

Public sector whistleblowing reforms

Stage 2 – reducing complexity and improving effectiveness and accessibility of protections for whistleblowers

Submission by Dr Helen Haines MP
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Introduction

Thank you for the opportunity to make a submission on the *Public sector whistleblowing reforms Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers Consultation Paper (Consultation Paper)*.

In my advocacy for a National Anti-Corruption Commission (**NACC**), I repeatedly stated that the strength of such a commission will depend on the strength of whistleblower protection laws. Whistleblowers play a vital role in fighting corruption and maintaining integrity in our government. By protecting people when they report suspected wrongdoing, we encourage transparency and proper conduct, and we discourage fraud, corruption and waste of public funds. In exchange, whistleblowers should have legal protections against reprisal actions and immunity from liability.

I have long urged¹ the government to undertake comprehensive reforms to strengthen Australia's whistleblower protections, in both the public and private sectors. These reforms are long overdue, leaving us with whistleblower protection laws that are increasingly out of date and inconsistent.

I welcome the release of the Consultation Paper as a step towards finally enacting laws that are consistent, effective and best practice.

Guidance for stage 2 reforms

In considering the further reforms needed to improve the accessibility and effectiveness of the PID Act for reporting potential wrongdoing, I encourage the Department to be guided by the report *Protecting Australia's Whistleblowers: the Federal Roadmap (the Roadmap)*, co-authored by Griffith University's Centre for Governance & Public Policy, the Human Rights Law Centre and Transparency International Australia.²

The Roadmap clearly sets out important reforms to ensure whistleblower protections laws can be effectively administered and enforced, are consistent, offer best practice protections and provide workable thresholds and limitations – all goals of this Consultation Paper.

The Roadmap's recommendations draw upon the recommendations of the October 2016 Review of the Public Interest Disclosure Act 2013 (**PID Act**) undertaken by Mr Phillip Moss AM (**the Moss Review**) and the 2017 Parliamentary Joint Committee on Corporations and Financial Service's Inquiry into whistleblower protections across the corporate, public and not-for-profit sectors (**PJCCFS Inquiry**). I understand the stage 2 reforms will aim to implement the outstanding recommendations of the Moss Review and other outstanding parliamentary reports.

Exposure draft bill for stage 2 reforms

Once submissions to the Consultation Paper are reviewed, I urge the Government to release an exposure draft bill as soon as possible, so that further scrutiny and comment can be provided by members of the public. This is the best way of ensuring that a bill introduced into Parliament is the best it can be, with broad support from legal experts and organisations.

¹ Most recently, I made a submission to the Senate Inquiry into the Public Interest Disclosure Amendment (Review Bill 2022 which I draw on for this Consultation Paper: <https://www.aph.gov.au/DocumentStore.ashx?id=7710a19b-7d77-4635-8bab-d2765231b17e&subId=732283>

² [Protecting+Australia's+Whistleblowers+Federal+Roadmap+Updated+Jan+2023.pdf \(squarespace.com\)](#)

Issues raised in Consultation Paper

I welcome many issues raised by the Consultation Paper, and in particular I support reforms that would:

1. provide more certainty as to when the PID Act covers external consultants providing services to the Australian Government;
2. adopt a 'no wrong doors' approach to internal disclosures;
3. expand access to professional support outside of government, such as medical practitioners, union officials and employee assistance programs. This is critical to ensuring whistleblowers are supported;
4. enforce a positive duty on employers to protect whistleblowers, by making them liable if they fail to do so;
5. provide clarity on the scope of immunities available, including preparatory acts;
6. provide access to civil remedies for disclosures made to the NACC. Currently no such remedies exist, meaning that a person who makes a disclosure or provides information about a corruption issue to the NACC cannot apply for civil remedies under the NACC Act to address or prevent reprisal.

In considering the stage 2 reforms, I now wish to draw particular attention to the following two issues – alignment of public and private sector whistleblower protections and the establishment of a Whistleblower Protection Commissioner. I urge the Government to address these issues in any draft legislation reforming whistleblower protections.

1. Alignment of public and private sector whistleblower protections

Currently, Australian private and not-for-profit sector organisations are subject to incomplete and inconsistent whistleblower protections laws. Protections are contained across multiple pieces of legislation such as the *Corporations Act 2001*, *Taxation Administration Act 1953*, *Fair Work (Registered Organisations) Act 2009*, *Aged Care Act 1997*, *National Disability Insurance Scheme Act 2013* and more. Inconsistencies include protections for anonymous whistleblowers, civil remedies available if reprisals occur, and standards of proof.

Indeed, the Consultation Paper refers to some of these inconsistencies.³

A single consolidated law for all private and not-for-profit sector whistleblowers is necessary, with consistency between public and private sectors where possible.

This was a recommendation of the PJCCFS Inquiry, which recommended that:

- *Commonwealth public sector whistleblowing legislation remain in a single updated Act, redrafted in parallel with the private sector Act;*
- *Commonwealth private sector whistleblowing legislation (including tax) be brought together into a single Act;*
- *The Government examine options (including the approach taken in the Privacy Act 1988) for ensuring ongoing alignment between the public and private sector whistleblowing protections, potentially including both in a single Act.*⁴

³ See pages 17-18 regarding evidentiary burdens where civil remedies are sought for a reprisal.

⁴ [Whistleblower protections in the corporate, public and not-for-profit sectors – Parliament of Australia \(aph.gov.au\)](http://aph.gov.au)

Since being elected the Albanese Government has undertaken a trend of piecemeal reform to whistleblower protection laws – the Public Interest Disclosure Amendment (Review) Bill 2022 which commenced in June 2023, and then the reforms under the Treasury Laws Amendment (Tax Accountability and Fairness) Bill 2023, which implemented protections for tax whistleblowers and is yet to pass Parliament.⁵

Such a patchwork approach to whistleblower protection reform across the public, private and not-for-profit sectors can perpetuate loopholes and gaps.

I urge the Government to implement the recommendation of the PJCCFS Inquiry above by introducing a single, consolidated law for private and not-for-profit whistleblower protections at the same time as the stage 2 public sector whistleblower protections are underway.

2. Establishment of a Whistleblower Protection Commissioner

A key component of my 2020 and 2021 Australian Federation Integrity Commission Bills⁶ (**AFIC Bill**) was the establishment of a Whistleblower Protection Commissioner. Unfortunately, this was not incorporated into the Government's National Anti-Corruption Commission Bill 2022 (**NACC Bill**).

Whistleblower protections laws are complex, therefore a Commissioner is necessary to provide individuals with advice and referral functions, as well as implement and enforce whistleblower protection laws.

In answer to issue 4⁷ and question 16,⁸ I submit that an additional independent body as drafted in my AFIC Bill should be established, with the following key purposes, functions and powers:

- ensure appropriate support and protection is provided to persons who make disclosures of wrongdoing;
- investigate and report on issues of reprisal, detrimental action, or failures to prevent detrimental action, arising or resulting from disclosures of wrongdoing;
- provide independent legal advice, representation or other practical support to private, public and not-for-profit sector whistleblowers who are, or may become, a party to proceedings in a court.

Such a Commissioner was supported by the Advisory Report for the Joint Select Committee examining the National Anti-Corruption Commission Bill.⁹

⁵ Please refer to my speech on this Bill:

https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/27533/0299/hansard_frag.pdf;fileType=application%2Fpdf

⁶ [Australian Federal Integrity Commission Bill 2021 \(No. 2\) – Parliament of Australia \(aph.gov.au\)](https://aph.gov.au/legislation/instruments/instr-detail.aspx?id=51284)

⁷ Oversight and integrity agencies, and consideration of a potential Whistleblower Protection Authority or Commissioner.

⁸ Should an additional independent body be established to protect public sector whistleblowers, and if so, what should be its key purposes, functions and powers?

⁹ Advisory Report on the provisions of the National Anti-Corruption Commission Bill 2022 and the National Anti-Corruption Commission (Consequential and Transitional Provisions) Bill 2022, [1.369].

Further areas of reform not addressed in the Consultation Paper

I urge the Government to consider the following issues in stage 2 of the public sector whistleblowing reforms, as outlined in the Roadmap:

- Provide greater powers and resources for training and oversight for staff, supervisors and authorised officers;
- Vest the Fair Work Commission with new jurisdiction to conciliate whistleblowing claims against public and private employers to ensure easier, consistent access to remedies;
- Properly protect public/third-party whistleblowing;
- Reform Crimes Act, Criminal Code and Evidence Act to protect public interest journalism and media sources.

Conclusion

Thank you again for the opportunity to make this submission on stage 2 reforms. I stand ready to work with the Government on draft legislation, to ensure that we can deliver the long-awaited whistleblower protections reforms that are effective, workable and provide best practice protections.

Sincerely,

Helen Haines MP