within and across the many different entities to which it applies.

Our submissions in this section relate to two key issues which flow from this:

1. The need to more accurately understand the **scope or scale of protection needs** across the Commonwealth public sector, which the reformed Act is trying to address – and is especially relevant to understanding the workload and resourcing needs of any new or enhanced whistleblower protection function (section 4);
2. The best approach to **embedding whistleblowing and whistleblower protection systems** in the operations and culture of all the entities to which the PID Act applies, especially given:
    - The wide diversity of **Commonwealth entities** to which the Act applies (APS agencies, non-APS agencies, Commonwealth companies and statutory bodies, ADF, etc)
    - The wide diversity of **private and not-for-profit organisations** to which the Act applies (Commonwealth suppliers, service providers and contractors, and their employees)
    - The fact the Commonwealth also imposes **separate** whistleblower protection requirements on ***these and all other* companies, financial institutions, tax entities, aged care providers, NDIS providers, and other private and not-for-profit entities**, under other laws (including the *Corporations Act, etc,* as noted in the paper) and
    - The wide variety of **integrity and regulatory agencies** also relying on, and involved in, effective whistleblower protection - especially with addition of the NACC and further investigative agencies under the proposed 'no wrong doors' approach.

These operational implications are crucial to the type of principles-based approach should inform reform of the PID Act, the institutional oversight issues in section 4, and the timing and content of the stage 2 PID Act amendments relative to the current or imminent reviews of other Commonwealth whistleblowing laws.

3.2. Current misapplication and under-reporting of PIDs

Designing protections which can be better embedded and enforced requires dealing first with the evidence of the extent to which the Act is *currently* playing any of its intended roles, relative to the actual protection needs that exist in the Commonwealth public sector.

As noted in section 2, there is considerable evidence that the problems in the Act mean it is simply not being implemented in the way that was originally intended. At best, the guidance, oversight and compliance activities of the Commonwealth Ombudsman (and IGIS) mean that the Act does appear to have had positive traction in:

- Ensuring agencies have PID rules and policies, authorised officers, etc, which many agencies place considerable effort into putting in place and maintaining; and
- Allowing some, or even many agencies, to use the PID Act framework to deliver protection approaches that succeed in supporting at least some whistleblowers, in some circumstances.

However, as noted in section 2, surprisingly few complaints of reprisal are lodged with agencies or the Ombudsman as a trigger for redress under the PID Act (only 52 claims in 2021-22, and 24 claims in 2022-2023). Even more surprising is that none have been substantiated – given the empirical and anecdotal evidence of how easy it is for responses to disclosures to go wrong, and for detriment to follow, let alone the high likelihood that at least some direct reprisals do occur.

Beyond the legal reasons why current remedies appear to have proved useless (section 2), it is clear the entire framework is being under-utilised as the intended approach to managing and protecting employee concerns about public interest wrongdoing. As early as 2016, the Moss Review concluded that the experience of Commonwealth officials seeking protection under the Act was 'not a happy one', while the administrative complexity of the Act has also made it unpopular with authorised officers and relevant agency officials.

This stands in sharp contrast to the objective proposed by our original research, and endorsed by the Moss Review, that the PID Act regime should support an **'if in doubt, report'** culture, ensuring *all* whistleblowing is facilitated, captured and appropriately managed. That approach requires all managers and agencies to properly recognise, identify and respond to *all* public interest concerns, in a verifiable way, so that responses are not simply left to chance, or worse.

There is copious evidence that in many agencies, vast numbers of disclosures by officials involving public interest concerns which should trigger the Act, are simply not being recognised or identified as such. This misapplication of the intention of the Act, and under-reporting of the matters to which it applies, undermines the objective of a comprehensive scheme and guarantees that it often plays no useful role in ensuring wrongdoing is dealt with or whistleblowers are supported.

For example, there is clear evidence that PIDs are being under-identified or under-reported in the Commonwealth, relative to other jurisdictions.

Table 1 below compares the number of PIDs reported under the equivalent legislation for 2022-23, for the Commonwealth and two other large and comparable jurisdictions – Queensland and NSW.

While formal under-reporting of PIDs is an established problem in all jurisdictions, due to similar administrative challenges as well as variability in how or whether different agencies correctly identify PIDs, the Commonwealth stands out. The fact that Commonwealth agencies are identifying **four times fewer** PIDs than NSW, and **seven times fewer** PIDs than in Queensland, relative to size of jurisdiction, is compelling evidence of a far worse under-implementation problem under the Commonwealth regime.

Table 1:
Public Interest Disclosures reported for 2022-23 (select jurisdictions)

	Received by agencies	Received by investigating authorities	Total	As % of total public sector employment[13]	Relative to Cth
Queensland[14]	na	na	2,187	0.56%	x 7
NSW[15]	404	1,294	1,698	0.31%	x 4
Commonwealth[16]	249	24	273	0.08%	x 1

Further, this level of under-reporting is consistent with major incidences of employee-reported public interest wrongdoing which have come to public attention, which do not appear to have ever been identified as PIDs.

An obvious example is the numerous instances of staff raising internal and external concerns about the unlaw, unfair or defective nature of the **Robodebt Scheme**, as subsequently aired during the Royal Commission into Robodebt[17] – all of which involved disclosable conduct in the form of maladministration under the PID Act. Even though these staff have commonly and accurately been identified as Commonwealth public interest 'whistleblowers', including by the Minister for Social Services, it does not appear anyone ever recognised and dealt with them as PIDs, or tried to trigger the resulting protections.

Finally, data from the Australian Public Service Commission on **APS code of conduct investigations** also indicates a systemic problem with staff disclosures of wrongdoing not being identified as PIDs, inconsistently with the Act, simply because the disclosure is being dealt with under 'another' process. For example, out of 567 internal reports leading to finalised APS code of conduct investigations in 2022-23, only 10 (less than 2%) were identified as PIDs – even though at least 258 of the reports (46%) were identified as having been made by staff, and were probably PIDs.[18]

These data suggest that reports of serious wrongdoing in the federal public sector are not being identified or assessed as PIDs, when they should be. There are many known or suspected reasons, including some already proposed to be addressed, as discussed further below. However the likely **extent** of under-reporting and misapplication of the Act is also vital to assess, to design a reformed framework that can be more effective.

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[13] Australian Bureau of Statistics 2022-23, *Public sector employment and earnings*, ABS, viewed 11 January 2024, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/public-sector-employment-and-earnings/latest-release>.

[14] Queensland Ombudsman, *Annual Report 2022-23 (*NB not including 660 historical PIDs reported by one Qld Health & Hospital Service).

[15] NSW Ombudsman, 2023, *Oversight of the Public Interest Disclosures Act 1994 annual report 2022-23*.

[16] Commonwealth Ombudsman, 2023, *2022-23 annual report*.

[17] Royal Commission into the Robodebt Scheme, *Report: Volume 1*, Commonwealth of Australia, 2023.

[18] Australian Public Service Commission, 2023, *State of the service report 2022-23*. E.g. to a central conduct or ethics unit, nominated person in a human resources area, an email reporting address, a fraud prevention and control unit or hotline, an employee advice or counselling unit, or another hotline.

3.3. The Commonwealth's real whistleblower protection needs

Given the lack of reliability of existing PID statistics as a measure of need, some attempt to quantify, or model, the extent of the needs intended to be met by the PID Act regime is warranted. This will help identify:

- How the Act should actually work at agency levels;
- Whether agencies are or aren't likely to be administering it properly; and
- What volume of individual cases may be likely to need the support or intervention of any enhanced whistleblowing support function (section 4).

Our first research project, based on the surveys of 7,663 public sector staff of 118 agencies across four Australian jurisdictions, estimated that across all Australian public sectors, about **12%** of all public servants (or 197,000 individuals) had probably reported public interest concerns to superiors or authorities at least once in the prevous two years, that met the definition of whistleblowing, and deserved the corresponding protections and supports.[19]

This estimate was conservative, when compared with the whistleblowing or reporting rates produced by different studies around the world – which vary widely, due to methodological differences (including the scope of wrongdoing reports, whether or not the report was made by a manager or other professional in their governance role, etc).[20] Therefore, any estimate is at best indicative, and dependent on assumptions made about what constitutes whistleblowing.

Figure 2 below sets out an indicative analysis of likely *minimum* protection needs that should be addressed by the reformed PID system, based on a number of conservative assumptions reflecting existing research. Table 2, following, sets out more detail on these assumptions.

E.g. we identify the **total pool** of potential whistleblowers intended to receive the benefit of protections as only current Commonwealth employees, when in fact the pool is far wider (including former employees, and employees of Commonwealth contractors).

Further, the base used for **wrongdoing observers** is simply the 3.2% of APS employees who consider they witnessed corruption in the previous year (not other disclosable conduct types), followed by a conservative **reporting rate** (50%) based on international studies. The resulting indicative population – **5,605 whistleblowers** – is **less than 2%** of the total pool, and a highly conversative estimates even compared to the 12% indicated by our 2008 report.

Figure 2 indicates that, on any reasonable assumptions, the actual number of public interest reports made by Commonwealth employees which should, technically, be recognised and reported as PIDs, is at least several orders of magnitude greater than presently occurs.

Even if the criteria for what should be identified as PIDs is limited to those who are assessable as *requiring and deserving active protection or support* – which are not criteria in the PID Act – the expected volume of individuals is still many times greater than those currently being detected, monitored or supported as the PID scheme would require.

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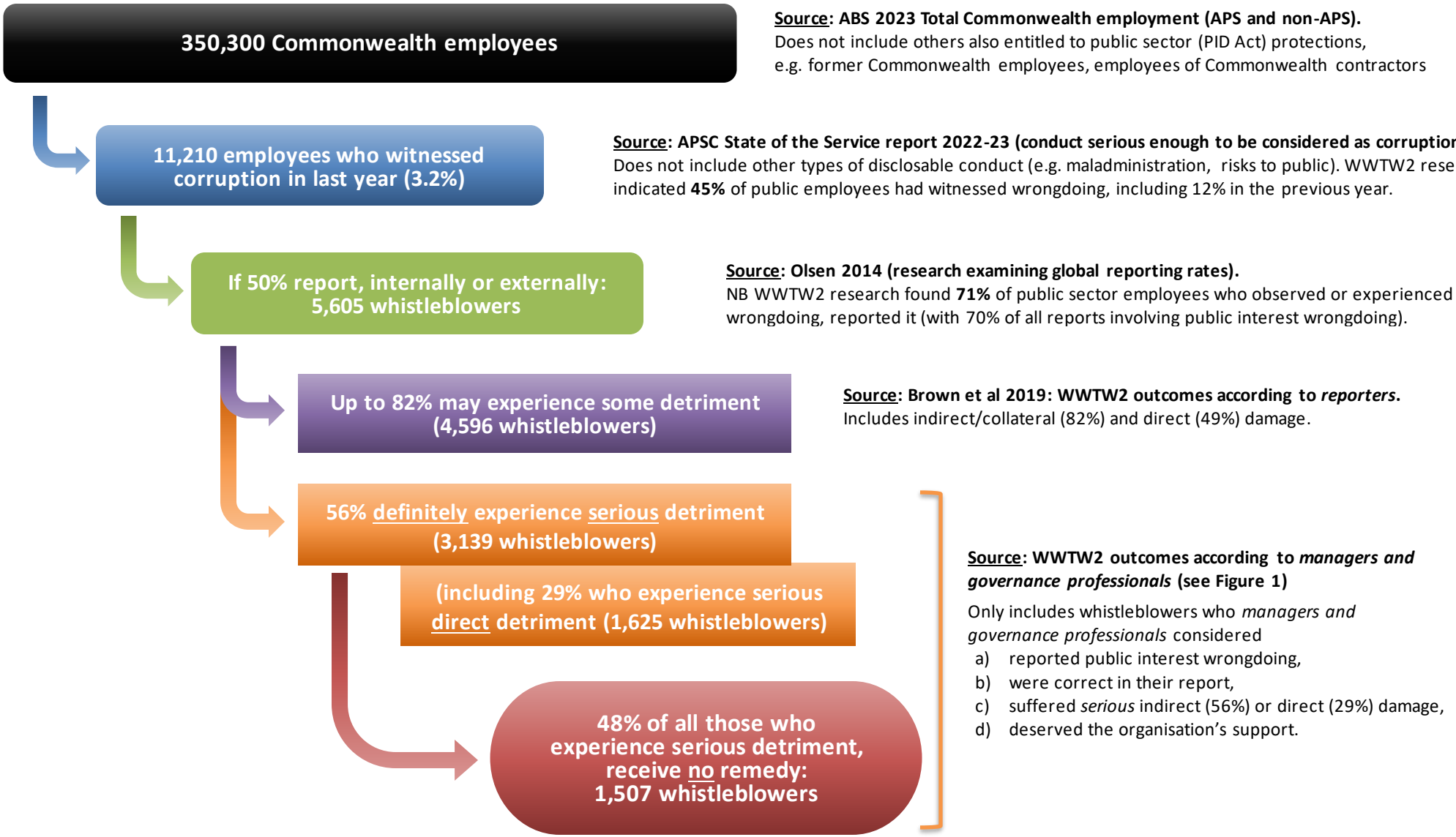
[19] Brown, AJ, Mazurski, E, & Olsen, J, 'The incidence and significance of whistleblowing', in *Whistleblowing in the Australian public sector: Enhancing the theory and practice of internal witness management in public sector organisations*, p. 40.

[20] Olsen, J, 2014, Reporting versus inaction: How much is there, what explains the differences and what to measure in Brown et al (eds), *International handbook on whistleblowing research*, Edward Elgar.

Figure 2: Indicative minimum numbers of Commonwealth public sector whistleblowers in need of support



Source: ABS 2023 Total Commonwealth employment (APS and non-APS).
Does not include others also entitled to public sector (PID Act) protections, e.g. former Commonwealth employees, employees of Commonwealth contractors

Source: APSC State of the Service report 2022-23 (conduct serious enough to be considered as corruption).
Does not include other types of disclosable conduct (e.g. maladministration, risks to public). WWTW2 research indicated **45%** of public employees had witnessed wrongdoing, including 12% in the previous year.

Source: Olsen 2014 (research examining global reporting rates).
NB WWTW2 research found **71%** of public sector employees who observed or experienced wrongdoing, reported it (with 70% of all reports involving public interest wrongdoing).

Source: Brown et al 2019: WWTW2 outcomes according to *reporters*.
Includes indirect/collateral (82%) and direct (49%) damage.

Source: WWTW2 outcomes according to *managers and governance professionals* (see Figure 1)

Only includes whistleblowers who *managers and governance professionals* considered

a) reported public interest wrongdoing,
b) were correct in their report,
c) suffered *serious* indirect (56%) or direct (29%) damage,
d) deserved the organisation's support.

Table 2: Notes accompanying Figure 1

Estimate	Source	Assumptions and comparisons
350,300 Commonwealth Government employees	Australian Bureau of Statistics (ABS)[21]	This does not include others who can make a PID, such as former Commonwealth employees, or employees of Commonwealth contractors
3.2% witnessed corruption – equates to 11,210 employees	State of the service report 2022-23	% of respondents who say they witnessed conduct by another official that they considered serious enough to be corruption. Does not include other categories of disclosable conduct such as maladministration, conduct that results in or increases the risk of danger to health or safety, conduct that may result in disciplinary action etc. A particularly low estimate given our WWTW2 research found that 45% of public employees observed or experienced wrongdoing, including 12% of total in the last year.[22]
50% report wrongdoing they witness – equates to **5,605 whistleblowers**	Research examining global reporting rates[23]	Assumes internal or external reporting. Again a low estimate compared to our WWTW2 research that found 71% of public employees who observed or experienced wrongdoing reported it.[24]
(Up to 82% may experience some detriment – equates to 4,596 whistleblowers)	(WWTW2 overall research[25])	(WWTW2 outcomes according to all *reporters*. Includes both indirect/collateral (82%) and direct (49%) damage. However not used as assumption in preference for more objective manager & governance professional data, in Figure 1 and below).
56% of reporters experience serious detriment – equates to 3,139 employees 48% received no remedy – equates to **1,507 employees**	WWTW2 Remedies research as per Figure 1	This only includes whistleblowers who *managers and governance professionals* considered: a) reported public interest wrongdoing, b) were correct in their report, c) suffered *serious* indirect (56%) or direct (29%) damage, d) deserved the organisation's support. NB these are not criteria that apply to whether a matter is a PID – simply criteria to identify the true extent of PIDs where protection has failed or intervention is needed to ensure remedies are provided (see section 4).

[21] Australian Bureau of Statistics 2022-23, *Public sector employment and earnings*, ABS, viewed 11 January 2024, <https://www.abs.gov.au/statistics/labour/employment-and-unemployment/public-sector-employment-and-earnings/latest-release>.

[22] Brown, AJ et al, 2019, *Clean as a whistle: A five step guide to better whistleblowing policy and practice in business and government*, Griffith University, p.5. **Appendix 1**.

[23] Olsen, J, 2014, Reporting versus inaction: How much is there, what explains the differences and what to measure in Brown et al (eds), *International handbook on whistleblowing research*, Edward Elgar.

[24] Brown AJ, et al, 2019, *Clean as a whistle: A five step guide to better whistleblowing policy and practice in business and government*, Griffith University, p.5.

[25] Brown AJ, et al, 2019, *Clean as a whistle: A five step guide to better whistleblowing policy and practice in business and government*, Griffith University, pp.23-24.

Much of the challenge lies in the fact that, in practice, the reporting process begins with high levels of informal disclosure of wrongdoing concerns, every day, in most or all agencies, to managers or governance staff with responsibility to deal with it – before any issue is formalised, let alone classed as a PID.

However the fact remains that any such concerns may, either immediately or eventually, constitute an act of whistleblowing which requires active management intervention and support, of the kind contemplated by the PID Act. Most importantly, it is at this 'front end' that unless improved agency approaches kick in, suppression or mismanagement of concerns is most likely to begin to result in detriment, as well as to wrongdoing going unaddressed, as scenarios like Robodebt bear out.

On any analysis, we would estimate that *at most*, policies under the current PID regime are detecting and providing potential support or assistance to only perhaps **10%** of actual Commonwealth whistleblowers who need to be coming under the PID radar.

This analysis also helps predict what may be the scope of a target population for support and protection from an independent oversight agency, discussed in section 4. The estimate that perhaps **1,507 Commonwealth employees** each year experience serious detriment for reporting perceived corruption, for which they receive no remedy, provides a start for that target.

The extent of underperformance of the regime has many implications for reform, as addressed below – including how the Act is redesigned for easier administration, for how its requirements are best embedded in agencies, and for how the right leadership and management cultures are achieved in the institutions to which the Act and related Commonwealth laws apply.

3.4. Removing administrative disincentives for agencies to use the Act

Reforms to address the PID Act's misapplication and under-reporting, described above, include several of the proposals already outlined in the consultation paper. One major reason for this level of misapplication is the current complexity and cumbersome nature of the Act. Related reasons include lack of awareness among supervisors of what constitutes a PID, and agencies' failure to nominate enough authorised officers to receive PIDs.[26]

As noted in section 2, the consultation paper asks:

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?

As flagged in section 2, many of the most cumbersome provisions in the Act governing referral, allocation, notification and coordination of disclosures should be removed from the Act, in favour of a more flexible approach. In fact, to understand the extent of the problem, it is worth remembering the evidence that prior to the present Attorney-General taking over responsibility for it in 2013, the original drafting was deliberately intended, or allowed, to make it extremely hard to implement at all (**Appendix 3**).

Making the Act more implementation-friendly for agencies is a critical part of bringing it back to life as the primary framework for ensuring reporting is feasible, worthwhile and does not lead to adverse outcomes for reporters -- rather than an Act that is avoided wherever possible, or reserved only for rare types of disclosures that are deemed 'special'.

[26] For example, the Commonwealth Ombudsman indicated in their 2022-23 annual report that the average number of authorised officers for agencies with greater than 10,000 employees was only 10.

If agencies perceive that dealing with a PID results in too many administrative burdens and technical requirements, they easily take a view that deeming a matter as a PID is only reserved for a small proportion of cases, such as only when the discloser requests 'PID status' or is already claiming or suffering detriment, even though these are not criteria set out in the legislation and prevent agencies from ensuring protection at the time it may be most needed.

This reinforces our support for a principles-based approach in which the Act is more clearly and simply structured, to achieve two primary objectives:

1. *Reducing the technical hurdles for establishing eligibility or accessing protections:* Here, we note that the PID Act has been described as 'technical, obtuse and intractable', and its 'complex interlocking substantive provisions' are 'largely impenetrable, not only for a lawyer, but even more so for an ordinary member of the public or a person employed in the Commonwealth bureaucracy'.[27]
2. *Reducing the prescriptive requirements on agencies for receiving and dealing with PIDs:* The detailed and prescriptive approach currently taken can result in agencies dealing with PIDs in ways that circumvent the objects of the Act, for example by conducting a 'PID investigation' before then undertaking a separate investigation under the *Public Service Act 1999* (for code of conduct matters), Defence Force legislation or the *Public Governance Performance and Accountability Act 2013* (for fraud matters).

Further, the use of the term 'investigation' can limit the action that is most appropriately taken by an agency in response to a PID, as well as limit the options available to disclosers in terms of reporting outside of government if it is *not* dealt with appropriately. If a person makes a valid disclosure that otherwise meets the criteria set out in the Act, their protection should not depend on any decision by a government agency about how it is best dealt with. Similarly, agencies should be able to decide how a PID is most appropriately dealt with, subject to supervision.

In most cases, while there will remain need for detailed if simpler requirements to help guide authorised officers and agencies with the assessment, referral, notification etc of disclosures, these should be placed in statutory guidance from the oversight authority, which remain enforceable in the form of new PID rules but are also more easily adapted over time. Most importantly, the audience for these procedures is those involved in the technical administration of this Act and other integrity processes, not every potential whistleblower and every manager as is the case for much of the rest of the Act (especially protection obligations).

Any risks of this principles-based approach would be outweighed by the advantages, particularly if there are robust mechanisms for oversighting and enforcing the PID Act (section 4).

3.5. Avoiding duplication, inconsistencies and protection gaps

Reforms to increase the intended traction of the Act also include ensuring it operates as the comprehensive, overarching framework proposed by the original Dreyfus report – and not 'eaten away' or made irrelevant by gaps, inconsistencies or duplication in other Commonwealth arrangements, which reduce its relevance to whistleblowers and integrity agencies.

To achieve this, the proposed principles-based approach should reinforce that – since the primary purpose of the Act is to ensure *safe* options for reporting, and *deliver* that safety – the Act is not intended to duplicate the investigation or other processes that wrongdoing concerns logically

[27] *Applicant ACD13/2019 v Stefanic* [2019] FCA 548, at 17-18.

trigger, primarily, under other legislation (e.g. including the Ombudsman, NACC, and APS Acts). It provides an **overlay of protections** on all internal and sector-wide integrity systems, ensuring agencies deliver support and protection when and as needed, irrespective of what the specific investigative response entails or who is undertaking it – not a separate or distinct **complaint track of its own** within those systems.

This similarly means that whistleblower protections need not, and should not, be duplicated in the administering legislation of other integrity bodies or processes – the protections should simply be triggered by making sure that a simplified PID Act applies to information that is given to those other agencies. These objectives are relevant to a number of questions in the paper:

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

The framework will only remain relevant if no Commonwealth employee, contractor or other 'insider" falls through the cracks of the system, by not being entitled to claim the protections of the PID Act. This includes, for example, **parliamentary and ministerial staff**. Irrespective of the fact that these will also hopefully receive greater protection in terms of their own workplace safety under other reforms, it makes no sense for them not to also be fully covered by the PID Act – for example if they need to disclose other forms of misconduct, not related to workplace safety.

We support Transparency International Australia's submission to ensure that public servants who **internally disclose corrupt conduct,** by anyone in the public sector, trigger the full PID protections (as opposed to only those that qualify as a 'NACC disclosure' by virtue of being made directly to the NACC, or those made within agencies provided the corruption is only in the agency). The solution here is structural reform to the Act, to remove the complex definitions of PIDs that require the disclosable conduct must be by, or relate to, someone in their own agency – when it should simply be any disclosable conduct by or relating to any public official or public agency, including parliamentarians or third parties, as is the case under state laws.

We also support removing the requirement that an **employee of a Commonwealth contractor** who blows the whistle on wrongdoing covered by the PID Act is only protected if that wrongdoing is occurring within that specific contract, being also one on which they are working. They should be protected in any circumstance where there is PID Act disclosable conduct involving *any* public official or *any* contractor, if the whistleblower could face detriment in their own employment – including disclosable conduct under another contract (on which they are not working), or involving public officials with whom they are interacting (not their own company), or other companies vying for or receiving contracts. This is especially the case given that, even if they are a corporate employee, they may not receive any protections from the *Corporations Act.*

Again, structural simplification of the Act to treat any employee of a Commonwealth contractor like any other public official, and afford protection if they report public sector-related wrongdoing (i.e. disclosable conduct) irrespective of who is responsible for it, would seal over many potential gaps and help achieve the intended comprehensive application.

2. What, if any, additional pathways should be created to provide ways for a public sector whistleblower… to make a disclosure and receive protections?

We strongly support the 'no wrong doors' approach endorsed by the Moss Review, and reflected in the *Roadmap* report (**Appendix 2**, p. 7). Any disclosure by a whistleblower to any agency to whom they would logically report wrongdoing, should automatically trigger PID protections.

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 – including e.g. the Australian Federal Police. Agencies who receive disclosures should have a responsibility to themselves refer these to the right place, rather than telling whistleblowers to shop around in the hope of finding someone appropriate. This approach is currently adopted in Victoria, Queensland and New South Wales.

Given the apparent failure by agencies to nominate a sufficient number of authorised officers to receive PIDs, we endorse the approach taken in s. 15(1)(c)(iii) of the *Public Interest Disclosure Act 2012* (ACT) to allow disclosures to be made to any 'public official of the entity who has the function of receiving information of the kind being disclosed or taking action in relation to that kind of information'. This would address the problem of officials making reports of misconduct by other channels (e.g. hotlines or personnel departments) which they logically should expect would trigger protections, only to find out that because that *specific* channel was not identified in the PID Act, they never had any protection.

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

For a comprehensive approach to be maintained, it is important the National Anti-Corruption Commission be recognised and treated as simply another investigative agency under the PID Act – notwithstanding its crucial role – rather than being treated differently.

As noted above, this means all corruption disclosures by persons entitled to PID Act protection (made internally, to other agencies or to the NACC) should trigger the full PID Act protections, including its civil and employment remedies; **without** the need to duplicate these in the enabling legislation of the NACC or other investigative agencies.

Similarly, we disagree with the recent amendments to the PID Act which provide that disclosures of corruption made by public officials to the NACC, do not *necessarily* trigger the PID Act protections if made anonymously, or orally, or without expressly claiming the concern is a PID. This unintentionally creates two classes of disclosure, without it being immediately clear when the same disclosure, made internally versus to the NACC, will or won't attract the PID protections.

This should be reversed, so it is clear that a PID made to the NACC will trigger protections even if made anonymously, orally or without stating it is a PID. Similar problems have occurred and had to be reversed at state level, when it has been assumed that the complaint procedures of specific agencies (such as anti-corruption bodies) simply replace any requirements in the PID Act – only to discover that whistleblower protections that should have been available, in fact were not, because the matter was handled as a complaint under another Act with more onerous requirements.

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

The ability to embed protections consistently and comprehensively across government would also be enhanced by removing inconsistencies, and replacing confusing language and tests, regarding whether or when a whistleblower is protected if they need to go public.

Currently, the definition of **intelligence information** in the Act undermines the credibility and comprehensiveness of the regime, because an intelligence agency employee who needs to publicly blow the whistle on corruption in their agency (on a matter which has nothing to do with national security or anything sensitive) could not claim any protection under the PID Act – even though an

identical official blowing the whistle on identical corruption in a *non*-intelligence agency, would have protection. Such different standards of justice with no logical basis undermine the confidence of all public employees in the scheme, and should be removed.

The language of the PID Act regarding **internal and external disclosures** should be overhauled to be more intuitive, in line with the normal understandings of public officials – especially the classification of disclosures made to the Ombudsman or another investigative agency as being 'internal'. All research and experience indicates that employees and managers understand 'internal' disclosures to be ones made within their own organisation (or to the agency in which the wrongdoing is occurring), with 'external' disclosures being to anyone outside that organisation, including both 'regulatory' disclosures to an independent agency, and 'other' or 'public' disclosures to third parties (including media). The Act would be easier to administer if its language aligned better with these common understandings.

Further, the direct inconsistencies between the public disclosure provisions in the PID Act and ***Corporations Act*** provide a stand-out example of where an official employed by a Commonwealth corporation, or an employee of a company who is a Commonwealth contractor, could be caught in the same circumstances by two sets of rules, operating with reverse principles. This issue is reflected in the *Roadmap* report (**Appendix 2**, p.16). We support the Human Rights Law Centre's submissions with respect to reform of the unnecessary public interest test in the PID Act public disclosure provisions. However, this is also one example of where the PID Act provision needs to be reformed in a way that will also provide the model for the same approach to then be taken in the *Corporations Act* or any other federal whistleblowing laws, as discussed below.

3.6. Consistent and seamless standards for all organisations

Finally, we urge the Government to appreciate that the ultimate key to embedding good whistleblowing and whistleblower protection systems in the operations and culture of all the entities to which the PID Act applies, relies on making the revised standards of protection as *simple and consistent as possible* across sectors.

Whether in the public or private sectors, these standards will only be internalised in the management of organisations if they are fundamentally common, and understood as central to the basic functions of leadership and governance that apply all in all organisational settings – not rules that apply uniquely to particular sectors, making them automatically the province only of specialist governance professionals or in-house lawyers, not every potential whistleblower or manager.

The need for the PID Act to be redesigned consistently with a cross-sectoral approach, which provides these unifying understandings, is reinforced by:

- The wide diversity of **Commonwealth entities** to which the Act applies (APS agencies, non-APS agencies, Commonwealth companies and statutory bodies, ADF, etc)
- The wide diversity of **private and not-for-profit organisations** to which the Act applies (Commonwealth suppliers, service providers and contractors, and their employees)
- The fact the Commonwealth also imposes **separate** whistleblower protection requirements on ***these and all other*** **companies, financial institutions, tax entities, aged care providers, NDIS providers, and other private and not-for-profit entities**, under other laws.

When the PID Act was first drafted, it was simply unknown – but widely presumed – that public sector and private sector whistleblowing standards probably needed to be different. However,

since that time, we now understand that in most fundamental respects, this is simply not the case -- particularly as a result of the research undertaken simultaneously in public and private sector entities under our second *Whistling While They Work* project. Hence, the alignment of legal protections and organisational standards between sectors that was recommended by the Parliamentary Joint Committee (2017), is not only desirable, but achievable, and necessary if protection approaches are to have effective traction in any sector.

As outlined in our report (**Appendix 1**), there was much similarity in the basic nature and dynamics of whistleblowing between public and private sector respondents. Most questions about how best to manage whistleblowing are answered by organisational and management dynamics that cut across all types of organisations, rather than being specific to particular sectors or jurisdictions. In particular, our research found:

- No significant differences between the public and private/not-for-profit sectors in terms of the extent to which serious detriment was remedied, and
- No relationship, in either sector, between what organisations say they do on paper in terms of their remediation processes, and the experience of whistleblowers
- Larger organisations were also no better than small ones, in either sector.

This highlights the need for better oversight of organisations across the board, and stronger enforcement action of common standards of protection in practice, rather than different standards or regulatory approaches in different sectors.

This approach was also accepted and adopted in the International Standard on Whistleblowing Management Systems, which applies to organisations of any sector, industry, or size.[28]

The research also found that in both sectors, it was the ethical culture of leaders and managers – i.e. whether they internalised and operationalised the first principles of support for staff – that determined whether it was safe to speak up in that organisation, and whether, when staff did blow the whistle, the outcomes were more positive.[29] As already indicated, the quality of the formal policies that applied to or within the organisation did nothing to explain the outcomes, compared to this fundamental issue of whether basic leadership obligations had been internalised.

In our view, these findings resonate with much of what the Government is currently tackling in its approach to integrity reforms more generally, including the stresses on public sector ethics revealed by the Robodebt Royal Commission and controversies over the ethics and regulation of Commonwealth contractors such as the large consulting firms.

As indicated at the outset, we welcome the recognition in the consultation paper that the PID Act is just one, important part of the tapestry of federal whistleblowing laws – several of which are also up for review and reform, and all of which are subject to the Parliamentary Joint Committee's 2017 proposal for consolidation into a single non-government Whistleblower Protection Act. We were also pleased that the paper referenced our joint report, *Protecting Australia's whistleblowers: The federal roadmap* (2022) (**Appendix 2**), and have re-attached this as relevant not only to the

[28] ISO 37002: 2021 *Whistleblowing management systems – Guidelines*.

[29] See Brown, AJ et al, 2019, *Clean as a whistle: A five step guide to better whistleblowing policy and practice in business and government*, Griffith University, pp.30-32 (**Appendix 1)**; Brough, P., Lawrence, S.A., Tsahuridu, E., Brown, A.J. (2021) 'The Effective Management of Whistleblowing'. In: Brough P., Gardiner E., Daniels K. (eds) *Handbook on Management and Employment Practices*. Handbook Series in Occupational Health Sciences, Springer.

specific areas of Stage 2 already mentioned, but how the government decides to proceed with strengthening whistleblower protections across the board.

The outstanding issue is whether, or how, the Government will proceed to reform its different laws in a coherent way that brings consistency and simplicity across the sectors – with the Stage 2 PID Act reforms being the next, but clearly not the last step in that process.

The risk of a continued default to piecemeal legislative approaches is well established, wherever different solutions continue to be found simply by virtue of the different policy silos in which government operates. The Independent Review of the Australian Public Service (Thodey Review, 2019) documented the problem that the federal government lacks 'coherent architecture' for joining up services and standards across its own agencies and sectors, making overcoming these silos one of biggest problems for any federal government.[30] We also attach a recent article touching on these issues: 'The last great opportunity? Penetrating the politics of whistleblower protection' (*Australian Quarterly,* Jan 2024, **Appendix 3**).

These issues underscore why the Government should ensure the PID Act stage 2 reforms form part of a comprehensive approach, with clarity that these will act as the model for new, simplified principles-based protections across all sectors, supported by remedies and enforcement arrangements (see section 4) which are fundamentally common and more easily recognised by all employers, managers and potential whistleblowers, and embedded in all organisations.

We especially urge the government to understand this is not just a case of consistency for the sake of it, but imperative to the government's immediate objective of reducing complexity and increasing the accessibility of the PID Act itself. The clarity of the PID Act (**Question 24**) is just as dependent on its principles being better designed to align with the challenges of whistleblower protection that apply across all types of organisations. Therefore the intelligibility and utility of its protections is also best ensured by a process which will deliver:

- greater consistency across all sectors, so basic management and employee obligations are more common and more easily understood, irrespective of workplace; and
- reduction in the multiplicity of regimes across sectors, to remove the duplication, confusion, time and cost involved in knowing what rules apply, which serves as disincentive for managers to fully take on the key obligations, and whistleblowers to come forward.

[30] Independent Review of the Australian Public Service (Thodey Review), *Our Public Service: Our Future*, 2019, p.162. https://www.pmc.gov.au/resources/independent-review-australian-public-service.

4. Effective, well-resourced institutional arrangements

4.1. Approach to reform

This final section of our submission addresses key questions raised under Issue 4 of the Consultation paper:

14. **Do any gaps exist in the current oversight and whistleblower protection functions of agencies, the Commonwealth Ombudsman and the IGIS? Who is best placed to take on additional responsibilities to fill these gaps?**

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

16. **Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?**

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

18. **If an additional independent body is established, do you have any views on its operation, for example in relation to referral pathways…?**

19. **How would the role of an additional independent body differ from and intersect with other existing oversight agencies? …**

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

The question of effective institutional arrangements to implement and enforce the protection regime is obviously one of the most important for this and further stage(s) of reform.

We continue to support the priority that needs to be given to this issue as reflected in the *Roadmap* report (**Appendix 2**, p.6), and in other submissions, especially the **Draft Design Principles for a Whistleblower Protection Authority** provided by Transparency International Australia's submission. These have already been informed by some of the following analysis, which we are now happy to provide.

4.2. Understanding the gaps in enforcement and institutional support

14. Do any gaps exist in the current oversight and whistleblower protection functions of agencies, the Commonwealth Ombudsman and the IGIS?

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

The fact that Commonwealth whistleblower protection oversight and enforcement functions are both fragmented and incomplete, is well established by the history of this debate. Indeed, the need for a strong, independent enforcement function was first reflected in the recommendation

for a dedicated federal whistleblowing agency by the Senate Select Committee on Public Interest Whistleblowing in 1994, long before the Commonwealth or most states had any actual experience yet with whistleblower protection legislation.[31]

The solution adopted by the then government, and 15 years later by the Dreyfus Committee and the 2013 PID Act, was to entrust administrative oversight responsibilities for the protection regime to the Commonwealth Ombudsman (and Inspector-General of Intelligence and Security). However, as noted in Transparency International Australia's submission, these administrative oversight functions presumed that public agencies were themselves capable of implementing and enforcing the protections (even if necessary against themselves), without an independent body requiring significant powers or capacity to do so.

Further, the regime involved no new independent gateway for whistleblowers to make disclosures outside their agency with any new confidence. Agencies were expected to remain the main port-of-call, with the Ombudsman and IGIS primarily available to assist with that process and monitor, to some extent, how agencies handled disclosures.

Within a few years, it became clear that these arrangements left substantial gaps in what was required, as squarely identified by two parliamentary committees in 2017:

- The Senate Select Committee on a National Integrity Commission rejected submissions from Commonwealth agencies that the existing multi-agency integrity system was functioning effectively to manage and resolve integrity matters, instead finding it to be 'a complex and poorly understood system that can be opaque, difficult to access and challenging to navigate', and endorsing the idea that a new federal anti-corruption agency should be an 'umbrella agency with which all Commonwealth integrity and corruption complaints could be lodged', with powers to refer and oversight their handling by other agencies.[32]
- The Parliamentary Joint Committee on Corporations and Financial Services inquiry into whistleblower protections in the corporate, public and not-for-profit sectors documented that, contrary to assurances given during its passage, the PID Act provided no ability for the Ombudsman or any other independent agency to assist a whistleblower in the event of unfair or detrimental treatment by or within an agency. The Ombudsman's office told the Committee:

  > *If a discloser alleges that they are subject to reprisal action, the [Office of the Commonwealth Ombudsman] advises the discloser to use the protections of the PID Act, namely: seek legal advice, contact the police, submit an application to the Federal Court or the Federal Circuit Court or contact the PID risk assessment officer within the agency. The [Ombudsman] is not a law enforcement agency, nor can our Office provide a person with available remedies under the PID Act. The [Ombudsman] does not have the jurisdiction to investigate whether or not reprisal action has occurred.*[33]

[31] Senate Select Committee on Public Interest Whistleblowing, *In the public interest: Report of the Senate Select Committee on Public Interest Whistleblowing,* Commonwealth of Australia, 1994.

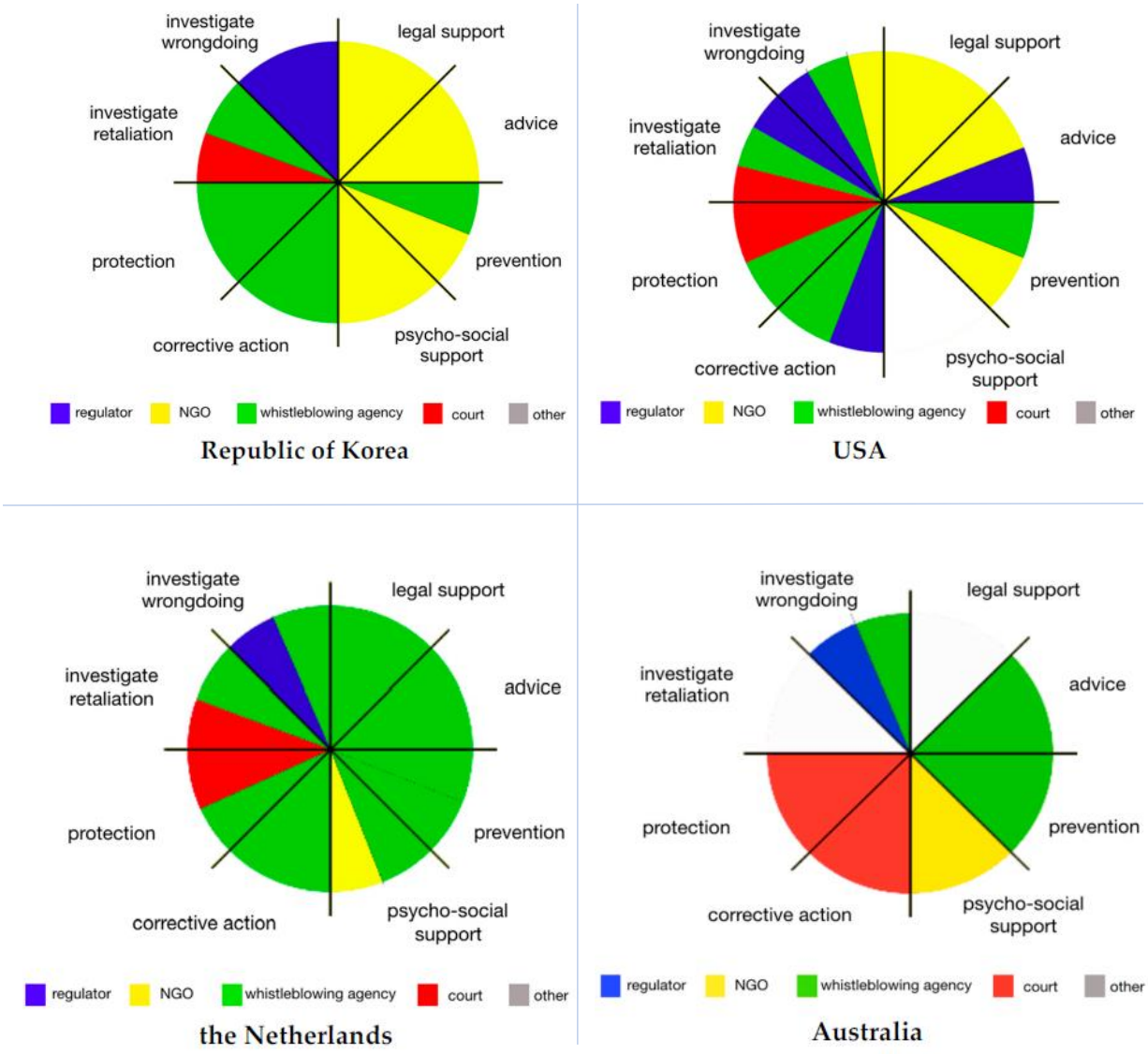
[32] Senate Select Committee on a National Integrity Commission, Report, 2017, pars 4.136 and 4.144.

[33] Commonwealth Ombudsman, *Answers to QON*, 7 June 2017; Parliamentary Joint Committee, p.151. The Moss Review similarly heard that the Ombudsman did not have the power or obligation to independently investigate alleged reprisals or detrimental actions because it could not investigate 'action taken in relation to… employment' of a public official: Commonwealth Ombudsman, 2016, *Submission to the Review of the Public Interest Disclosure Act 2013* (Cth).

These significant gaps were factors in the Parliamentary Joint Committee's unanimous recommendation that: *A one-stop shop Whistleblower Protection Authority be established to cover both the public and private sectors… in an appropriate existing body*.[34]

In 2018, the first ever international study of institutional arrangements for whistleblowing confirmed Australia also suffered from significant gaps, when compared to other countries. It examined which agencies fulfilled any of eight key functions. As shown in **Figure 3,** Australia's federal public sector regime stood out against other key countries as having no independent agency that investigated retaliation or assisted whistleblowers with accessing remedies, with whistleblowers forced to rely solely on private court action for protective action.

Figure 3.
Institutional whistleblowing arrangements (public sector) (4 countries)[35]



[34] Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017, Recommendation 12.1 (p.158). https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Report.

[35] Loyens, K., & Vandekerckhove, W. (2018) 'Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements', *Administrative Science.* 2018, *8*, p.30.

Figure 4. Current institutional roles in whistleblowing oversight (Commonwealth) (Olsen, in progress)

Key: Role largely provided for -- | Substantial gap -- | Total gap X

Role			Description	Public sector (PID Act)	Private/Not for profit sectors (Corporations Act etc)
Advisory	1	**Awareness**	General awareness-raising of importance of whistleblowing in detecting & deterring wrongdoing	Ombudsman & IGIS (also NACC, APSC & public sector entities)	ASIC (but not a legislated function) (also companies)
	2	**Training**	Dissemination of information, skill development, capacity-building, organisational standards for specific stakeholders	Ombudsman & IGIS	ASIC (e.g. regulatory guidance, but not a legislated function)
Support and protection	3	**Psychosocial support**	Access to personal/career coaching & mental health services	Nil independent role (general Employee Assistance Programs)	Nil independent role (general Employee Assistance Programs)
	4	**Prevention**	Early management intervention in higher risk matters through advice & assistance to organisation &/or whistleblower	Highly limited independent (Omb & IGIS notified but little if any real-time role)	X
	5	**Legal support**	Access to free legal advice for whistleblowers, tailored to specific & individual needs	X	X
	6	**Conciliation**	Access to alternative dispute resolution or administrative remedies for detrimental/unfair treatment of whistleblower	X	X
Investigation	7	**Wrongdoing**	Investigation of alleged primary disclosure (wrongdoing)	Various inc. NACC, Ombudsman, IGIS, ANAO, AFP, public sector entities	Various inc. ASIC, ACNC, APRA, ACCC, AFP, companies
	8	**Detriment**	Investigation of alleged detrimental/unfair treatment of a whistleblower	Highly limited independent role (otherwise only entities)	ASIC (but not a legislated function)
	9	**Reviews**	Independent review of internal (organisation/ agency/ company) investigations (either type)	Highly limited independent role esp. for whistleblower detriment	X
Adjudi-cation	10	**Corrective action**	Ensuring primary wrongdoing is dealt with & sanctioned	Various inc. APSC, NACC, Ombudsman, IGIS, AFP, entities	Various inc. ASIC, ACNC, APRA, ACCC, AFP, companies
	11	**Protection remedies**	Ensuring redress & compensation for detrimental/unfair whistleblower treatment	X (courts only)	X (courts only)
Institutional	12	**Policy evaluation**	Ongoing review of effectiveness of the regime	Attorney-General – after 3 years	Treasurer – after 5 years
	13	**Auditing**	Systemic & individual reviews of organisations' compliance	Ombudsman (but not a legislated function)	ASIC (but not a legislated function)
	14	**Monitoring**	Ongoing review of the implementation of the system, including annual reporting on KPIs	Ombudsman (largely limited to outputs)	X
	15	**Coordination**	Strategic & operational coordination of roles performed by different stakeholders across the system	X	X

For a more complete picture, **Figure 4** above sets out the results of new research-in-progress analysing the institutional roles fulfilled by different agencies in the implementation of Australian federal whistleblowing laws, building on the international research.[36]

Breaking down the eight functions identified by Loyens & Vandekerckhove into 15 more specific roles in five categories, this comparison confirms the extensive gaps in institutional oversight arrangements for whistleblower protection, in both the public and private sectors.

For the public sector, **only 4 out of the 15 functions** are currently largely or wholly provided for, with substantial gaps existing in relation to seven functions, and a total gap in relation to four functions – especially those related to enforcement.

A brief explanation of the roles with key gaps confirms their significance:

3. Access to personal/career coaching and mental health services (Psychosocial support)

Currently, federal whistleblowers only have access to general employee assistance programs, if provided by their organisation – which are unlikely to be tailored to address the unique wellbeing needs of whistleblowers. Other jurisdictions, including in Australia (e.g. Victoria and NSW), have mechanisms to ensure psychosocial care is provided or stand up dedicated witness liaison units.

4. Early management intervention in higher risk matters through advice & assistance to organisation &/or whistleblower (Prevention)

While agencies are required to notify the Ombudsman when they allocate a disclosure, and indicate if reprisal is alleged, information is not currently requested by the Ombudsman about the risk of detriment or support being provided to the public official. It is also not publicly reported what action the Ombudsman takes in relation to these notifications, or whether it is merely an administrative recording of disclosures made.

5. Access to free legal advice for whistleblowers, tailored to specific & individual needs (Legal support)

Dedicated support should be available for whistleblowers seeking legal advice or taking formal action to secure remedies, as was recently recommended in Queensland. While the consultation paper refers to the availability of legal support, in our view it is unclear, if not unlikely that whistleblowers would qualify for any of the existing Commonwealth legal financial assistance schemes.[37]

6. Access to alternative dispute resolution or administrative remedies for detrimental/unfair treatment (Conciliation)

With the consent of both whistleblower and the relevant agency, professional alternative dispute resolution is a low-cost option for reaching agreement on action to restore a whistleblower to the situation they were in before they experienced detriment. It does not replace a whistleblower's right (or an oversight agency's obligation) to investigate detriment. This role has proved effective both internationally (e.g. see the US Office of Special Counsel)

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[36] Mapping by Olsen (PhD in progress) builds on roles first articulated in Loyens, K., & Vandekerckhove, W., 2018, 'Whistleblowing from an international perspective: A comparative analysis of institutional arrangements'. *Administrative Sciences, 8*, 30-45.

[37] Attorney General's Department, 2023, *Commonwealth legal assistance*.

and in some Australian cases (e.g. NSW Ombudsman and Queensland Human Rights Commission). There is currently no federal body with this power or function.

8. Investigation of alleged detrimental/unfair treatment of a whistleblower

As indicated earlier, the Ombudsman is extremely limited in its ability to independently investigate detrimental action, even at a recommendatory level. Loyens & Vandekerckhove noted that the Ombudsman can only receive complaints about whether agencies comply administratively with the PID Act, and 'In practice… thus only investigates whether agencies applied the procedural requirements of the whistleblowing legislation in dealing with the disclosure.'[38]As noted in section 2, while 52 whistleblower complaints of reprisal were lodged in 2021-22, and 24 in 2022-23, agencies did not substantiate any of these claims. The Ombudsman itself received 89 complaints about agencies' handling of PIDs over this period (2021-23), but of the 51 complaints finalised by the Ombudsman in 2022-23, only five resulted in formal comments or suggestions to improve agency processes.

The addition of the NACC now means that detrimental treatment which amounts to corrupt conduct could be independently investigated by the NACC. However, as at state level, this is only likely to apply to direct (intentional) reprisals, rather than wider detrimental treatment or failures to support, and at least currently, is likely to be limited to criminal reprisal investigations (which as noted in section 2, have all only previously failed at state level).

9. Independent review of internal (organisation/ agency/ company) investigations

In relation to primary investigations of wrongdoing, there is the potential for the Ombudsman, NACC, or other agencies to review agency investigations if in their jurisdiction. However, as above, any reviews of investigations into whistleblower detriment are limited and not publicly reported, despite the fact that agencies do not appear to ever substantiate any.

11. Ensuring redress & compensation for detrimental/unfair whistleblower treatment

As indicated above, currently no agency has the power or function to take formal enforcement action to ensure that officials who face detriment as a result of reporting serious wrongdoing are remedied. The only recourse is for whistleblowers to act on their own behalf to pursue remedies, despite the fact that they blew the whistle in the public interest, and despite them usually lacking the financial or legal resources for such action.

12. Ongoing review of the effectiveness of the regime (Policy evaluation)

While the regime was initially subject to requirement for a statutory review, the lack of timeliness in government response to the 2016 Moss Review demonstrates a need for a more effective, ongoing and regular consideration of the overall effectiveness of the regime. In NSW, this function is undertaken by the PID Steering Committee, which is chaired by the NSW Ombudsman and includes the Department of Premier and Cabinet (the agency responsible for administering the legislation). It reports annually to Parliament.

13. Systemic & individual reviews of organisations' compliance (Auditing)

This role involves continual monitoring and proactive responses to organisations that are most at risk of failing to comply with the Act. The Ombudsman has conducted one investigation into

[38] Loyens, K., & Vandekerckhove, W. (2018) 'Whistleblowing from an International Perspective: A Comparative Analysis of Institutional Arrangements', *Administrative Science.* 2018, *8*, p.10.

agencies' compliance with the PID Act, but does not have the dedicated audit function that exists in other jurisdictions.

15. Strategic coordination of roles performed by specific stakeholders across the system

The NSW PID Act provides for a PID Steering Committee, chaired by the oversight agency as noted above and mentioned in the consultation paper. Such a mechanism has also been recommended in Queensland. Membership could also include other stakeholders, including union, whistleblower advocacy or legal representatives. There is no such mechanism or function federally.

Of these weak or missing roles, the most concerning is the lack of an independent agency with clear responsibility and power to investigate alleged or suspected detrimental conduct and obtain remedies for whistleblowers is the most concerning (roles 8 and 11). Despite high original hopes,[39] these gaps indicate the PID Act regime will remain largely unworkable until such time as an independent agency is empowered and resourced to fulfill these missing roles.

4.3. Options for a whistleblower protection authority

16. Should a additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?

The analysis above supports the case for an entirely new or massively expanded independent body to properly fulfil all these functions. All key purposes, functions and powers suggested in the consultation paper would sensibly be assigned to such an authority in order to fill these gaps.

As an alternative to the unsuccessful model to date, the focus of a dedicated whistleblower protection authority (WPA) would be independent oversight and enforcement of the protections, with a focus on practical support to whistleblowers, rather than simply administrative support to agencies and compliance assurance. Such a body would provide active guidance and support to whistleblowers, assist agencies in the coordination and management of disclosures, conciliate disputes, investigate reprisals and where necessary, support or initiate strategic litigation aimed at testing and securing the protections, particularly in the form of civil remedies.

The need for an additional body with these functions is consistent with the conclusion in favour of a 'one stop shop Whistleblower Protection Authority' unanimously reached by the Joint Parliamentary Committee on Corporations and Financial Services.[40] According to the Committee, the Whistleblower Protection Authority should have the following functions:

- provide a clearing house for whistleblowers bringing forward public interest disclosures;
- provide advice and assistance to whistleblowers;
- support and protect whistleblowers, including by:
    - investigating non-criminal reprisals in the public and private sectors; and
    - taking non-criminal matters to the workplace tribunal or courts on behalf of whistleblowers or on the agency's own motion to remedy reprisals or detrimental outcomes in appropriate cases.

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[39] See A J Brown, 'Towards 'ideal' whistleblowing legislation? Some lessons from recent Australian experience', (2013) 2(3) *E-Journal of International and Comparative Labour Studies* 153–182.

[40] Parliamentary Joint Committee on Corporations and Financial Services, 2017, *Whistleblower Protections,* Canberra: Parliament of Australia. Recommendation 12.1, see par 12.79, p.157.

The Parliamentary Joint Committee also recommended that the WPA administer a reward scheme in favour of whistleblowers, as discussed further below.

The provision of clearer gateway, receipt, advice, referral, and more active and effective whistleblower protection functions are all critical and interrelated needs for the Commonwealth integrity system to work.

Importantly, the Parliamentary Joint Committee also recommended a Whistleblower Protection Authority's functions should extend beyond simply the PID Act, to **enforcement of private sector protections**.

As shown in **Figure 4**, similar institutional oversight gaps also exist in relation to the private and not-for-profit sectors, even after the passage of the amended *Corporations Act* whistleblower protections in 2019. While the Government announced an initial $6.6 million over two years for the Australian Securities and Investments Commission (ASIC) to implement those enhanced provisions,[41] these funds were 'so that ASIC can better receive, assess, triage and address whistleblower disclosures about misconduct', rather than to enforce protections. The reforms made ASIC the primary recipient of a wide range of disclosures, required it to enforce new requirements for company whistleblowing policies, and empowered it to seek civil penalties for criminal victimisation, but otherwise did not bestow protection functions.

We support an authority with functions to also enforce private sector protections, in order to:

- Fill the equivalent gaps in federal institutional oversight, for those sectors
- Ensure that protections could be applied comprehensively across the full diversity of Commonwealth entities to which the PID Act applies, including Commonwealth companies
- Reduce gaps and inconsistencies in the protections applying to the wide diversity of private and not-for-profit organisations covered by *both* the PID Act and Corporations Act (especially Commonwealth suppliers, service providers and contractors)
- Support the more seamless approach to embedding whistleblower protection obligations in the management systems and culture of organisations, described in section 3.

Enabling the authority to draw on, and enforce, protections in ***any*** federal law would be logical for ensuring that whistleblowers who reveal misconduct in government could be protected, irrespective of whether they themselves are in government or not. This is especially relevant to supporting the work of the National Anti-Corruption Commission.

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

There are limited options for the establishment of an appropriate body.

One option remains the **National Anti-Corruption Commission**, consistently with the view of the Senate Select Committee on a National Integrity Commission that this agency should be an 'umbrella agency with which all Commonwealth integrity and corruption complaints could be lodged', and from which support could be provided.[42]

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[41] 'Turnbull Government expands ASIC's armoury', Joint media release, Hon Scott Morrison MP, Treasurer, Kelly O'Dwyer MP, Minister for Revenue and Financial Services, 7 August 2018, http://kmo.ministers.treasury.gov.au/media-release/092-2018/.

[42] Senate Select Committee on a National Integrity Commission, Report, 2017, pars 4.136 and 4.144.

Proposals for inclusion of a federal Whistleblower Protection Commissioner in the new national integrity agency were moved in the *National Integrity Commission Bills 2018* and *Australian Federal Integrity Commission Bill 2021* by Independent MPs Cathy McGowan and Dr Helen Haines, and the Greens. While neither government proceeded with this model, despite the then Labor Opposition supporting it in the Senate, this remains one option.

However, without great care in the way in which the function is independently constituted, there are significant factors mitigating *against* combining the whistleblower protection functions with those of **any existing investigative agency**. This includes both the NACC, and the Ombudsman.

As investigators of disclosable conduct, it is important that these agencies are perceived as impartial, as well as avoiding the risk of a conflict of roles – either because the investigating body takes action perceived to favour, act on behalf of, or advocate for a whistleblower, or is forced to compromise its support for a whistleblower in order to prioritise its primary investigation. Both these problems arose recently in Queensland (see **case study** below).

There are also further reasons why existing integrity agencies such an Ombudsman's office and IGIS may not be well placed to take on more proactive whistleblower protection functions:

- While they can make recommendations, they do not have powers to take legal action or make binding orders against individuals or agencies to enforce protections
- They typically reactively respond to a complaint being made, when detriment to a whistleblower has already occurred, rather than exercising early intervention powers to prevent harm from occurring
- Assessment, communication and investigation processes and timeframes are not well aligned with consider the acute support needs of a whistleblower in a workplace
- Resources are frequently under pressure for use on other organisational priorities
- Decisions about which matters to deal with are also often made considering broader strategic priorities, rather than simply protection of whistleblowers as a core function
- Administrative complaint-handling and investigation staff typically lack the knowledge and capability to deal with employment-related matters or disputes, provide practical support or legal aid, or conciliate.

If established as part of any existing agency, the WPA would still need to be a fully independent integrity or regulatory agency at arm's length from government, with the function given to a special, permanent statutory officer or commissioner supported by a sufficient 'ring-fenced' budget and staff, co-located with the host agency but not subject to its direction, nor redirection onto other functions.

On balance our view is that the functions would be best established in a new independent agency, especially as the ultimate scope and resources of such an agency would appear to justify this (see below). Enshrining whistleblower protection functions in an existing integrity agency is likely to cause greater tensions than any conflicts of interest that may arise by housing all relevant whistleblower functions (such as support, conciliation and enforcement) in a new independent agency – as has been shown to work, for example, in the case of the US Office of Special Counsel. While mechanisms would be needed to ensure close cooperation between the agency and a large number of other existing integrity agencies, that is little different than if the agency was co-located within just one of those agencies.

Case study: The Queensland CCC's investigations of Logan City Council

In 2017, Ms Sharon Kelsey, Chief Executive Officer (CEO) of Logan City Council, made internal disclosures followed by a PID to the Queensland Crime and Corruption Commission (CCC) and to the Mayor and Councillors of Logan City Council, alleging that the Mayor had engaged in corrupt conduct. Despite maintaining his innocence for several years, the Mayor eventually pleaded guilty to corruption offences.

However, Ms Kelsey's employment was terminated not long after her initial disclosures, in February 2018 by vote of the Logan City Council. In April 2019, the Mayor and seven Logan City Councillors were charged with fraud by dishonestly causing a detriment against Ms Kelsey. They effect of the charging was that they were immediately suspended as councillors, the council was dissolved and an interim administrator appointed.

Following complaints by the Local Government Association of Queensland, the Parliamentary Crime and Corruption Committee (PCCC) commenced an inquiry into the CCC's investigation of Logan City Council. The inquiry found that the CCC acted outside its powers in assisting Ms Kelsey with proceedings before the Queensland Industrial Relations Commission (QIRC) in relation to reprisal and reinstatement as CEO, and by charging the Councillors and Mayor. This is despite the CCC making a necessary decision not to formally pursue remedies for the treatment of Ms Kelsey in the QIRC, which it had power to do, because doing so could have compromised its primary job of investigating the Mayor's alleged corruption.

While the findings of the PCCC are questionable, this matter demonstrates the consequences of the potential conflict – even if merely perceived – in functions between investigation and protection roles. Any enhanced protection roles, as outlined above, must be expressed legislatively and located functionally in a manner that fully recognises and deals with the real potential for such fundamental conflict.

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 WPA should act as a clearinghouse 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. For this purpose, anyone 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.

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 detriment in their organisation or career.

In addition, to help prevent agencies from undertaking avoidable detrimental actions, formal prosecution or legal action against persons who have made a PID should not be able to be taken by agencies, unless they can first demonstrate to the WPA that the legal action is not linked in any way to the making of the PID.

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?

These issues are largely addressed above. It should be also noted that the role of the WPA would not be to investigate primary wrongdoing allegations, other than to assess that the discloser is entitled to protections or ensure that the allegations were in fact dealt with. Primary investigation would remain the role of existing investigative or oversight agencies.

Any coordination risks are no greater than already exist in a multi-agency system, irrespective of where the WPA function is located. The role of the WPA would include plugging or bridging gaps in that system, giving it a primary responsibility and incentive to actively address coordination and communication issues in favour of agreed outcomes.

4.4. Scale, resources and next steps

Final decisions about the constitution and location of an enhanced WPA function will obviously need to be made in light of the scale of need which the agency is intended to fill – defined in terms of not only the functions to be fulfilled, but the scope and number of cases it is expected to deal with, dependent on it also being given the resources to properly promote its functions.

This may include different scales of resources for different functions – ranging from advice and support functions for very large numbers of potential whistleblowers, to conciliation, investigation and litigation functions in relation to a smaller (but more resource intensive) number of actual whistleblowers, facing or experiencing detrimental treatment.

Even if the jurisdiction of the WPA is confined to the core Commonwealth public sector, it is clear from our earlier analysis that the scope is still such that it will need to deal with substantially more than just the **50 or so** cases of alleged reprisal which are currently arising annually, but not properly dealt with, under the existing PID regime.

Rather, as indicated in **Figure 2** (section 3), a better minimum estimate of the target population requiring active support and protection from an independent agency would be in the order of the **1,500 or so** Commonwealth whistleblowers who, without intervention, can be predicted to experience serious detriment for which they will receive no remedy. The primary mission of the WPA would be to change this situation by ensuring that, under an enhanced Act:

1. More disclosures are properly identified as subject to the Act, triggering verifiable risk assessment and mitigation responses at agency level
2. Whistleblowers at higher risk of detrimental outcome are more actively monitored with independent verification of steps taken to support and protect them
3. Agencies are given more active support in their management decisions to prevent adverse decisions with respect to whistleblowers
4. More cases of alleged unfair/detrimental treatment are independently investigated, and/or conciliated, to ensure that remedies are facilitated where warranted
5. Cases of egregious detrimental treatment, if resisted by agencies, are fully litigated in civil proceedings, to obtain suitable remedies and establish the precedents that will guide agencies in the future regarding the expected standard of care (and potential liability if they fail).

As noted earlier, the indicative number in Figure 2 is likely an underestimate, but well and truly justifies the need for an independent body with substantial resources of its own.

Further, this number does not include any of the potential caseload, if or when the jurisdiction of the WPA is extended to Commonwealth contractors (which should be from the outset) or to the wider private sector, as recommended by the Parliamentary Joint Committee. If or when the WPA is properly established to enforce whistleblower protections applying in any sector – at whatever stage of reform – then it becomes further unlikely that any existing agency is appropriate for performing these functions, and that an independent agency will be required.

The key question for government becomes whether, or how, to commence establishing these protection functions in a way that will enable them to be scaled up to fulfil these full needs, in time. This is as opposed to establishing limited, jurisdiction specific functions that are not then suitably configured for extension to further sectors, or have to be duplicated, for additional cost but lower effectiveness for different sectors.

We recommend taking the time to get the design of a whistleblower protection authority right, in line with the further stages of law reform needed to achieve consistent protections across all federal regimes, so that the authority can be established with all the powers and resources needed to do its job properly. The alternative approach is to risk establishing a limited 'quick and dirty' whistleblowing enforcement function, simply for the public sector, which is not properly resourced and, once again, not fit for the ultimate purposes it is meant to perform.

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

Finally, we strongly support the establishment of a reward scheme as part of the solution to identifying sufficient resources to support a strong whistleblower protection function.

The Parliamentary Joint Committee unanimously recommended the establishment of a reward scheme to help fund whistleblowers, which would be administered by the WPA, using funds generated from the recovery of penalties, assets, settlements or losses from companies or wrongdoers as a result of enforcement actions triggered by those whistleblowers.[43] 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.

This proposal is especially appropriate for whistleblowers located in the private sector – including among Commonwealth contractors – from which these 'returns on investment' are most likely to be generated. However, other mechanisms could also be used to estimate the savings to the Commonwealth generated by effective whistleblowing actions, in order to capture a proportion of these to fund whistleblower support (such as the more than $1.8 billion in compensation that would have been prevented if staff complaints against Robodebt had been heeded).

If well designed, a reward scheme has the potential to help fund whistleblower protections, more broadly, if not only the individual whistleblower but the WPA itself has access to the proceeds of corruption and penalties or financial recoveries stemming from whistleblowing disclosures. In this way, the costs of support and compensation for a far wider range of whistleblowers could be met,

[43] Parliamentary Joint Committee, Recommendation 11.1, p.138.

from the proceeds of whistleblowing, than simply those individual whistleblowers whose specific cases result in penalties or clearly quantifiable rewards.

Inevitably, a critical factor determining the scale at which the WPA is established to operate, is the amount of public funds that the government is prepared to make available for the purpose – as discussed in **Appendix 3** ('The last great opportunity? Penetrating the politics of whistleblower protection' (*Australian Quarterly,* January 2024).

A benefit of incorporating a reward scheme in the design of the new institutional arrangements, is that such rewards are typically calculated as a proportion of the quantifiable benefit that flows to the Commonwealth, taxpayers and the wider community from the corrective actions taken to address the wrongdoing identified by whistleblowers. This is a fundamental reminder that whistleblower protection is not simply a cost on taxpayers, but an investment in much bigger benefits and savings.

We suggest that necessary next steps could include:

- a more complete cost-benefit analysis of the current and potential benefits to the Commonwealth of enhanced whistleblowing regimes, undertaken by the Productivity Commission or another suitable expert team; and
- more detailed costing of what it would take to fulfil the WPA's functions at a scale that would have a worthwhile impact in realising those benefits, reducing costs via prevention of reprisals, and delivering the intended remedies – irrespective of the process or staging that is proposed to be followed to establish its functions.

We trust these submissions are useful to the Department and are happy to further assist.