



**Australian Government**  
**Attorney-General's Department**

January 2023

# **Senate Legal and Constitutional Affairs Committee**

**Attorney-General's Department Submission**

## Introduction

The Attorney-General's Department welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the Public Interest Disclosure Amendment (Review) Bill 2022 (PID Bill).

This submission is intended to be considered in conjunction with the PID Bill and Explanatory Memorandum, and provides an overview of:

- the key features of the PID Bill
- how the PID Bill fits into a broader framework of initiatives to strengthen the Australian Government integrity framework
- the Government's staged approach to comprehensive public sector whistleblowing reform, and
- the steps the department, National Anti-Corruption Commission and Commonwealth departments and agencies will need to take to implement the amendments contained in the PID Bill.

Whistleblower protections play an important role in promoting the integrity of public institutions and ensuring public trust and confidence in those institutions by helping bring to light allegations of wrongdoing. The *Public Interest Disclosure Act 2013* (PID Act) seeks to encourage and facilitate reporting of wrongdoing by public officials by providing protections to public officials who make public interest disclosures and ensuring that Commonwealth agencies properly investigate and respond to such disclosures.

## Overview of the PID Bill

The PID Bill amends the PID Act to deliver priority reforms to the existing Commonwealth public sector whistleblowing framework established by the PID Act to:

- strengthen protections for public sector whistleblowers and introduce protections for witnesses, including by:
  - introducing a positive duty for principal officers to protect witnesses against reprisals, and to provide ongoing training and education to public officials in their agency
  - expanding the definition of 'detriment' that will attract remedies
- enhance oversight of the scheme by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security (IGIS)
- make the scheme easier for agencies to administer, including by:
  - facilitating the reporting and sharing of information related to public interest disclosures to ensure they can be properly addressed, and
  - improving the allocation and investigation processes for authorised officers and principal officers
- clarify the coverage of the legislation, and
- remove solely personal work-related conduct from the scope of the scheme.

The PID Bill would implement key recommendations of the 2016 *Review of the Public Interest Disclosure Act 2013* by Mr Philip Moss AM (Moss Review), as well as core recommendations of other inquiries into the operation of the PID Act (see **Attachment A** for a detailed overview of the key recommendations). These include:

- 21 of the 33 recommendations of the Moss Review to improve and strengthen the PID Act
- recommendations 10 and 11 of the 2020 Parliamentary Joint Committee on Intelligence and Security *Inquiry into the impact of the exercise of law enforcement and intelligence powers on the freedom of the press* (PJCIS Press Freedom Report) to improve oversight by the Inspector-General of Intelligence and Security (IGIS) of public interest disclosures within intelligence agencies and public oversight of the use of the public interest disclosure scheme through biannual reports to Parliament, and
- recommendations 6.1 and 6.3 of the 2017 Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into whistleblower protections in the corporate, public and not-for-profit sectors report* (PJCCFS Whistleblower Report) to clarify that former officials can make a public interest disclosure (PID) and expand the definition of ‘takes a reprisal’.

The PID Bill also contains a limited number of additional amendments to more closely align aspects of the PID Act with the private sector whistleblowing scheme in the *Corporations Act 2001* (Cth) where appropriate, and to improve the operation of the PID Act.

These amendments would deliver immediate improvements to the operation of the PID Act, and are intended to be in place prior to the commencement of the National Anti-Corruption Commission (NACC) in mid-2023. This will support whistleblowers and agencies engaging with the NACC, ahead of progressing broader reforms to comprehensively redraft the PID Act to address the underlying complexity of the scheme and provide effective and accessible protections for public sector whistleblowers.

## Alignment with broader integrity framework

In addition to the PID Bill, the Government is progressing a range of initiatives to strengthen the Commonwealth integrity framework, including:

- the establishment of the NACC following the passage of the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) and the *National Anti-Corruption Commission (Consequential and Transitional Provisions) Act 2022* (Cth) (NACC Consequential Act) in November 2022
- introducing new requirements under the *Public Governance, Performance and Accountability Rule 2014* for Commonwealth entities to take measures to prevent, detect and deal with corruption
- progressing Government-led recommendations in the *Set the Standard* report into Commonwealth Parliamentary workplaces by the Sex Discrimination Commissioner, Kate Jenkins, to ensure these workplaces are safe and respectful
- developing options to further enhance the integrity, accountability and transparency requirements of the *Commonwealth Grants Rules and Guidelines* (CGRGs), including consideration of the recommendations from the Joint Committee of Public Accounts and Audit Report No. 484, as well as recent recommendations from the Auditor-General’s Audit of the Building Better Regions Fund
- progressing reforms to the *Public Service Act 1999*, informed by the recommendations of the Thodey Review, as part of the broader APS reform agenda
- considering the merits and design of a federal judicial commission to address complaints about the conduct of federal judges, and
- ensuring that processes for appointments to key independent institutions are transparent and merit-based.

The PID Bill would complement and support the Government's broader integrity agenda, by making immediate amendments to the PID Act to strengthen the public sector whistleblowing framework.

## Staged approach to public sector whistleblowing reform

The Government has committed to a staged approach to reforming the PID Act. The PID Bill represents the first stage of this process, and will deliver immediate improvements to the PID Act.

The Attorney-General has announced that the Government will commence a second stage of reforms this year, following the passage of the PID Bill. This will involve comprehensively redrafting the PID Act to simplify its operation and address underlying complexity in the legislation to provide effective and accessible protections to public sector whistleblowers. The Government will also consult widely on the need to establish a Whistleblower Protection Authority or Commissioner.

As part of this second stage of reforms, the department intends to consider more complex, outstanding reforms and recommendations from the Moss Review and the PJCCFS Whistleblower Report (**Attachment A**).

The second stage of reforms will also provide an opportunity to consider the PID Act more broadly in light of the establishment of the NACC, the APS reform agenda, and the broader suite of measures that form part of the Government's broader integrity agenda—including those outlined above.

## Key features of the Public Interest Disclosure Amendment (Review) Bill 2022

The purpose of the PID Act is to promote integrity and accountability in the public sector by providing a framework for public officials to disclose suspected wrongdoing by another public official or by an Australian Government agency, and to ensure such disclosures are properly investigated. Importantly, the PID Act provides robust protections for current or former public officials who make qualifying public interest disclosures under the scheme, including protections against reprisal actions and immunity from civil, criminal and administrative liability for making the disclosure.

The PID Bill would implement key recommendations of the Moss Review and parliamentary committee reports, to make immediate improvements to the PID Act. The amendments contained in the PID Bill can be broadly grouped into the following categories, which are described further below:

- strengthening protections for public sector whistleblowers
- focusing the PID Act on the disclosure and investigation of wrongdoing that goes to the integrity of public officials
- simplifying the administration of the PID Act
- clarifying the coverage of the PID Act
- enhancing the oversight of the PID Act by the Commonwealth Ombudsman and the IGIS, and
- contingent amendments, contained in Schedule 4 of the PID Bill, to maintain the appropriate interaction between the NACC Act and PID Act.

## Strengthening protections for public sector whistleblowers and witnesses

A key focus of the PID Bill is to strengthen protections available for public sector whistleblowers under the PID Act, and to introduce protections for witnesses who provide information to support investigations arising as a result of public interest disclosures.

Part 3 of Schedule 1 of the PID Bill (Protection of disclosers and witnesses) would implement recommendations 20, 22 and 28 of the Moss Review and 6.3 of the PJCCFS Whistleblower Report, to:

- **Item 40:** extend protections under the PID Act to persons who provide assistance in relation to a public interest disclosure (collectively referred to as ‘witnesses’) to provide them with the same protections against reprisal action, and immunities, as a discloser under the PID Act
- **Items 41, 44 and 46:** expand the protections under the PID Act against ‘taking a reprisal’ against a whistleblower to align with the *Corporations Act 2001* (Cth) (Corporations Act), including the reprisals offences in section 19 of the PID Act, to:
  - provide protections for those who ‘could’ make a disclosure, in addition to existing protections for those who have made a disclosure—ensuring that protections under the PID Act extend to persons who may suffer a reprisal merely because they have become aware of information that could be disclosed under the Act
  - expand the existing offence for making a threat to cause detriment to include conduct that ‘results in’ a threat to cause detriment—ensuring that the offence applies to indirect threats, such as a senior official directing a more junior official to threaten detriment against a discloser, and
  - expand the definition of ‘detriment’ in relation to reprisal action to align it with the definition used in the Corporations Act and encompass a broader range of harm that whistleblowers may suffer when reporting integrity wrongdoing and corruption—ensuring that the protections under the PID Act extend beyond employment-related detriments (such as termination) to include matters such as harassment or intimidation, injury or harm (including psychological harm), damage to a person’s property, reputation, or business or financial position, or any other damage to a person
- **Items 54, 58 and 59:** introduce new and expanded obligations on principal and authorised officers and supervisors, to ensure people involved in processes under the PID Act are supported, including:
  - a new obligation on principal officers to support disclosers and witnesses
  - a new obligation on principal officers to provide ongoing training and education to public officials about integrity and accountability, as well as any necessary training for supervisors
  - extending the existing obligations on principal officers to take reasonable steps to protect public officials from reprisal action to include those who ‘could’ make a disclosure, and replicating that obligation for authorised officers—ensuring that these obligations align with the expanded scope of the protections, outlined above
  - a new obligation on supervisors to require them to explain the PID process to disclosers, including the available.

Together, these amendments would ensure that public sector whistleblowers and witnesses receive immediate, improved protections against a broader range of detriment, and further encourage and empower public officials to disclose wrongdoing.

## Focusing the PID Act on wrongdoing that goes to public officials' integrity

At present, the protections and investigative framework under the PID Act apply to a wide range of 'disclosable conduct', including any conduct that may result in disciplinary action against the public official (subparagraph 29(2)(b)). This was a feature of the PID Act when it was introduced, to encourage public officials to disclose all forms of wrongdoing in the workplace.

While, as the Moss Review notes, this broad scope aligns with the goal of a transparent and accountable public sector, the procedures under the PID Act are not best suited to resolving all instances of disclosable conduct currently able to be reported under the PID Act.<sup>1</sup>

The obligation to allocate and investigate disclosures in a particular manner, the secrecy offences contained in the PID Act, and the protections against 'reprisal action' can complicate or delay best practice conflict-management solutions that emphasise alternative dispute resolution or merits review processes, or that facilitate the timely, efficient and effective resolution of grievances. This is particularly the case for personal, work-related or employment grievances, such as allegations of bullying or harassment, interpersonal conflict, and the handling of employment, promotion and disciplinary matters, where there are well-established administrative and statutory frameworks for managing grievances, including under the *Public Service Act 1999*. As the Moss Review noted, the application of the substantive and procedural requirements of the PID Act—which can take up to 104 days to complete, or longer if the Commonwealth Ombudsman or IGIS grant an extension—to such matters can have the effect of prolonging the discloser's exposure to the situation they have reported.<sup>2</sup>

As such, Part 1 of Schedule 1 of the PID Bill (Personal work-related conduct) would implement recommendations 5 to 7 of the Moss Review, to:

- **Items 1, 3 and 4:** remove 'personal work-related conduct' from the scope of disclosable conduct, and
- **Item 2:** amend subparagraph 29(2)(b) to limit that provision to conduct which could result in termination of the official's employment or engagement.

In doing so, the PID Bill would focus the PID Act on forms of wrongdoing that go to the integrity of public officials' conduct, such as fraud and corruption. This approach recognises that the majority of personal work-related conduct could more appropriately be dealt with through other processes, including existing performance management and dispute resolution processes within agencies. These amendments would facilitate the efficient and effective resolution of disputes by enabling disclosures to be considered by the most appropriate body in the first instance, as opposed to using investigation processes under the PID Act which may not be best suited.

The PID Bill acknowledges that there would be instances where it remains appropriate for disclosures of 'personal work-related conduct' to be dealt with under the PID Act. Public sector whistleblowers would still be able to report personal work-related conduct under the PID Act where the conduct:

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<sup>1</sup> Moss (n 1) 30.

<sup>2</sup> Moss (n 1) 31.

- constitutes reprisal action (as defined in the PID Act)<sup>3</sup>—this would ensure that public sector whistleblowers continue to receive protections when they bring to light ‘personal work-related conduct’ that is experienced as a consequence of an initial disclosure, or
- is of such a significant nature that it would undermine public confidence in an agency or have other significant implications for an agency—this may include conduct that is of a systemic nature, that affects the management or control of the agency (or public confidence therein), or that is otherwise significant in nature.

Where a disclosure contains allegations of both personal work-related conduct and another form of disclosable conduct under the PID Act, the disclosable conduct would continue to be covered by the PID Act.

## Simplifying the administration of the PID Act

The Moss Review, parliamentary inquiries, and the Federal Court have concluded that the PID Act is overly complex.<sup>4</sup> These complexities impact the effectiveness of the scheme, including by discouraging public officials from reporting wrongdoing under the scheme, as well as complicating efforts by departments and agencies to consider, allocate and investigate disclosures.

As outlined above, the Government intends to redraft the PID Act as part of the second stage of reforms, including to address the underlying complexity of the scheme.

In the first stage of reforms, Parts 2 (Allocation and investigation of disclosures) and 4 (Reporting and sharing information) of Schedule 1 of the PID Bill would amend the PID Act to provide greater flexibility to agencies in how they handle disclosures.

### Allocation of disclosures

Items 11 and 19, in Part 2 of Schedule 1 of the PID Bill, would amend the current provisions that govern the process by which principal and authorised officers must allocate public interest disclosures. These items primarily seek to clarify key aspects of the existing operation of these provisions, and redraft them to improve their readability. However, these items also substantively amend these provisions to:

- **Items 11 and 19, in Part 2:** provide a discretion to officers exercising functions under the PID Act not to allocate or investigate, or to stop investigating, a disclosure if it would be more appropriately investigated under another law or power, and
- **Item 11, in Part 2:** enable an authorised officer to allocate a disclosure to another agency in the same portfolio, if the officer is satisfied that the other agency is better able to handle that disclosure.

The ability to not allocate a disclosure under the PID Act if it would be more appropriately investigated under another law or power implements recommendation 31 of the Moss Review. This reform is intended to enable

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<sup>3</sup> As currently defined by 13(1) of the PID Act, a person suffers reprisal action if another person, by act or omission, causes them any detriment because they believe or suspect that they have or may have made, or proposes to make a public interest disclosure. As noted, the PID Bill would expand this definition to align with the Corporations Act and provide protections for those who could make a disclosure as well.

<sup>4</sup> Moss (n 1) 6, 18-19, and 48; PJCCFS (n 1) 97 and 121; PJCIS (n 1) 115; *Applicant ACD13/2019 v Stefanic* [2019] FCA 548 per Griffiths J at [17].

agencies to more expediently divert disclosures outside of the PID Act at the allocation stage where they would be better addressed through alternative investigative mechanisms (for example, by the IGIS under the IGIS Act)—at present, such matters can only be dealt with by referring the matter once it been allocated for investigation.

To ensure transparency and accountability in exercising these new discretions, the PID Bill would provide for additional notice requirements on authorised and principal officers who decide not to allocate or investigate a disclosure. The PID Bill would provide that an authorised officer must give written notice to the discloser as soon as reasonably practicable after a decision is made not to allocate a disclosure. That notice must include the reason for not allocating a disclosure, and the details of any action taken or proposed to be taken to refer a disclosure to another law or power, or to facilitate such a referral. The authorised officer would also be required to notify the Ombudsman or the IGIS (as appropriate) of the same matters.

Similarly, the PID Bill would provide that if a principal officer exercises their discretion not to investigate, or to end an investigation, where they consider, on reasonable grounds, that the conduct would be more appropriately investigated under another law or power, the principal officer must refer the conduct or facilitate its referral for investigation under that other law or power (see item 23 of Part 2 of Schedule 1 of the Explanatory Memorandum). The principal officer must also notify the discloser and the Ombudsman or the IGIS (as appropriate) of the other law or power, the agency, person or body to which the disclosure has been, or is to be, referred, and any steps taken, or proposed to be taken, to refer the disclosure.

The ability to allocate a disclosure to another agency in the same portfolio (generally with the consent of the recipient agency, other than in the case of allocations by investigative agencies, such as the Commonwealth Ombudsman and IGIS) implements recommendation 14 of the Moss Review. This amendment is intended to enable smaller agencies to refer a disclosure to a portfolio department if they consider that, in their particular circumstance, they are unable to perform their obligations under the PID Act.

## **Information sharing**

The Moss Review also identified that improvements to the PID Act are required to better support its interoperability with other investigative regimes, including to support better information sharing between relevant agencies to ensure that a disclosure is handled by the most appropriate scheme.<sup>5</sup> An improved focus on interoperability is important in light of the recent establishment of the NACC, to ensure that the two schemes can interact effectively to support one another to address corruption and strengthen integrity in the public sector.

To improve the interoperability of the PID Act with other integrity schemes, the PID Bill would implement recommendations 4 and 16 of the Moss Review, to:

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<sup>5</sup> Moss (n 1) 6: The PID Act's interactions with other procedures for investigating wrongdoing are overly complex. Investigations into disclosures are often isolated from other integrity and accountability legislative frameworks by the operation of the secrecy offences. Key investigative agencies have been omitted. There is also a perception that the PID Act framework is legalistic, making it difficult to resolve a PID.



- **Item 63, in Part 4 of Schedule 1:** repeal the secrecy offence contained in section 65 of the PID Act to better support information sharing between agencies in relation to a disclosure, and
- **Items 63 and 64, in Part 4 of Schedule 1:** expressly authorise agencies to share relevant documents and information between agencies, including investigative agencies (currently the Office of the Commonwealth Ombudsman (OCO) and the IGIS), in particular circumstances.

Importantly, these amendments preserve the existing protections in section 20 of the PID Act relating to the disclosure of the discloser's name and contact details. Such information may only be disclosed in accordance with section 20 of the PID Act, or with the discloser's consent.

## Clarifying the coverage of the legislation

The PID Act was drafted as an integrity mechanism for the federal public service and designed to accord with the structure of federal departments and agencies. Part 7 of Schedule 1 of the PID Bill (Agencies, public officials, principal officers) makes a number of amendments to clarify the PID Act's coverage to the federal public sector. The majority of these amendments are technical in nature, and would update the PID Act to align with the *Public Governance, Performance and Accountability Act 2013*, ensuring that the terminology used in the PID Act to aligns with the Public Governance, Performance and Accountability Act.

Part 7 of Schedule 1 of the PID Bill also contains amendments, outlined further below, to:

- **Item 85:** make it clear that both current and former public officials may make public interest disclosures under the PID Act, and
- **Items 88 and 89:** explicitly provide that members of the judiciary, parliamentarians and persons employed or engaged under the *Members of Parliament (Staff) Act 1984* (MoP(S) Act) are not 'public officials' within the meaning of the PID Act.

### Former public officials

Item 85, contained in Part 7 of Schedule 1 of the PID Bill, implements recommendation 6.1 of the PJCCFS whistleblower report, by inserting a note following the definition of 'public official' to clarify that both current and former public officials can make disclosures under the PID Act. The note reflects the effect of existing sections 7 and 26 of the PID Act. This amendment would make clear that former public officials can obtain protections under the PID Act when they bring to light wrongdoing previously discovered in their capacity as a public official, even if they are no longer a public official.

### Persons employed or engaged under the MoP(S) Act

Items 88 and 89, contained in Part 7 of Schedule 1 of the PID Bill would explicitly provide that members of the judiciary, parliamentarians and persons employed or engaged under the MoP(S) Act are not 'public officials' within the meaning of the PID Act. In relation to judicial officers, this would clarify existing arrangements under the PID Act that judicial officers are not within the scope of the PID scheme.<sup>6</sup>

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<sup>6</sup> Subsection 32(1) of the PID Act provides that conduct is not disclosable conduct if it is conduct of a judicial officer. Subsection 69(4) of the PID Act also provides that a judicial officer is not a public official for the purposes of the Act.

The explicit exclusion of members of parliament and persons employed or engaged under the MoP(S) Act would implement recommendation 26 of the Moss Review. The Moss Review considered that disclosures by members of Parliament and their staff ‘should be scrutinised by the Parliament itself, not agencies within the Executive’.<sup>7</sup> The PID Act was not originally intended to capture allegations of wrongdoing by or about members of parliament or their staff members. These amendments confirm that position.

The Moss Review also recommended that consideration be given to extending the PID Act to members of parliament or their staff if an independent body with the power to scrutinise their conduct is created (recommendation 27). Referencing that recommendation, the *Set the Standard: Report on the Independent Review of Commonwealth Parliamentary Workplaces* (Set the Standard report) recommended that protections in the PID Act be extended to persons employed or engaged under the MoP(S). That report also considered that a federal anti-corruption commission (if established) and the proposed Independent Parliamentary Standards Commission (recommendation 22 of Set the Standard report) should be made authorised recipients of disclosures by MoP(S) Act staff.

The NACC Act will establish a federal anti-corruption commission of the kind contemplated in both the Moss Review and Set the Standard Report recommendations. MoP(S) Act staff who disclose corruption issues to the NACC will have access to strong protections under the NACC Act against reprisal and detriment for those disclosures. Consistent with the November 2022 update by the Parliamentary Leadership Taskforce established to implement recommendations from the Set the Standard report, the Government will consider further protections for MoP(S) Act staff who report misconduct in the context of implementing other recommendations in the Set the Standard report, in particular the establishment of the Independent Parliamentary Standards Commission.

## Enhancing the oversight of the PID Act

Effective oversight of the PID Act is necessary to ensure confidence in the integrity of the scheme. Parts 2 (Allocation and investigation of disclosures) and 5 (Roles of the Ombudsman and IGIS) of Schedule 1 of the PID Bill would enhance the oversight roles of the Commonwealth Ombudsman and the IGIS, by:

- **Item 28, in Part 2 of Schedule 1:** implementing recommendation 3 of the Moss Review, by requiring principal officers of agencies to provide a copy of all disclosure investigation reports to the Commonwealth Ombudsman or the IGIS (as appropriate) within a reasonable period of time, and respond to any recommendations that the relevant oversight agency makes in relation to the report—this amendment will enable proactive scrutiny of agencies’ investigations, and position the Ombudsman and IGIS to intervene to protect individuals or remedy errors, where required
- **Item 34, in Part 2, and item 70, in Part 5 of Schedule 1:** expressly setting out the role of the Commonwealth Ombudsman and the IGIS in receiving and investigating complaints about an agency’s handling of a disclosure, including making clear that complaints about the handling of a disclosure can be made to the Commonwealth Ombudsman under the Ombudsman Act, and the IGIS under the IGIS Act, and

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<sup>7</sup> Moss (n 1) 62.

- **Item 15, in Part 2 of Schedule 1:** implementing recommendation 10 of the PJCIS Press Freedom Report, to improve notice requirements to the IGIS to ensure appropriate oversight of the handling of disclosures by intelligence agencies or agencies with intelligence functions, including by:
  - requiring an authorised officer of an intelligence agency to provide a disclosure to the IGIS as soon as reasonably practicable and in any case within 1 business day if the discloser states the disclosure is ‘urgent’ and within 14 days for non-urgent disclosures, and
  - requiring the principal officer of the intelligence agency in which the disclosure originated to provide regular written notice to the IGIS during the 90-day investigation window to outline investigation progress and potential outcome timelines, including possible extensions.

## Interaction with the National Anti-Corruption Commission

### Overview

On 30 November 2022, the NACC Act and NACC Consequential Act were passed by the Australian Parliament. The legislation provides for the establishment of the NACC, and for the transitional arrangements for the existing Australian Commission for Law Enforcement Integrity to be subsumed into the Commission.

The NACC will have broad jurisdiction to investigate public sector corruption and will have prevention and education functions to improve anti-corruption efforts in the Commonwealth public sector. The Government intends that the NACC will commence operations by mid-2023.

Schedule 4 to the PID Bill contains contingent amendments to the NACC Act, the NACC Consequential Act and the PID Act. These amendments are necessary to:

- clarify the administrative arrangements for the handling, referral and investigation of disclosures under the PID Act and NACC Act, and
- ensure that protections for disclosers remain consistent across the NACC and PID Act frameworks.

### Administrative arrangements

Part 1 of Schedule 4 to the PID Bill would repeal amendments to the PID Act made in the NACC Consequential Act, as these amendments would no longer be relevant if the PID Bill is passed by the Parliament and commences prior to commencement of the NACC Consequential Act.

Part 2 and Part 4 of Schedule 4 to the PID Bill would amend the PID Act to:

- Insert a definition of ‘corruption issue’ into the PID Act consistent with the definition under section 9 of the NACC Act
- Clarify the operation of the PID Act, in circumstances where the Commissioner of the NACC has issued a direction under subsection 43(1) of the NACC Act to stop taking specified action that applies to the allocation or investigation of a disclosure under the PID Act, to ensure the effectiveness of any action the Commissioner has taken, or might take, in relation to a corruption issue, including that:
  - authorised officers cannot allocate a disclosure and principal officers cannot investigate (or continue to investigate) a disclosure, if doing so would contravene the direction
  - authorised officers are required to notify the Commonwealth Ombudsman or the IGIS (as appropriate) if they are unable to allocate a PID due to such a direction

- principal officers are required to notify a discloser of a decision to investigate (or further investigate) a disclosure that is no longer subject to such a direction, and
- statutory timeframes in the PID Act to allocate and investigate a disclosure restart once an authorised officer or principal officer (as appropriate) becomes aware that such a direction no longer applies.
- Provide that authorised officers and principal officers cannot decide not to allocate or investigate the disclosure (as appropriate) under the PID Act on the basis that it would be more appropriately investigated under another law or power, merely because they have referred the disclosure to the NACC. This reflects section 39 of the NACC Act, which provides that agencies may continue to take actions in relation to matters referred to the NACC, unless and subject to any direction given by the Commissioner of the NACC for the agency to stop taking specified action.

These amendments would be required subject to the commencement of the NACC Consequential Act and passage and commencement of Schedules 1 to 3 to the PID Bill.

### **Consistent protections for disclosers**

Part 4 of the NACC Act contains protections for any person who provides evidence or information to the NACC in relation to a corruption issue. These protections provide immunity from civil, criminal and administrative liability for whistleblowers and other persons (for example, witnesses assisting the NACC), and creates criminal offences for anyone taking, or threatening to take, reprisal action against a whistleblower or other person (sections 24, 29 and 30). These protections are modelled on those in the PID Act (sections 10 and 19), but are available for all persons—not just public officials.

The PID Bill will amend the NACC Act to reflect amendments to the whistleblower protections in the PID Act to ensure both regimes provide strong protections for whistleblowers. Part 3 of Schedule 4 to the PID Bill would amend sections 29 and 30 of the NACC Act to:

- expand the definition of ‘takes a reprisal’ and broaden the scope of the reprisal offences to criminalise reprisal action against a person who could make a disclosure to the NACC
- expand the definition of ‘detriment’ to recognise harm beyond a person’s employment, including harassment or intimidation of a person, harm or injury to a person (including psychological harm), damage to a person’s property, reputation, business or financial position or damage of any other kind
- clarify that reprisal action includes direct and indirect threats to cause detriment to a person
- clarify the physical and fault elements for the offences of taking a reprisal by causing detriment and taking a reprisal by threatening to cause detriment
- provide that reasonable administrative action taken to protect another person from detriment is an exception to behaviour that might otherwise constitute a reprisal offence under the NACC Act, and
- provide that in a prosecution for a reprisal offence under the NACC Act it is not necessary to prove that any person has made, may have made, proposes to make, or could make a disclosure to the NACC.

These amendments would ensure that the reprisal offence provisions in the NACC Act continue to align with amendments to the corresponding provisions in the PID Act, so that protections from reprisal action for disclosers remain consistent across the NACC and PID Act frameworks.

## Implementation

### Approach to implementation

Subject to the passage of the legislation, it is intended for the amendments in the PID Bill to commence before the NACC commences operations in mid-2023. As the PID Bill would amend the PID Act to improve protections for public sector whistleblowers, it is important that the PID Bill commences alongside the NACC to ensure that protections across the two schemes remain aligned.

The department has consulted all portfolios on the development of the Bill. Agencies will require a period of time following the passage of the PID Bill, to prepare for its commencement, including to update their internal practices and procedures, and provide training to staff, including in relation to amendments to:

- obligations on principal and authorised officers
- allocation and investigation processes, and
- information handling requirements and notice obligations.

The Commonwealth Ombudsman, IGIS and department intend to support agencies to implement the amendments contained in the PID Bill, including by preparing updated guidance material for agencies and disclosers.

## **Attachment A – Implementation of Moss Review Recommendations and other Committee reports**

- The 2016 *Review of the Public Interest Disclosure Act 2013* (PID Act) by Mr Philip Moss AM (Moss Review) made 33 recommendations to improve the PID Act.  
Of these recommendations:
  - 21 recommendations would be implemented in the *Public Interest Disclosure Amendment (Review) Bill 2022* [Stage 1 Bill]
  - 12 recommendations will be considered as part of broader reforms to the PID Act and across Government in 2023 [Second stage of reforms]
- The 2017 Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) whistleblower report made 5 recommendations relating to the PID Act.  
Of these recommendations:
  - 2 recommendations would be implemented in the Stage 1 Bill
  - 3 recommendations will be considered as part of the second stage of reforms
- The 2020 Parliamentary Joint Committee on Intelligence and Security (PJCIS) Press Freedom report made 3 recommendations in relation to the PID Act. Of these recommendations:
  - 1 recommendation has been implemented
  - 2 recommendations would be implemented in the Stage 1 Bill

2016 Moss Review	
Recommendation 1: That the PID Act be reviewed every three to five years to enable its operation to be assessed and regard to be given to new research and developments in similar state and territory legislation.	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022
Recommendation 2: That the Australian Public Service Commissioner, the Merit Protection Commissioner, the Integrity Commissioner, the Parliamentary Services Commissioner, the Parliamentary Services Merit Protection Commissioner, and the Inspector-General of Taxation be prescribed as investigative agencies to simplify the PID Act’s interaction with other investigative and complaint schemes and to strengthen the investigative capacity under the PID Act.	To be considered as part of the second stage of reforms
Recommendation 3: That the PID Act be amended to require a Principal Officer to provide the Commonwealth Ombudsman or the IGIS with a copy of the investigation report within a reasonable period of time.	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022

<p><b>Recommendation 4:</b> That the Commonwealth Ombudsman share information about the handling of or response to a PID with relevant investigative agencies.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 5:</b> That the definition of ‘disclosable conduct’ in the PID Act be amended to exclude conduct solely related to personal employment-related grievances, unless the authorised officer considers that it relates to systemic wrongdoing. Other existing legislative frameworks are better adapted to dealing with and resolving personal employment-related grievances.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 6:</b> If Recommendation 5 is adopted, that the PID Act be amended to include reprisal within the definition of disclosable conduct whether or not the reprisal relates to personal employment-related grievances.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 7:</b> That disclosable conduct which constitutes ‘disciplinary action’ be amended to include only conduct which the authorised officer considers would, if proven, be reasonable grounds for termination or dismissal.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 8:</b> That the external and emergency disclosure provisions be considered in a future review of the PID Act, when further evidence about how they are being used is available.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 9:</b> That the PID Act be amended to include situations when an authorised officer failed to allocate an internal PID, or a supervisor failed to report information they received about disclosable conduct to an authorised officer, as grounds for external disclosure.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 10:</b> That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 11:</b> That the effectiveness of the principles-based approach to regulation be evaluated periodically to assess the experience of individuals, agencies and investigative agencies.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 12:</b> That the PID Act be amended to include statutory recognition of guidance material provided by the Commonwealth Ombudsman, similar to the recognition of guidance material in section 93A of the <i>Freedom of Information Act 1982</i>.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 13:</b> That the Commonwealth Ombudsman and the IGIS be appropriately resourced to enable them to monitor and scrutinise compliance with the PID Act by agencies within their remit.</p>	<p>To be considered as part of the second stage of reforms</p>

<p><b>Recommendation 14:</b> That the PID Act be amended to include a discretion for the principal officer or authorised officers of an agency to allocate a PID, or delegate a PID investigation, to the agency’s portfolio department with the consent of that department.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 15:</b> That the PID Act be amended to recognise the principal officer’s obligation to provide procedural fairness to a person against whom wrongdoing is alleged before making adverse findings about that person.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 16:</b> That the secrecy offences relating to the use or disclosure of information about a PID (protected information) be repealed as these offences unnecessarily limit agencies’ ability to respond to alleged wrongdoing.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 17:</b> If recommendation 16 is accepted, that the PID Act be amended to clarify that existing secrecy offences, such as those in the <i>Crimes Act 1914</i>, the <i>Australian Security and Intelligence Organisation Act 1979</i> and the <i>Intelligence Services Act 2001</i>, continue to apply to the disclosure or use of information, unless it is a public interest disclosure under section 26 of the PID Act, for the purposes of the PID Act, or to perform a function or exercise a power of the PID Act.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 18:</b> That the PID Act be amended to simplify the offence about use or disclosure of identifying information by including within its exemptions:</p> <ul style="list-style-type: none"> <li>• explicit reference to the protections for good faith actions or omissions by a public official exercising powers or performing functions under the PID Act (as in section 78);</li> <li>• lawyers or other trusted professionals who disclose the information to provide professional advice or assistance to a discloser or potential discloser (as in section 67); and</li> <li>• other existing exemptions.</li> </ul>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 19:</b> That the PID Act be amended to recognise implied consent as an exemption to the secrecy offence relating to identifying information.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 20:</b> That the PID Act be amended to include a positive obligation upon a principal officer to support disclosers and witnesses involved in the PID process, in the same way they already have an obligation to protect disclosers from detriment.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 21:</b> That the obligation on public officials to assist a principal officer in conducting a PID investigation should be broadened to include assisting an agency or public official to perform a function or role under the PID Act.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>



<p><b>Recommendation 22:</b> That the PID Act be amended to include a positive obligation on principal officers to provide ongoing training and education to public officials who belong to their agency about integrity and accountability, incorporating the PID Act’s protections and mechanisms to report concerns. This training should become more rigorous as a public official takes on supervisory role or is promoted.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 23:</b> That the PID Act be amended to include an obligation for supervisors who receive information from a public official about disclosable conduct to explain their existing obligation to report that information to an authorised officer.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 24:</b> That the PID Act be amended to permit disclosures of security classified information (other than intelligence information) to a lawyer for the purpose of seeking legal advice about a public interest disclosure, without requiring the lawyer to hold the requisite security clearance.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 25:</b> That the PID Act be amended to protect disclosures for the purpose of seeking professional advice about using the PID Act.</p>	<p>To be considered as part of the second stage of reforms</p>
<p><b>Recommendation 26:</b> That the PID Act be amended to clarify that its provisions do not apply to reports about alleged wrongdoing by Senators, Members and their staff, or allegations made by them.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 27:</b> That consideration be given to extending the application of the PID Act to members of Parliament or their staff if an independent body with the power to scrutinise their conduct is created.</p>	<p>Consider as part of broader reforms across Government</p>
<p><b>Recommendation 28:</b> That a witness receives the same protections from reprisal, civil, criminal and administrative liability as a discloser. These protections should not affect a witness’ liability for their own conduct and should apply regardless of whether the formal investigation of a PID had commenced when the witness provided information.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 29:</b> That the definition of ‘agency’ in the PID Act be replaced with the <i>Public Governance, Performance and Accountability Act 2013</i> term ‘entity’ while retaining treatment of intelligence and security agencies as entities separate from their portfolio department.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>
<p><b>Recommendation 30:</b> That the definition of ‘contracted service provider’ be amended to ensure that grant recipients are not subject to the PID Act.</p>	<p>Implement in the Public Interest Disclosure Amendment (Review) Bill 2022</p>

<b>Recommendation 31:</b> That the PID Act be amended to provide a discretion not to investigate disclosable conduct under that legislation if it would be more appropriately investigated under another legislative or administrative regime.	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022
<b>Recommendation 32:</b> If recommendations 5 and 31 are adopted, that section 53(5) of the PID Act be repealed since it will be redundant.	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022
<b>Recommendation 33:</b> That section 56(2) of the PID Act be amended to exclude from the mandatory obligation to notify police of evidence of an offence punishable by at least 2 years situations when the conduct relates to a corruption issue which has been notified to the Integrity Commissioner under section 19 of the <i>Law Enforcement Integrity Commissioner Act 2006</i> .	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022

**2017 Parliamentary Joint Committee on Corporations and Financial Services (PJCCFS) whistleblower report**

<b>Recommendation 6.1:</b> The PID Act be amended to make it explicit that former public officials, as well as current and former contractors to the Australian Public Service, are able to make disclosures	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022
<b>Recommendation 6.3:</b> Protections in both the public and private sector be made consistent for threats or actual reprisals against people who make, propose to make, could make or are capable of making a public interest disclosure.	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022
<b>Recommendation 8.5:</b> The existing whistleblower protections for external disclosures in the PID Act be simplified (including a more objective test) and extended to disclosures to a registered organisation, a federal Member of Parliament or their office, and be included in a Whistleblowing Protection Act, except the provisions relating to intelligence functions which should continue to apply to the public sector only.	To be considered as part of the second stage of reforms
<b>Recommendation 11.1:</b> Following the imposition of a penalty against a wrongdoer by a Court, a whistleblower protection body or prescribed law enforcement agencies may give a 'reward' to any relevant whistleblower.	To be considered as part of the second stage of reforms
<b>Recommendation 12.1:</b> That a Whistleblower Protection Authority (WPA) be established (further detail below).	To be considered as part of the second stage of reforms

**2020 Parliamentary Joint Committee on Intelligence and Security (PJCIS) Press Freedom report**

<b>Recommendation 9:</b> That the government formally responds to the recommendations of the Moss Review, before the completion of the Senate Environment and Communications References Committee’s inquiry into press freedom. This recommendation was implemented when the former government’s response to the Moss Review was released on 16 December 2020.	Already implemented
<b>Recommendation 10:</b> Amend the PID Act to require the following when a disclosure is made by an official connected to an intelligence agency: <ul style="list-style-type: none"><li>• the agency report a disclosure to the Inspector-General of Intelligence and Security (IGIS) within 24 hours if the discloser indicates it is urgent, or as soon as possible after the disclosure is made, but within the current 14-day timeframe</li><li>• the agency maintain contact and notification with the IGIS during the 90-day investigation window to outline investigation progress and potential outcome timelines, including possible extensions.</li></ul>	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022
<b>Recommendation 11:</b> That the Australian Government provide for the mandatory reporting of aggregated statistics, related to numbers and timeframes of all disclosures, to be made to the Parliament every six months by the Attorney-General.	Implement in the Public Interest Disclosure Amendment (Review) Bill 2022