Human Rights Law Centre

Griffith UNIVERSITY

TRANSPARENCY INTERNATIONAL AUSTRALIA

Senator Nita Green
Chair, Senate Legal and Constitutional Affairs Committee
Parliament House
Canberra ACT 2600

20 January 2023

Dear Chair,

The Human Rights Law Centre, Centre for Governance and Public Policy at Griffith University and Transparency International Australia welcome the opportunity to make this joint submission to the Senate Legal and Constitutional Affairs Committee for its inquiry into the *Public Interest Disclosure Amendment (Review) Bill 2022*.

In support of our submission, we **enclose** our report *Protecting Australia's Whistleblowers: The Federal Roadmap* (***Roadmap***), first published in November 2022, which provides further detail and references on several of the key issues. This is an updated version of the *Roadmap* report, identifying which of the whistleblowing law reform priorities for the Commonwealth are addressed by the present Bill. We trust the updated report will be a useful aid to the Committee's deliberations.

Kind regards,

Kieran Pender
Senior Lawyer
Human Rights Law Centre

Professor A J Brown, Griffith University
Boardmember, Transparency
International Australia

Alice Drury
Acting Legal Director
Human Rights Law Centre

Clancy Moore
Chief Executive Officer
Transparency International Australia

Stronger Whistleblower Protections: A First Step?

Submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the *Public Interest Disclosure Amendment (Review) Bill 2022*

Human Rights Law Centre

Centre for Governance and Public Policy, Griffith University

Transparency International Australia

January 2023

Authors

Kieran Pender, Senior Lawyer, Human Rights Law Centre

Dr A J Brown, Professor of Public Policy and Law, Centre for Governance and Public Policy, Griffith University; Boardmember, Transparency International Australia

Human Rights Law Centre
The Human Rights Law Centre uses a strategic combination of legal action, advocacy, research, education and UN engagement to protect and promote human rights in Australia and in Australian activities overseas. Our vision is an Australian democracy in which civil society is robust and vibrant; public debate is informed, fair and diverse; government is open and accountable; and the wellbeing of people and the planet are at the heart of every government decision. Our work includes supporting whistleblowers, who are crucial to shedding light on and ensuring accountability for government and corporate wrongdoing and systemic failures.

Centre for Governance and Public Policy
The Centre for Governance and Public Policy at Griffith University is an outstanding intellectual environment for world-class research engaging international scholars and government and policy communities. We examine and critique the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures. Working closely with governmental and non-governmental partners, we make a tangible mark on governance research.

Our Australian Research Council-funded research into whistleblowing includes the *Whistling While They Work #1* and #2 projects, undertaken in collaboration with public integrity and regulatory agencies across Australia – the world's largest and most comprehensive studies in the field (see www.whistlingwhiletheywork.edu.au). This research fundamentally informed both the case for the original *Public Interest Disclosure Act 2013* and the more recent *Corporations Act* reforms in 2019, among other state, national and international reforms.

Transparency International Australia
Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system.

Transparency International's substantial research and policy advice includes the Best Practice Guide for Whistleblowing Legislation (2018), alongside TI Australia's own country specific research and contributions dating back to the first Australian Standard on Whistleblower Protection (2004).

Executive Summary

Australia's whistleblower protection laws are not working. Reform is urgent and long overdue.

This Bill to amend the *Public Interest Disclosure Act 2013* (Cth) (***PID Act***) can be an important first step to address shortcomings in public sector whistleblower protections. Our organisations support the proposed amendments in principle, subject to revisions outlined in our submissions to better align the amendments with the spirit of the underlying Moss Review recommendations and developments since that Review.

However, as outlined in our recent report, *Protecting Australia's Whistleblowers: the Federal Roadmap* (updated version **enclosed**), it is clearly time for a major review, not only of the public sector *PID Act* regime in isolation as announced so far by the Government, but of the regimes of related, consistent and inconsistent whistleblower protections across Commonwealth regulation, including common questions of best practice standards, enforcement and implementation – as previously recommended by other parliamentary committees.

The updated *Roadmap* highlights that of the **21 areas of reform** needed to achieve effective Commonwealth whistleblower protections across the public, private and not-for-profit sectors, this Bill only implements:

- **one** step in full (expansion of the public sector definition of 'detriment'); and
- **four** steps in part (for the public sector, ensuring a 'no wrong doors' approach to whistleblower protections; increasing powers and resources for training and oversight; enhancing information-sharing and ability to access support; and excluding solely individual employment grievances).

We call on the Committee to support a clear, ambitious vision for the comprehensive reform needed, and help identify the enhanced, transparent, whole-of-government processes that will enable the Government and Parliament to achieve a system of truly world-leading whistleblower protections across the Commonwealth's field of responsibilities, supported by a whistleblower protection authority, within this parliamentary term.

The Australian public, and Australia's whistleblowers, deserve nothing less.

Our detailed submissions concern:

1. The need for a comprehensive parliamentary process and approach;
2. The need for an integrated, whole-of-government implementation process;
3. Support for a whistleblower protection authority;
4. Extension of the *PID Act* to all public officials including all anti-corruption whistleblowers, parliamentary and court staff'
5. A more fit-for-purpose exclusion of solely personal work-related grievances from the *PID Act*;
6. Ensuring a consistent personal work-related grievances exclusion in the *Corporations Act*;
7. Support for the expanded, consistent definition of 'detriment'; and
8. Support for the remainder of the Bill, subject to a clearer process for comprehensive reform.

Recommendations

1. That in light of the many critical issues that the *Public Interest Disclosure Amendment (Review) Bill 2022* does not address, the Parliament facilitate effective and comprehensive reform of Commonwealth whistleblower protection laws by establishing a Joint Select Committee to report on the issue in 2023, with terms of reference to include:

    - The scope of laws requiring reform;
    - The simplicity and intelligibility of current and proposed protections;
    - Principles to guide the establishment of state-of-the-art protections;
    - Priority areas for consistency between public and private sector laws;
    - How to re-establish a comprehensive approach in each of the public and private/not-for-profit sectors, including single laws for each sector as recommended by previous parliamentary committees;
    - Best practice institutions for implementing and enforcing whistleblower protections within and across the sectors;
    - Progress with the implementation of previous parliamentary committee recommendations; and included in the above:
    - What further areas should be priorities for reform beyond the current *Public Interest Disclosure Amendment (Review) Bill 2022*.

2. That the Government progress the required comprehensive approach to reform by enlarging the 2024 statutory review of the *Corporations Act 2001* (Cth) (private sector) whistleblowing protections to include how best to achieve and implement consistent, high quality, effective whistleblower protections across all Commonwealth laws, including the broader reforms needed to the *PID Act*, in response to the Joint Select Committee.

3. That the Government enhance its process for considering whether there is need for an independent whistleblower protection authority or commissioner, to include:

    - Clear terms of reference developed with bipartisan and public consultation;
    - Clear consideration of not simply the need but preferred options for best practice institutional arrangements to better implement and enforce protections in Commonwealth laws;
    - Strong whole-of-government mechanisms for ensuring needs and options are fully and expeditiously mapped across Commonwealth law and regulation;
    - Clear mechanisms for ensuring international experience and expertise are used to fully inform design of Australia's options; and
    - A clear process for feeding the results of the Government's research and recommendations on this issue into the comprehensive reform process above, to arrive at a coordinated outcome and clear forward reform agenda for this or the next parliament.

4. That given the Government's priority of improving public sector *PID Act* protections in time to support commencement of the National Anti-Corruption

Commission in 2023, the *Public Interest Disclosure Amendment (Review) Bill 2022* be extended to make clear that the full protections of the *PID Act* apply to:

- Any public official who discloses corrupt conduct as defined by the National Anti-Corruption Commission Act 2022 (currently, internal disclosures of corrupt conduct by or involving members of parliament or third parties still do not trigger the protections);
- Any parliamentary staff who blow the whistle on disclosable conduct (still proposed to be totally excluded from the definition of 'public official' who can claim the Act's protections); and
- Any public official, including parliamentary staff or court staff, who blow the whistle on disclosable conduct in or affecting the federal judiciary, given progress towards the proposed federal Judicial Conduct Commission.

5. That proposed sections 29(2A) and 29A of the *PID Act* be redrafted to better achieve the Moss Review's recommendation to exclude matters that are solely personal work-related grievances, by:

    - Expressly including the language of 'solely' or 'only' as recommended by the Moss Review;
    - Retaining the clearer language of 'grievance' (as used by the Moss Review and the equivalent s.1317AADA of the *Corporations Act)*;
    - Adopting more precise language and/or construction to specify when a personal work-related grievance may nevertheless still attract the *PID Act* protections and processes; and
    - Making explicit that if a matter may involve *both* disclosable conduct *and* a personal work-related grievance, then *PID Act* protections and oversight still apply to the entire matter.

6. That the revised *PID Act* exclusion for solely personal work-related grievances be replicated simultaneously in the *Corporations Act*, to provide a consistent, improved test across both regimes.

7. That the proposed amendment to expand the definition of 'detriment' in the *PID Act* be strongly supported, including for the advantage of securing greater consistency between the *PID Act* and *Corporations Act* regimes.

8. That the remaining proposed amendments, which provide for greater flexibility in the management of disclosures, stronger oversight and monitoring of the administration of disclosures by the Commonwealth Ombudsman and Inspector-General for Intelligence of Security, and other miscellaneous minor changes, also be supported.

Introduction

Public interest whistleblowers make Australia a better place. They should be protected, not punished. However, it is clear Australia's whistleblower protection laws are not fulfilling their beneficial intent, and that serious, comprehensive reform is needed across multiple areas of Commonwealth law to achieve this outcome.

Our organisations welcome the *Public Interest Disclosure Amendment (Review) Bill 2022 (***the Bill**) as a sign of the Government's commitment to embark on such reform. However, the Bill itself contains only very limited steps towards improved protections.

This is clear from the **enclosed** updated version of our report, *Protecting Australia's Whistleblowers: The Federal Roadmap* (***Roadmap***), originally published on 23 November 2022. The *Roadmap* report and its supporting research and references provide further detail in support of each of our submissions below.

More broadly, however, the updated *Roadmap* highlights that of the **21 areas of reform** needed to achieve effective Commonwealth whistleblower protections across the public, private and not-for-profit sectors, this Bill only implements:

- **one** step in full (expansion of the public sector definition of detriment, to match the private sector definition: see Recommendation 7 below); and
- **four** steps in part (for the public sector, ensuring a 'no wrong doors' approach to whistleblower protections; increasing powers and resources for training and oversight; enhancing information-sharing and ability to access support; and excluding solely individual employment grievances: see Recommendations 4,5,6 and 8 below).

See Figure 1 below (updated *Roadmap* checklist, p.21).

We appreciate the Attorney-General's statements that this Bill is only a 'first stage' of reform, making 'priority amendments' to the public sector *Public Interest Disclosure Act 2013* (Cth) ***(PID Act)*** in order to implement 'key recommendations' of the 2016 **Moss Review** of that Act in time for some immediate improvements to be in place when the National Anti-Corruption Commission commences in mid-2023.

The Government has also announced its 'significant package of public sector whistleblowing reform' will then include a second stage in 2023, after passage of the Bill, to involve:

- 'redrafting the PID Act to address the underlying complexity of the scheme and provide effective and accessible protections to public sector whistleblowers' and
- 'a discussion paper on whether there is a need to establish a Whistleblower Protection Authority or Commissioner'.

These commitments are further signs of the welcome recognition of the Government regarding the importance of strong whistleblower protections. When passed in 2013, the *PID Act* was a landmark development for federal whistleblowing, but it has fallen seriously short in practice.

Figure 1: Protecting Australia's Whistleblowers: The Federal Roadmap Report Checklist (updated)

This table provides a breakdown of what proposed or completed federal reforms would achieve, in relation to this roadmap, since first published in November 2022. As at January 2023, the items marked as on track to be achieved (partly, substantially or wholly) reflect the reforms contained in the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth).

		Sector(s)	
		Public	Private and Not-for-profit
Effective Administration and Enforcement			
1.	Establish a whistleblower protection authority	■	■
2.	Ensure a 'no wrong doors' approach	☑	■
3.	Increase powers and resources for training and oversight	☑	■
4.	Enact a single law covering all non-public sector whistleblowers		■
Best Practice Protections			
5.	Clarify immunities from prosecution	■	■
6.	Simplify proof requirements for remedies and compensation	■	■
7.	Enforce a positive duty to support and protect whistleblowers	■	■
8.	Ensure easier, consistent access to remedies	■	■
9.	Enhance information-sharing and ability to access support	☑	■
10.	Expand the definition of detriment	☑	
Workable Thresholds and Limitations			
11.	Properly protect public and third party whistleblowing	■	■
12.	Exclude solely individual employment grievances	☑	

Status

☑ Partially

☑ Substantially/wholly

However, now is the time for the Government and Parliament to embark on major review, not only of the public sector *PID Act* regime in isolation, but the quality of whistleblower protections and their enforcement across Commonwealth regulation.

In our view, the strengths, limits and deficiencies in the present Bill, addressed in our submissions below, confirm that more is needed to ensure the present approach to reform does not once again achieve only piecemeal and partial results – failing to

secure the necessary scope of reform across government, preventing the Government from achieving its stated intent and failing to realise the opportunity for Australia to return to its position as a world-leader in whistleblower protection, within the term of this Parliament and beyond.

While we support passage of the Bill (subject to the submissions below), we consider it important for the Committee to articulate a clear view of how it considers effective reform of Commonwealth whistleblower protection laws can and should be best progressed by the Parliament. This is especially the case given:

- The limited improvements provided by this Bill;
- The absence of public detail to date regarding the remainder of the Government's proposed reform process; and
- The Government's indications that its forthcoming process remains limited only to the public sector, when a much broader view is required.

We trust the following recommendations will assist the Committee.

1. Need for a comprehensive parliamentary process and approach

Recommendation 1: That in light of the many critical issues that the Public Interest Disclosure Amendment (Review) Bill 2022 does <u>not</u> address, the Parliament facilitate effective and comprehensive reform of Commonwealth whistleblower protection laws by establishing a Joint Select Committee to report on the issue in 2023, with terms of reference to include:

- *The scope of laws requiring reform;*
- *The simplicity and intelligibility of current and proposed protections;*
- *Principles to guide the establishment of state-of-the-art protections;*
- *Priority areas for consistency between public and private sector laws;*
- *How to re-establish a comprehensive approach in each of the public and private/not-for-profit sectors, including single laws for each sector as recommended by previous parliamentary committees;*
- *Best practice institutions for implementing and enforcing whistleblower protections within and across the sectors;*
- *Progress with the implementation of other previous parliamentary committee recommendations; and included in the above:*
- *What further areas should be priorities for reform beyond the current Public Interest Disclosure Amendment (Review) Bill 2022.*

As identified in our *Roadmap* report, the majority of problems with whistleblower protections in Commonwealth laws are not unique to the public sector *PID Act*, which is the focus of this Bill. Rather, they are shared across numerous areas of Commonwealth legislation, with current and potential inconsistencies between the protections in different Commonwealth laws, also now a problem in its own right.

The reform required to properly protect and empower Australian whistleblowers in any sector – public, private or not-for-profit – is therefore not limited to the public

sector under the *PID Act*. Effective reform needs to be progressed comprehensively, with due regard to the need for consistency across sectors.

Nor is the required reform limited to the remaining recommendations of the 2016 Moss Review – which was only ever an initial review of the operation of the *PID Act*, undertaken just three years after its enactment, since which time there have been seismic changes in whistleblower protection standards domestically and internationally. These include legislative change in the European Union following *Directive 2019/1937 on the protection of persons who report breaches of Union law* (***EU Directive***) and developments in other parts of the world, including the United States, long a world-leader in whistleblower protections.

This more complex landscape was recognised by the landmark Parliamentary Joint Committee on Corporations and Financial Services inquiry, *Whistleblower protections in the corporate, public and not-for-profit sectors* (2017). This followed on prior parliamentary committee inquiries by recommending:

- Upgraded approaches to protection;
- Areas where greater consistency is required between sectors;
- A single law to keep whistleblower protections consistent and coherent across the private and not-for-profit sectors (alongside the public sector);
- Establishment of a whistleblower reward scheme, across sectors; and
- Establishment of a whistleblower protection authority, across sectors.

Our *Roadmap* report highlights that in most areas, effective protections in the public sector cannot be pursued in isolation, would be insufficient even if they were, and will likely prolong inconsistencies and confusions which undermine protections in all sectors (see especially Points 1,2,5,6,7,8,9).

The Bill underscores the value of achieving consistent best practice by proposing a key change, to expand the definition of 'detriment' from which a whistleblower is legally protected, to match that in the *Corporations Act 2001* (see Recommendation 7 below). However, that is the only issue on which this Bill makes such an advance.

As in 2017 (and previously in 1994, 2009 and 2014 among other landmark reports), the Parliament through its multi-party committees has a crucial role to play in articulating the key principles for reform to address problems and needs across the whole community and Australian economy – as opposed to the piecemeal silos of law and regulation through which Government traditionally works.

The time is right for a far-reaching parliamentary inquiry for this purpose, including to update the recommendations of the 2017 Corporations and Financial Services Committee inquiry, and help set an agenda for whole-of-government reform in this or the next parliament.

2. Need for an integrated, whole-of-government implementation process

Recommendation 2: That the Government progress the required comprehensive approach to reform by enlarging the 2024 statutory review of the Corporations

Act 2001 (Cth) (private sector) whistleblowing protections to include how best to achieve and implement consistent, high quality, effective whistleblower protections across all Commonwealth laws, including the broader reforms needed to the Public Interest Disclosure Act, in response to the Joint Select Committee.

As indicated above (Introduction), the Government has so far indicated that it is only working towards a significant reform package for **public sector** whistleblower protections, in its second stage of reform to commence later in 2023.

However, in 2024, the *Corporations Act 2001* requires a statutory review to also be undertaken of the new whistleblower protections enacted by the Commonwealth for the private sector in 2019, in Part 9.4AAA of that Act and the *Taxation Administration Act 1953* (Cth).

Key issues to be addressed by that review will include:

- Similar deficiencies with the quality of protections shared between the *PID Act, Corporations Act* and *Taxation Administration Act*
- Key areas of ongoing inconsistency between the schemes
- The problem of other out-of-date, substandard whistleblower protections still existing in a multiplicity of Commonwealth laws affecting both private and public sectors, including the *Fair Work (Registered Organisations) Act, Aged Care Act,* and *National Disability Insurance Scheme Act*
- Whether there should be a single law for whistleblower protection for the private and not-for-profit sectors, as recommended by the 2017 parliamentary inquiry
- The performance of otherwise enhanced protections in the *Corporations Act*, relative to public sector schemes.

Already, in February 2019, then shadow Attorney-General Mark Dreyfus QC and financial services spokesperson Clare O'Neill committed a future Labor government to introducing a single whistleblower protection law across Commonwealth regulation of the private and not-for-profit sectors, in line with the 2017 Parliamentary Joint Committee recommendation.

This commitment recognised the need for protections to be as coherent, consistent, simple and accessible as possible across sectors, for the benefit of both employees and organisations.

In our view, progressing fundamental reform of the *PID Act* in isolation from these questions risks continuing rather than addressing existing fragmentation and inconsistency, as well as failing to arrive at clear, best practice protections across the board or potentially in any sector. This appears to be a real risk if different processes are undertaken to reviewing the same fundamental questions, by different Commonwealth departments, at different times over the next 2 years.

With as yet no detail published regarding either process by the Government, there is still opportunity to combine these processes in an enhanced whole-of-government approach which can reliably deliver simpler, more consistent, higher quality reform across all areas of Commonwealth whistleblower protection.

In our view, given the timeframes, there is also more likelihood of a quality outcome if *more* time is taken to address the further substantial reforms needed to the *PID* Act

through such an integrated process, rather than by proceeding only slightly sooner with a standalone process not geared to address the issues, evidence and experience shared across sectors.

3. Clear support for a whistleblower protection authority

> *Recommendation 3: That the Government enhance its process for considering whether there is need for an independent whistleblower protection authority or commissioner, to include:*
>
> - *Clear terms of reference developed with bipartisan and public consultation;*
> - *Clear consideration of not simply the need but preferred options for best practice institutional arrangements to better implement and enforce protections in Commonwealth laws;*
> - *Strong whole-of-government mechanisms for ensuring needs and options are fully and expeditiously mapped across Commonwealth law and regulation;*
> - *Clear mechanisms for ensuring international experience and expertise are used to fully inform design of Australia's options; and*
> - *A clear process for feeding the results of the Government's research and recommendations on this issue into the comprehensive reform process above, to arrive at a coordinated outcome and clear forward reform agenda for this or the next parliament*.

The establishment of a whistleblower protection authority is one of the most significant areas of reform needed, across all sectors of Commonwealth whistleblowing law – see *Roadmap*, Point 1.

We urge the Committee to add its support for this critical reform.

The inadequacy of current arrangements for enforcing whistleblower protections is reinforced by the fact that not a single attempt to secure remedies has been successful under the *PID Act* in the decade since it was enacted. Moreover, two federal whistleblowers, David McBride and Richard Boyle, continue to face criminal prosecution despite the demonstrated public interest in their disclosures. Important lessons for the practical operation of the criminal immunity provision in the *PID Act* have also been learnt from the Boyle prosecution, which are not addressed in this Bill. Extensive empirical research has also found that too many whistleblowers continue to face undeserved detrimental outcomes, for which they are receiving none of the remedies intended by the legislation. That must change.

We welcome the Government's intention to produce a discussion paper on whether there is a 'need' for a whistleblower protection authority to better implement and enforce these laws. However, such an authority was already recommended by the Parliamentary Joint Committee in 2017. Indeed, in February 2019, then shadow Attorney-General Mark Dreyfus QC and financial services spokesperson Clare O'Neill also announced a future Labor government would establish such an authority, suggesting the need was already well accepted.

The Government also already has the benefit of a concrete proposal for a whistleblower protection authority to which it can respond, in the form of Part 9 of the *National Integrity Commission Bills 2018* and *Australian Federal Integrity Commission Bill 2020*. Indeed, the then Opposition (now Government) voted in support of this legislation, enabling it to pass the Senate, in 2019.

In our view, it is clear that the more important question is *how* an effective whistleblower protection authority would be implemented, rather than whether one is needed.

The proposed discussion paper has also been described by the Government as being only part of its package of **public sector** reform, without reference to the role of such an authority for the private and not-for-profit sectors. This scope would be inconsistent with proposals to date, including the recommendations of the 2017 Parliamentary Joint Committee, which identified the need for an authority to enforce protections across Commonwealth law, i.e. in both the public and private sectors.

While it is therefore welcome that the Government plans to investigate and facilitate public discussion about this crucial reform, we consider that the intent underlying this Bill will only ultimately be achieved if this further work is undertaken as part of a robust, transparent, whole-of-government process which yields best practice results, in line with the recommendations above.

As the value of the present 'priority' amendments rests on confidence that further, more important reforms to the whistleblower protection regime will also occur, we urge the Committee to indicate its support for the strongest possible approach to this issue.

4. Extension of the *PID Act* to all public officials including all anti-corruption whistleblowers, parliamentary staff and court staff

Recommendation 4: That given the Government's priority of improving public sector PID Act protections in time to support commencement of the National Anti-Corruption Commission in 2023, the Public Interest Disclosure Amendment (Review) Bill 2022 be extended to make clear that the full protections of the PID Act apply to:

- *Any public official who discloses corrupt conduct as defined by the National Anti-Corruption Commission Act 2022 (currently, internal disclosures of corrupt conduct by or involving members of parliament or third parties still do not trigger the protections);*
- *Any parliamentary staff who blow the whistle on disclosable conduct (still proposed to be totally excluded from the definition of 'public official' who can claim the Act's protections); and*
- *Any public official, including parliamentary staff or court staff, who blow the whistle on disclosable conduct in or affecting the federal judiciary, given progress towards a federal Judicial Conduct Commission.*

It is crucial to an effective whistleblower protection regime that the scheme comprehensively cover all types of public official, in respect of disclosures of any

significant wrongdoing. This is reflected in the 'no wrong doors' approach to disclosure endorsed by successive reviews (see *Roadmap*, Point 2), which several of the amendments in this Bill also support (see Recommendation 8 below).

However, in our view the Bill omits priority reforms needed to establish and maintain this comprehensive coverage. The Government's approach suggests instead that different types and standards of whistleblower protection may be allowed to proliferate for different types of officials, depending on what they are reporting or disclosing – and in some cases still with no protections at all.

First, the Bill does not address – instead it extends – the problem that no public servant who blows the whistle on wrongdoing by elected members of parliament or their staff currently receives protection, because 'disclosable conduct' under the PID Act must be engaged in by 'an agency' or a public official within an agency. This still does not include the Parliament.

The recent partial exception to this is that any disclosure of corrupt conduct to the National Anti-Corruption Commission (a 'NACC disclosure') now attracts the protections of the Act, including conduct by parliamentarians and staff (s.26(1A) as inserted by the NACC *Consequential Amendments Act 2022)*. However, this only applies to disclosures made directly to the NACC itself. A public servant who discloses corrupt conduct by a parliamentarian or their staff *within their agency*, which is by far the most common route of first disclosure, remains unprotected unless and until they directly approach the NACC.

The continued exclusion of elected members and their staff from the scope of wrongdoing whose disclosure can attract protection undermines the credibility of the *PID Act* and should be addressed by a 'priority amendment' under this Bill. It is inconsistent with the approach in every Australian State and Territory, and with the original 2009 report on whistleblower protections by the House of Representatives Standing Committee on Legal and Constitutional Affairs, chaired by the now Attorney-General.

Second, the Bill at Item 88 proposes to amend s.69(4) of the *PID Act* to make clear that the staff of members of Parliament (those engaged under the *Members of Parliament (Staff) Act 1984* (***MoPS Act***)) are not 'public officials' who can receive protection if they disclose wrongdoing under the *PID Act*.

This explicit exclusion was recommended by the Moss Review, pending establishment of a parliamentary standards commission or other oversight body to which disclosures could be made by parliamentary staff (to which whistleblower protections could then be extended). The Explanatory Memorandum to the Bill states that the Government will consider further protection for *MOPS Act* staff in due course, pursuant to recommendation 23 in the Sex Discrimination Commissioner's 2021 *Set the Standard* report.

However, this reform consolidates the unique status of Parliament House as a 'black hole' for whistleblower protection, leaving those who work for members of Parliament uniquely vulnerable if they speak up about wrongdoing. This contrasts with 'Parliamentary Service employees' who *are* included within the scope of 'public official' – meaning that individuals working under the same roof have vastly different levels of legal protection. If a parliamentary service employee reports fraud or sexual harassment within their workplace, they will be protected against reprisal under the

PID Act; but if a *MoPS Act* political staffer in the same building reports the same wrongdoing, they have no such protections.

Third, the ability of public officials including court staff to blow the whistle on wrongdoing in the federal judicial system would also remain limited under the Bill. We note and welcome the Government's commitment to establishing a Judicial Conduct Commission, which reinforces that whistleblower protections will also be needed for that sector. As a matter of principle, there is no reason why court staff should not already benefit from the same whistleblower protections offered to other public servants.

These additional priority amendments would fill crucial gaps in protection which currently undermine the value and credibility of the *PID Act* regime. We do not agree with the Government's view, stated in the Explanatory Memorandum, that it is enough for these matters to be considered at a later date.

Further, we do not accept the argument in the Moss Review and the Explanatory Memorandum that including these employees first requires the establishment of an appropriate oversight body, such as an Independent Parliamentary Standards Commission. This is also a potential recipe for further piecemeal reform in which separate whistleblower protections are added to new bodies for different topics – creating the same problems of inconsistency and confusion that affect the private and not-for-profit sectors – rather than making consistent, high quality whistleblower protections accessible in a single *PID Act*. In any event, the absence of specialist bodies for these types of disclosure does not preclude expansion of the *PID Act*'s protections, as demonstrated by comprehensive state whistleblowing legislation. It is unsatisfactory that the level of legal protection available to different Commonwealth employees who witness and report wrongdoing can still depend on (a) their particular employment status; and (b) the particular employment status of those responsible.

5. A more fit-for-purpose exclusion of solely personal work-related grievances from the *PID Act*

Recommendation 5: That proposed sections 29(2A) and 29A of the PID Act be redrafted to better achieve the Moss Review's recommendation to exclude matters that are solely personal work-related grievances, by:

- *Expressly including the language of 'solely' or 'only' as recommended by the Moss Review;*
- *Retaining the clearer language of 'grievance' (as used by the Moss Review and the equivalent s.1317AADA of the Corporations Act);*
- *Adopting more precise language and/or construction to specify when a personal work-related grievance may nevertheless still attract the PID Act protections and processes; and*
- *Making explicit that if a matter may involve both disclosable conduct and a personal work-related grievance, then PID Act protections and oversight still apply to the entire matter.*

The Bill proposes to amend s.29 of the *PID Act* and insert a new s.29A to exclude personal work-related conduct from the scope of the law. This is defined as an act or omission by a public official occurring in relation to or in the course of another public official's employment, appointment or engagement that would have, 'or would tend to have, personal implications for the [latter official]': proposed s.29A. The Bill includes indicative examples, such as interpersonal conflict (including 'bullying or harassment'), disciplinary action and matters relating to promotions, suspensions etc. Proposed s.29(2)(2A) then provides that personal work-related conduct is not disclosable conduct unless it constitutes taking a reprisal, or 'is of such a significant nature that it would undermine public confidence in an agency … or has other significant implications for an agency'.

We support the intent of these amendments, as outlined in Point 12 of our *Roadmap* report. The relevant Moss Review recommendation addressed concerns that the scope of disclosable conduct attracting *PID Act* protections was so broad, it risked being overwhelmed by personal employment grievances which were better addressed by other mechanisms.

However, any amendments which narrow the scope of whistleblower protections must be undertaken with great care. We do not consider the 'carve-out' proposed in the revised s.29 and s.29A to be the appropriate approach. The proposed exclusion of 'work-related conduct' is both very broad, going beyond the spirit of the Moss recommendation, and very vague as to when the disclosure of such conduct may nevertheless still attract protection.

We consider this complex drafting will not translate into effective implementation, as experience indicates it will encourage some agencies to treat anything that involves work-related personal conduct as being excluded from *PID Act* protection, even where there is a mix of work-related personal conduct and other (public interest) wrongdoing within a disclosure. Such mixed disclosures are the largest single category of disclosures, constituting around half of all whistleblowing cases, as our empirical research has shown (see *Whistling While They Work 2*).

Accordingly, s.29(2A) and s.29A of the *PID Act* require significant redrafting to better achieve the letter and spirit of the Moss Review's recommendation. Specifically, we call on the Committee to recommend that the exclusion of personal work-related grievances:

A. Be expressed using language that makes clear that only matters which are 'solely' or 'only' personal work-related grievances are excluded, consistently with the Moss Review (and similarly to a cognate exclusion already contained in the *PID Act:* s.31, Disagreements with government policies etc);

B. Retain the clearer language of 'grievance' (as used by the Moss Review and the equivalent s.1317AADA of the *Corporations Act)* to implement and communicate the intended limitation – as opposed to 'conduct' which is significantly broader, and could more easily prevent disclosure of any/all work-related disclosable conduct even if not solely involve an individual or personal grievance;

C. Adopt more precise language and/or construction to specify when a personal work-related grievance may nevertheless still attract the *PID Act* protections and processes, than the vague language of 'significance' proposed in s.29(2A)(b) (used differently and with less clarity even than the equivalent s.1317AADA of the *Corporations Act)*; and

D. Make explicit that if a matter may involve *both* disclosable conduct *and* a personal work-related grievance, then *PID Act* protections and oversight still apply to the entire matter – with the Act extended to provide greater flexibility for the use of alternative (non-*PID Act*) processes and timeframes to resolve work-related grievance components where appropriate, and with the whistleblower's consent, provided this remains under the supervision and monitoring of the relevant authorised officer(s) and oversight agencies.

In our view, redrafted provisions adopting these principles would appropriately balance the need to exclude *solely* personal work-related grievances from the scope of the *PID Act* while minimising the risk that meritorious disclosures are disregarded or miscategorised, or that work-related detrimental action against a whistleblower occurs because that grievance is wrongly perceived as able to be 'hived off' from a public interest disclosure when in fact they are connected.

6. Ensuring a consistent personal work-related grievances exclusion in the *Corporations Act*

> *Recommendation 6: That the revised* PID Act *exclusion for solely personal work-related grievances be replicated simultaneously in the Corporations Act, to provide a consistent, improved test across both regimes.*

The proposed drafting of s.29A in the Bill is somewhat based upon, yet in other respects different from, the corresponding provision in the *Corporations Act* inserted in 2019: s.1317AADA. While we consider the *Corporations Act* provision to be better, it still suffers from some of the same defects. What both regimes need is a clearer and simpler provision that better conveys the intended nature of the exclusion, in a way which cannot be misinterpreted and mis-implemented.

In the interests of consistency, it is then important that s.1317AADA of the *Corporations Act* be amended to bring it into line with a suitably revised personal work-related grievances exclusion in the *PID Act*. These are identical issues, so for the sake of simplicity and clarity they should be expressed the same way in the respective provisions. Otherwise, even minor differences of drafting are going to cause legal headaches and costs for no reason, when whistleblowers are forced to litigate what they mean in the respective provisions.

Just as this Bill adopts the *Corporations Act* definition of 'detriment', bringing some badly needed consistency to the *PID Act* (see below Recommendation 7), so too the best approach to excluding personal work-related grievances should be replicated in the *Corporations Act*. We urge that this parallel amendment take place as soon as possible, preferably at the same time as the passage of this Bill, as there is no reason why this issue should not be solved now rather than delaying this alignment until the results of further reform processes (which could still update the provision, in both Acts).

7. The expanded, consistent definition of 'detriment' be supported

> *Recommendation 7: That the proposed amendment to expand the definition of 'detriment' in the PID Act be strongly supported, including for the advantage*

of securing greater consistency between the PID Act and *Corporations Act regimes*.

Item 44 of the Bill will amend the *PID Act* to expand the definition of 'detriment' from which whistleblowers are legally protected, in a manner that would fully implement Point 10 of our *Roadmap*.

Currently, s.13(2) of the Act defines detriment as including 'any disadvantage', including dismissal, injury to employment, alteration of an employee's position or discrimination. Although the definition is inclusive, the indicative examples are substantially narrower than the equivalent provision in the *Corporations Act*; this focus on employment might by implication exclude personal and collateral disadvantage.

Section 1317ADA of the *Corporations Act*, in contrast, defines detriment to include 'harassment or intimidation', 'harm or injury … including psychological harm', 'damage to a person's property', 'damage to a person's reputation' and 'damage to a person's business or financial position'. The Bill will replicate this more appropriate, expansive definition. We strongly recommend the Committee support this aspect of the Bill, including for the advantages of greater consistency with the *Corporations Act* protections, discussed above.

8. The remainder of the Bill be supported, subject to a clearer process for comprehensive reform

Recommendation 8: That the remaining proposed amendments, which provide for greater flexibility in the management of disclosures, stronger oversight and monitoring of the administration of disclosures by the Commonwealth Ombudsman and Inspector-General for Intelligence of Security and other miscellaneous minor changes, also be supported.

The remainder of the Bill implements recommendations of the Moss Review to improve the management of disclosures, increase oversight and monitoring powers for the Commonwealth Ombudsman and Inspector-General for Intelligence of Security, and make miscellaneous minor and consequential changes.

We support these amendments, which go some way towards addressing Point 2 ('ensure a "no wrong doors" approach'), Point 3 ('increase powers and resources for training and oversight') and Point 9 ('enhance information-sharing and ability to access support') in the enclosed *Roadmap*.

However, we reiterate that these amendments will only have their ultimate desired effect if the substantial further reform is undertaken – in a comprehensive rather than piecemeal fashion – to address the unnecessary complexity of the *PID Act*'s disclosure management regime, the inadequacy of existing legal protections, the lack of effective remedial and enforcement arrangements, and the breadth of inconsistencies across federal whistleblowing laws which are not addressed by this Bill. It is time for a robust, transparent, comprehensive, whole of government process to fix whistleblower protections in Australia, to bring an end to the piecemeal approach which has led to so many of our current problems, and which some may argue is only continued by this Bill.