

Review of the Public Interest Disclosure Act 2013

An independent statutory review conducted by Mr Philip Moss AM

15 July 2016

Secretariat support by the Department of the Prime Minister and Cabinet

Senator the Hon Michaelia Cash
Minister Assisting the Prime Minister for the Public Service
Parliament House
Canberra ACT 2600

Dear Minister,

I am pleased to provide my report of the independent review I have conducted into the *Public Interest Disclosure Act 2013* (the PID Act). The Review addresses its terms of reference.

The Review was established in January 2016 in accordance with section 82A of the PID Act, which requires that a review of the PID Act be undertaken two years after its commencement. The same legislative provision requires that you cause a copy of the report to be tabled in Parliament within 15 sitting days after you receive it.

I conducted the Review in consultation with the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, who oversee the PID Act. They provided the Review with considerable assistance and I take this opportunity to acknowledge their contribution. I also acknowledge the input which the Review received from individuals and agencies from the Commonwealth public sector, the states and territories, civil society organisations and academia.

Finally, for their excellent work, I thank the members of the Review team, Ms Hilary Jones, Ms Bethany Randell and Ms Lynnie Traynor, from the Department of the Prime Minister and Cabinet.

Yours sincerely,



Philip Moss AM
Independent Reviewer

15 July 2016

© Commonwealth of Australia 2016

This work is licensed under a [Creative Commons Attribution 3.0 Australia licence](https://creativecommons.org/licenses/by/3.0/au/) (CC BY 3.0 AU)



TERMS OF REFERENCE

The Government has requested Mr Philip Moss AM review and report on the effectiveness and operation of the *Public Interest Disclosure Act 2013*.

This Review will give effect to section 82A of the Public Interest Disclosure Act which requires a review of the operation of the Act to be undertaken two years after it has commenced. This Review is an opportunity to gather information and views on whether the Act is operating as intended and whether it could be improved.

The Review should consider:

1. the impact of the Act on individuals seeking to make disclosures in accordance with its provisions;
2. the impact of the Act on agencies, including any administrative burdens imposed by investigation and reporting obligations in the Act;
3. the breadth of disclosable conduct covered by the Act, including whether disclosures about personal employment-related grievances should receive protection under the Act; and
4. the interaction between the Act and other procedures for investigating wrongdoing, including Code of Conduct procedures under the *Public Service Act 1999* and the Commonwealth's fraud control framework.

The Review should be informed by public submissions.

The Review report must be provided to the Minister Assisting the Prime Minister for the Public Service by 15 July 2016.

TABLE OF CONTENTS

Executive Summary	5
Methodology	9
Results of The Review’s Online survey	11
List of Recommendations	13
Introduction	17
Themes arising during consultations on the Review	17
A pro-disclosure culture.....	20
Continuous, evidence-based improvement.....	22
Part 1: Stronger oversight	24
Recognise more investigative agencies	24
Strengthen scrutiny by the Commonwealth Ombudsman and the IGIS	26
Part 2: A stronger focus on significant wrongdoing	30
Exclude disclosures solely about personal employment-related grievances	30
Define conduct that could result in ‘disciplinary action’ as termination or dismissal.....	35
Other issues the Review considered to strengthen the focus on significant wrongdoing	36
Grounds for making an external disclosure	38
Part 3: Simpler legislative procedures	40
A principles-based approach.....	40
Retain simple procedures to make PIDs?	45
Insert a power to refer PIDs to a department for investigation	45
Part 4: Balance between transparency, confidentiality and procedural fairness	47
Recognise the existing requirement to provide procedural fairness	47
Better target the secrecy offences to information that requires protection	47
The treatment of ‘intelligence information’ and the intelligence community.....	51
Part 5: Make it easier for people to get advice and help	53
Support from people within an agency	53
Support from people outside an agency.....	55
Retain access to remedies for reprisal and detriment.....	57
Part 6: Clarify the coverage of the legislation	61
Retain the current focus on public sector whistleblowing	61
Clarify the continued exclusion of the judiciary, Senators, Members of Parliament and their staff members	62
Clarify application to witnesses, some agencies and grant recipients	64
Part 7: Simpler interactions with other investigatory regimes	66
Conclusion	69

GLOSSARY

ACT	Australian Capital Territory
ACT PID	<i>Public Interest Disclosure Act 2012 (ACT)</i>
AIMS	Australian Institute of Marine Science
ANSTO	Australian Nuclear Science and Technology Organisation
APS	Australian Public Service
ASIO	Australia Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
CSIRO	Commonwealth Science and Research Organisation
IGIS	Inspector-General of Intelligence and Security
Non-APS	Commonwealth Public Sector employees not covered by the <i>Australian Public Service Act 1999</i>
NSW	New South Wales
NSW PID	<i>Public Interest Disclosures Act 1994 (NSW)</i>
NT	Northern Territory
NT PID	<i>Public Interest Disclosure Act (NT)</i>
PID	Public Interest Disclosure
PID Act	<i>Public Interest Disclosure Act 2013 (Cth)</i>
PGPA Act	<i>Parliamentary Governance, Performance and Accountability Act 2013 (Cth)</i>
QLD	Queensland
QLD PID	<i>Public Interest Disclosure Act 2010 (QLD)</i>
SA	South Australia
SA PID	<i>Whistleblower Protection Act 1993 (SA)</i>
TAS	Tasmania
TAS PID	<i>Public Interest Disclosures Act 2002 (TAS)</i>
VIC	Victoria
VIC IBAC	Victorian Independent Broad Based Anti-Corruption Commission
VIC PD	<i>Protected Disclosure Act 2012 (VIC)</i>
WA	Western Australia
WA PID	<i>Public Interest Disclosure Act 2003 (WA)</i>

This report uses the current language of the PID Act, including defined terms such as Principal Officer, Authorised Officer, and public official. Where the Review's recommendations have recommended changes to terminology, for instance 'agency' to 'entity', the Review has continued to refer to the existing statutory terms for clarity.

EXECUTIVE SUMMARY

1. The *Public Interest Disclosure Act 2013* (the PID Act) was enacted in June 2013 and commenced in January 2014. The legislation's purpose is to facilitate disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector.
2. When first enacted, the PID Act was informed by a growing body of research, such as the Australian Research Council-funded project *Whistling While They Work*,¹ which regards whistleblowers and complaints as an opportunity for organisations. This research helped build bi-partisan political support for the passage of the bill.² At the time of enactment, Professor AJ Brown lauded the legislation as the 'most comprehensive protection regime for public sector whistleblowers in Australia'³: a significant improvement to Australia's integrity and anti-corruption framework.
3. Under the PID Act, internal public interest disclosures (PIDs) can be made by a current or former public official to any supervisor, an Authorised Officer in an agency, the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security. External public interest disclosures can be made in a narrow range of circumstances and usually only after an internal disclosure has been made. Disclosable conduct is defined broadly and includes fraud, serious misconduct and corrupt conduct, as well as minor wrongdoing. Public officials include APS and non-APS employees, contracted service providers and their staff members, as well as agency heads, directors of Commonwealth companies, members of the Australian Defence Force and the Australian Federal Police, statutory officeholders, and individuals exercising statutory powers.⁴ Secrecy and confidentiality provisions protect the identity of disclosers and information that was disclosed or uncovered during an investigation.

¹ P Roberts, AJ Brown, and J Olsen, (2011) *Whistling While They Work*, ANU Press. The project surveyed whistleblowing in 118 public sector organisations in Australia. The project's datasets totalled 8,813 individual respondents and made it the world's largest specific-purpose research project into whistleblowing, per capita.

² The Bill received support from the major parties and the Australian Greens, as well as Senator Xenophon, demonstrating broad political support for comprehensive protection for public sector whistleblowers in Australia.

³ Griffith University media release, 'Whistleblowing Act the most major federal integrity reform in 25 years – accountability expert'. 26 June 2013. Professor Brown also stated that the PID Act has some limitations: it cannot be triggered by disclosures of wrongdoing on the part of MPs or their staff; and, it excludes from disclosure any intelligence information. 'Labor's whistleblower bill just window dressing without change'. Matthew Nott. *Crikey*. 23 March 2013.⁴ PID Act, section 26 and defined in section 69. The Act also permits a member of the public to be deemed to be a 'public official' if the individual has information that concerns 'disclosable conduct' (section 70).

⁴ PID Act, section 26 and defined in section 69. The Act also permits a member of the public to be deemed to be a 'public official' if the individual has information that concerns 'disclosable conduct' (section 70).

Disclosers are protected from civil, criminal or administrative liability as a result of making a PID, as well as reprisal. These protections apply from when the discloser makes a valid PID.⁵

4. The Review was conducted in consultation with the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, who share responsibility for overseeing the PID Act. The Review also consulted widely on the effectiveness and operation of the PID Act, as required by the Terms of Reference. This approach included input from independent experts, members of Parliament, civil society organisations, Commonwealth agencies, states and territories and whistleblowers. A detailed description of how the Review was conducted is provided in the Methodology section of this report.
5. **The experience of whistleblowers** under the PID Act is not a happy one. Few individuals who had made PIDs reported that they felt supported. Some felt that their disclosure had not been adequately investigated or that their agency had not adequately addressed the conduct reported. Many disclosers reported experiencing reprisal as a result of bringing forward their concerns.
6. **The experience of agencies** is that the PID Act has been difficult to apply. Most agencies noted that the bulk of disclosures related to personal employment-related grievances and were better addressed through other processes. Agencies noted also that the PID Act's procedures and mandatory obligations upon individuals are ill-adapted to addressing such disclosures.
7. In the second reading speech, the then Attorney-General, and Minister for the Public Service and Integrity, the Hon Mr Mark Dreyfus MP, noted that the aim of the Legislation was to promote integrity and accountability in the Commonwealth public sector. The PID Act framework is not only intended to bring to light wrongdoing, but also to help agencies to understand wrongdoing and to respond appropriately. From the experiences of individuals and agencies, the Review concludes that in its two and a half years of operation the PID Act has enabled this aim to be achieved, but only to a limited extent.
8. The relative newness of the PID Act framework may be part of the cause, yet the Review concludes that the current PID Act provisions impair the effective operation of the framework. In this respect, the Review notes that there are two principal challenges:
 - 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.

⁵ As defined in PID Act, section 26. Note that a person can receive protections from reprisal even if they have not made a PID, but the offender suspects they have and this belief is a reason for the reprisal action.

Executive Summary

- The **kinds of disclosable conduct** are too broad, rather than being targeted at the most serious integrity risks, such as fraud, serious misconduct or corrupt conduct. The Review found that while the PID Act is helping to bring to light allegations of serious wrongdoing, these disclosures are in the minority. Most PIDs concern matters that are better understood as personal employment-related grievances, for which the PID Act framework is not well suited.
9. The Review considers that, by adopting legalistic approaches to decision-making, the PID Act's procedures undermine the pro-disclosure culture it seeks to create.
 10. The Review's recommendations reflect the PID Act's important role in relation to the Commonwealth public sector's overall integrity and accountability framework. The Review's recommendations aim to improve the PID Act by:
 - strengthening the Commonwealth public sector's pro-disclosure culture by encouraging agencies and individuals to see reporting of wrongdoing as an ordinary part of work and an opportunity to enhance integrity arrangements;
 - increasing the Commonwealth Ombudsman's and the Inspector-General of Intelligence and Security's capacity to oversee the PID Act;
 - appointing existing specialist statutory officeholders who monitor integrity and accountability in the Commonwealth public sector as additional investigative agencies;
 - focussing disclosable conduct towards fraud, serious misconduct and corrupt conduct, by excluding disclosures made solely about personal employment-related grievances, except when the character disclosure indicates systemic wrongdoing or reprisal; and
 - making it easier for potential disclosers, witnesses and those public officials who administer the PID Act to get help and support.
 11. A summary of the Review's key recommendations is below.

- a. To strengthen the **Commonwealth Ombudsman' and the IGIS' ability to scrutinise and monitor decisions of agencies about PIDs** by strengthening the transparency of agency decision-making. The Commonwealth Ombudsman could then share this information with any relevant investigative agency to scrutinise and monitor the handling of PIDs within their remit and to inform their use of their own investigative or review powers. This role would require additional resourcing.
- b. To create **more investigative agencies under the PID Act**, including the Australian Public Service Commissioner and the Merit Protection Commissioner (as well as their roles in relation to the parliamentary departments), the Inspector-General of Taxation, and the Integrity Commissioner.
- c. To strengthen the PID Act's **focus on significant wrongdoing** like fraud, serious misconduct, and corrupt conduct in order to achieve the integrity and accountability aims. To this purpose, personal employment-related grievances would be excluded from the PID Act, unless they relate to systemic issues or reprisal, and 'disciplinary conduct' would be defined as termination or dismissal. Such issues are better investigated or resolved through other existing dispute resolution processes.

- d. To include in the **grounds for external disclosure** situations where an Authorised Officer has failed to allocate a disclosure, or a supervisor has failed to report information received from a public official about disclosable conduct to an Authorised Officer.
- e. To redraft procedural aspects of the PID Act using a **'principles-based' approach**. The PID Act has prescriptive procedural requirements which undermine the development of a 'pro-disclosure' culture. Reducing prescriptive compliance can help foster culture change and strengthen the consistency and fairness of decisions. The Commonwealth Ombudsman and the IGIS, with their enforceable powers, then can lead conversations with agency decision-makers about continuous improvement and the policy intent of the PID Act.
- f. To insert an explicit requirement for **procedural fairness**.
- g. Secrecy obligations not to use or disclose **identifying information** remain criminal offences. Offences not to use or disclose **protected information** would be repealed.
- h. Retain the current **definition and treatment of intelligence information**. The Review concludes that the IGIS's oversight role is sufficient to ensure the integrity and accountability of the intelligence and security agencies.
- i. To **provide better support for disclosers, or potential disclosers, by enabling them to get help and advice** from lawyers, and other professional support services such as unions, Employee Assistance Programmes, and professional associations, as well as include a proactive obligation on Principal Officers and any public official with a supervisory role to support disclosers and other public officials within their agency in performing a function or role under the PID Act.
- j. To **provide witnesses with the same protections as disclosers** from detriment, civil, criminal and administrative liability.

METHODOLOGY

12. The Review commenced on 15 January 2016 and wrote to over 250 stakeholders inviting written submissions to the Review's Terms of Reference. These stakeholders included those people who had made a submission to the 2013 Parliamentary inquiries into the Public Interest Disclosure Bill 2013, civil society and all Commonwealth public sector departments and agencies.
13. Forty-six submissions were received;⁶ most of which were published on the Review's website which received over 2018 views by 1225 individuals.⁷

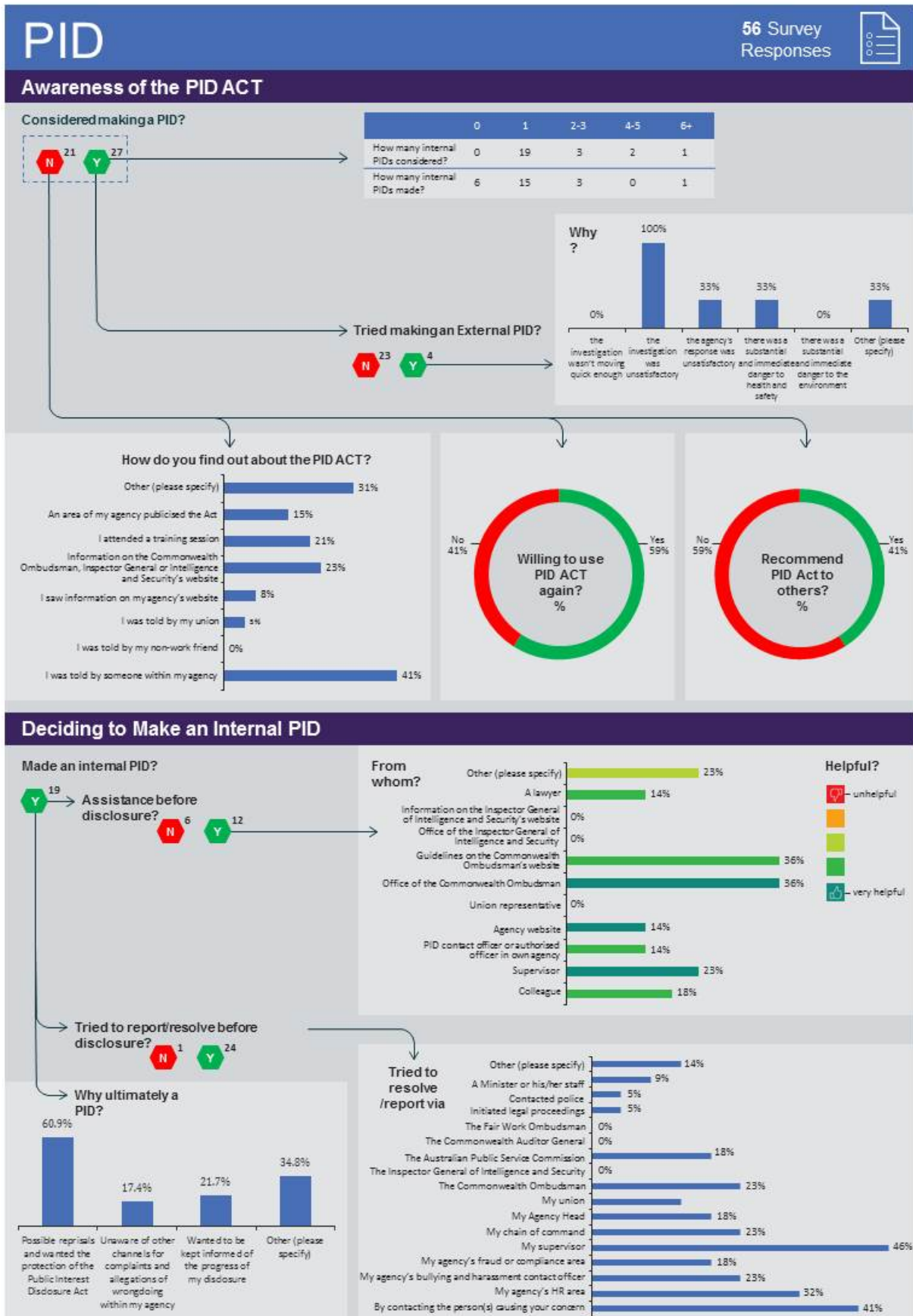
- | | |
|---|---|
| 1. Accountability Round Table | 23. Department of Foreign Affairs and Trade |
| 2. Attorney-General's Department | 24. Agency Submission |
| 3. Australian Federal Police | 25. Department of Human Services |
| 4. Australian Nuclear Science and Technology Organisation, Australian Institute of Marine Science and Commonwealth Science and Industrial Research Organisation | 26. Department of Immigration and Border Protection |
| 5. Australian Public Service Commission | 27. Department of Social Services |
| 6. Australian Secret Intelligence Service | 28. Department of Veterans' Affairs |
| 7. Australian Security and Intelligence Organisation | 29. Human Rights Law Centre |
| 8. Australian Taxation Office | 30. Inspector-General of Intelligence and Security |
| 9. Blueprint for Free Speech | 31. Individual Submission |
| 10. Dr Peter Bowden, University of Sydney | 32. Individual Submission |
| 11. Mr John Brown | 33. Individual Submission |
| 12. Professor AJ Brown, Griffith University | 34. Individual Submission |
| 13. Ms Noni Cadd | 35. Individual Submission |
| 14. Clayton Utz | 36. Joint Media Organisations |
| 15. Commonwealth Ombudsman | 37. Law Council of Australia |
| 16. Community and Public Sector Union | 38. Merit Protection Commissioner |
| 17. Department of Agriculture and Water Resources | 39. National Health and Medical Research Council |
| 18. Department of Communications and the Arts | 40. National Museum of Australia |
| 19. Department of Defence | 41. Office of National Assessments |
| 20. Agency Submission | 42. Reserve Bank of Australia |
| 21. Department of Employment | 43. Rule of Law Institute of Australia |
| 22. Agency Submission | 44. Whistleblowers Australia |
| | 45. Whistleblowers Australia Supplementary Submission |
| | 46. Mr Andrew Wilkie MP |

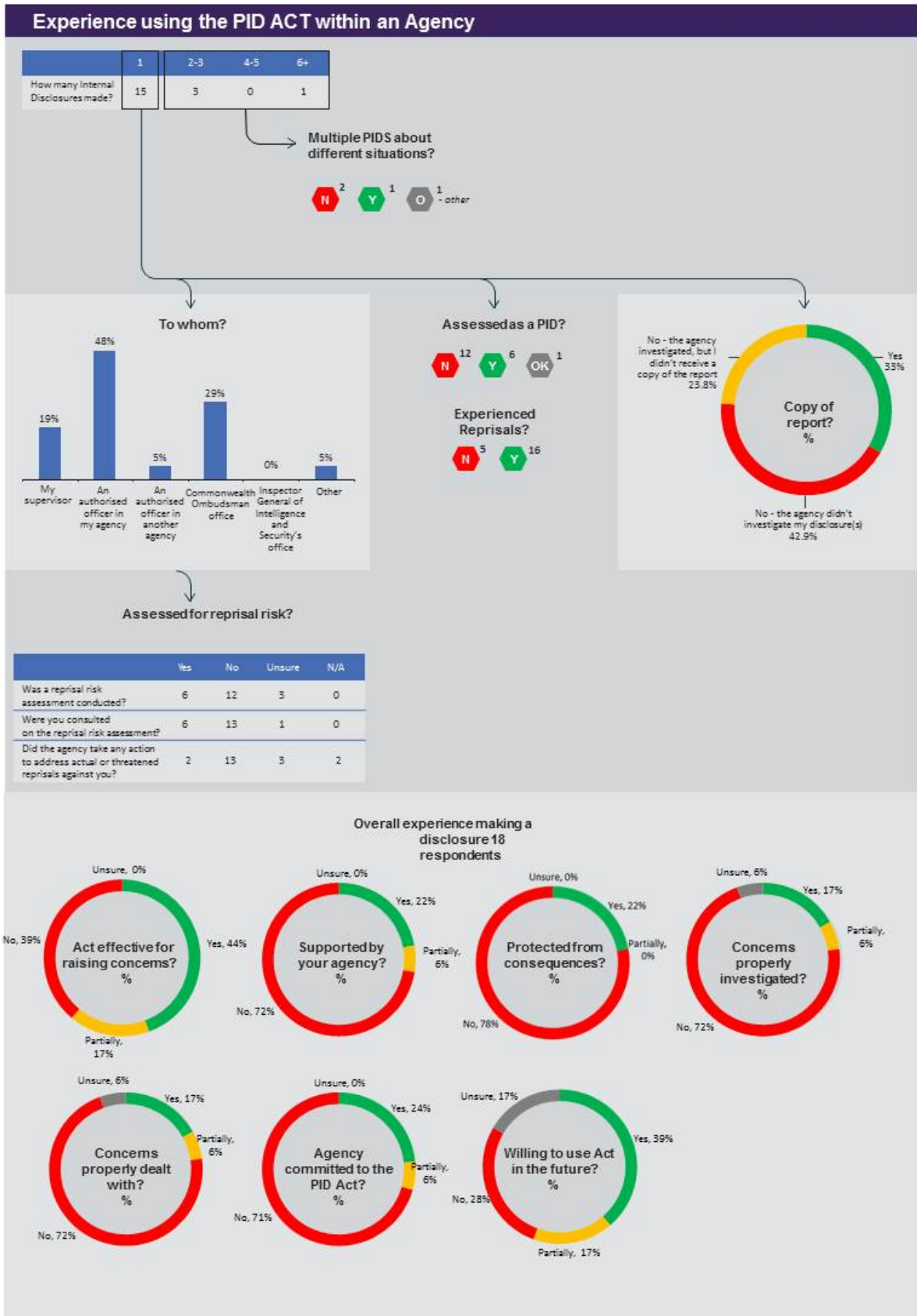
⁶ The website was available at <http://www.dpmc.gov.au/government/legislation-review/statutory-review-public-interest-disclosure-act-2013>.

⁷ Thirteen submissions (or parts thereof) were not published to protect the privacy of the submitter or a third party, or in response to a request that the submission be treated in-confidence.

14. On 22 March, the Review released an online survey aimed at those who had considered using the PID Act to report a concern. The Review received 56 responses to the survey which enabled a range of individual's experiences using the PID Act to be captured. A summary of the survey results is overleaf.
15. The review met with key stakeholders to discuss their views about the PID Act. These consultations included:
 - Community of Practice forums for PID practitioners within Commonwealth public sector agencies in Canberra, Sydney and Melbourne;
 - as a panel member, a discussion forum hosted by the Institute of Public Administration Australia (IPAA) in Canberra; and
 - separate discussions with the Minister Assisting the Prime Minister for the Public Service, Senator the Hon Michaelia Cash, Senator Nick Xenophon and Mr Andrew Wilkie MP.
16. To understand the various approaches to PID in the Australian jurisdictions, the Review participated in a forum of all oversight bodies of public sector whistleblowing schemes for all states and territories convened by the Commonwealth Ombudsman's staff. The Review also met:
 - ACT Commissioner for Public Administration, Ms Bronwen Overton Clarke,
 - Acting NSW Ombudsman, Professor John McMillan AO,
 - Victorian Ombudsman, Ms Deborah Glass OBE, and
 - Victorian IBAC Commissioner, Mr Stephen O'Bryan QC.
17. In June, the Review sought comment on its draft report, or extracts thereof, from key stakeholders, including:
 - the Commonwealth Ombudsman and the IGIS, who share oversight of the PID Act;
 - the Department of the Prime Minister and Cabinet, which has policy responsibility for the PID Act,
 - the Australian Government Solicitor, who frequently provides advice on the implementation of the PID Act;
 - the Community and Public Sector Union;
 - Professor AJ Brown of Griffith University, who has been involved in the development of PID Act laws across Australia;
 - statutory officeholders affected by the Review's recommendations, such as the Australian Public Service Commissioner, the Merit Protection Commissioner, the Integrity Commissioner, and the Inspector-General of Taxation; and
 - agencies with relevant expertise, such as the Departments of Finance, Defence, Immigration and Border Protection, and the Attorney-General's Department.
18. A brief summary of the Review's draft recommendations was shared with all departmental Secretaries.
19. The final report was provided to the Responsible Minister on Friday 15 July 2016.

RESULTS OF THE REVIEW'S ONLINE SURVEY





LIST OF RECOMMENDATIONS

INTRODUCTION

PART 1: STRONGER OVERSIGHT

- 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.
- 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.
- 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.
- Recommendation 4. That the Commonwealth Ombudsman share information about the handling of or response to a PID with relevant investigative agencies.

PART 2: A STRONGER FOCUS ON SIGNIFICANT WRONGDOING

- Recommendation 5. 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.
- Recommendation 6. 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.
- Recommendation 7. 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.
- Recommendation 8. 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.
- Recommendation 9. 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.

PART 3: SIMPLER LEGISLATIVE PROCEDURES

- Recommendation 10. That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.
- Recommendation 11. That the effectiveness of the principles-based approach to regulation be evaluated periodically to assess the experience of individuals, agencies and investigative agencies.
- Recommendation 12. 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 *Freedom of Information Act 1982*.
- Recommendation 13. 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.

PART 4: BALANCE BETWEEN TRANSPARENCY, CONFIDENTIALITY AND PROCEDURAL FAIRNESS

- Recommendation 14. 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.
- Recommendation 15. 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.
- Recommendation 16. 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.
- Recommendation 17. If Recommendation 16 is accepted, that the PID Act be amended to clarify that existing secrecy offences, such as those in the *Crimes Act 1914*, the *Australian Security and Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*, 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.
- Recommendation 18. That the PID Act be amended to simplify the offence about use or disclosure of identifying information by including within its exemptions: 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); lawyers or other trusted professionals who disclose the

List of Recommendations

information to provide professional advice or assistance to a discloser or potential discloser (as in section 67); and other existing exemptions.

Recommendation 19. That the PID Act be amended to recognise implied consent as an exemption to the secrecy offence relating to identifying information.

PART 5: MAKE IT EASIER FOR PEOPLE TO GET ADVICE AND HELP

Recommendation 20. 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.

Recommendation 21. 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.

Recommendation 22. 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.

Recommendation 23. 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.

Recommendation 24. 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.

Recommendation 25. That the PID Act be amended to protect disclosures for the purpose of seeking professional advice about using the PID Act.

PART 6: CLARIFY THE COVERAGE OF THE LEGISLATION

Recommendation 26. 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.

Recommendation 27. 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.

Recommendation 28. 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.

Recommendation 29. That the definition of 'agency' in the PID Act be replaced with the *Public Governance, Performance and Accountability Act 2013* term 'entity' while retaining treatment of intelligence and security agencies as entities separate from their portfolio department.

Recommendation 30. That the definition of 'contracted service provider' be amended to ensure that grant recipients are not subject to the PID Act.

PART 7: SIMPLER INTERACTIONS WITH OTHER INVESTIGATORY REGIMES

Recommendation 31. 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.

Recommendation 32. If Recommendations 5 and 31 are adopted, that section 53(5) of the PID Act be repealed since it will be redundant.

Recommendation 33. 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 *Law Enforcement Integrity Commissioner Act 2006*.

INTRODUCTION

THEMES ARISING DURING CONSULTATIONS ON THE REVIEW

20. During consultations, individuals and agencies consistently described the same challenges of the PID Act. These challenges formed the basis of the Review's assessment and informed the Review's recommendations. These challenges are set out below.

THE IMPACT OF THE PID ACT ON INDIVIDUALS

21. The PID Act exacts a personal toll on the individuals involved: disclosers; public officials; and those whose conduct is the subject of a disclosure.
22. For **whistleblowers**, a PID may be the last resort and their disclosures may be made with a sense of frustration, fear of reprisal and uncertainty about how their information will be received.⁸ For many disclosers, the protections inherent in the PID process can provide confidence and certainty that their concerns are being seriously considered. Yet, few respondents reported feeling well-supported or confident in their PIDs. Individuals who made a PID reported long-term health and career effects because they reported wrongdoing.⁹ In the submissions and online survey results, individuals who had made PID Act disclosure reported that, despite the protections in the legislation, they experienced reprisal and did not feel that they had their agencies' backing after making their disclosures. These personal stories were reflected in agencies' submissions that described similar effects on the disclosers. Often, these submissions questioned whether the PID Act's processes caused trauma for individual disclosers.
23. At present, the PID Act provides extensive protections for disclosers. The Review noted that, in themselves, these protections are sufficient. The PID Act also provides transparency so disclosers can understand how their disclosure is being handled by the agency. Yet these protections and this transparency appear to be undermined by a perceived lack of support for disclosers and fear of reprisal. The Review considers that the best way to strengthen the PID Act's protections is by continuing to invest effort in measures to help agencies and their staff adopt a pro-disclosure culture. Such an environment would help agencies and their staff members better understand how to support individuals who report their concerns.
24. **For those accused** of wrongdoing, being the subject of a PID can exact a personal toll. They may suffer reputational damage as the result of an allegation and subsequent investigation, which may prove to be unfounded. Submissions from the Departments of Defence, Immigration and Border Protection, Health, Human Services and Social Services, and discussions with agency PID

⁸ All but one respondent to the Review's online survey (see Methodology) who made an internal disclosure stated that they had tried to report or resolve their concern through an alternative channel prior to making a PID. Approximately 70 per cent had sought assistance prior to making a disclosure (15 out of 22 respondents). Individual submissions and the Review's online survey show that fear of reprisal was a major factor in the use of PID protections (14 out of 22 respondents).

⁹ Both individual and agency submissions, as well as online survey responses, highlight this personal cost.

administrators at the Community of Practice forums, all highlighted difficulties that those accused of wrongdoing had experienced. For example, there was confusion about how and when to provide procedural fairness to those accused, given the PID Act's secrecy and confidentiality provisions, and its provision for disclosers to remain anonymous.

25. In contrast to the protections provided in the PID Act for disclosers, the need for procedural fairness for those accused is an omission within the current legislation. The Review has made recommendations to balance transparency, confidentiality and procedural fairness, such as including legislative acknowledgment of the need to provide procedural fairness and by narrowing the scope of secrecy offences.
26. For **public officials who administer the PID Act**,¹⁰ failure to comply with some aspects of the legislative provisions, such as the secrecy provisions, can carry criminal penalties,¹¹ while mishandling or delays in an investigation can be a basis for an external disclosure.¹² Some 150 agency officers who attended the Community of Practice forums impressed the Review with their commitment to the PID Act's framework, yet expressed their anxiety about the PID Act requirements and their capacity to comply. PID practitioners described the fear of dealing with disclosers and the 'nervousness' and 'stress' experienced by Authorised Officers and supervisors when a PID is raised. They also spoke of their apprehension of making a mistake in applying the provisions of the PID Act, and the potential effect that such a misapplication might have on the agency, the discloser and themselves.
27. The Review's recommendations for simpler legislative procedures will help PID practitioners to fulfil their obligations more confidently and capably, and help them to make fairer and more consistent decisions.

THE IMPACT OF THE PID ACT ON AGENCIES

28. Despite clear support for the aims of the PID Act, submissions and consultations with agencies highlighted that the provisions are difficult to implement.
29. There are presently scores of people involved in administering PID on behalf of the 185 agencies subject to the legislation. The Review met approximately 150 of these agency PID practitioners at Community of Practice forums in Canberra, Sydney, and Melbourne. Many of these individuals had only handled one or two PIDs, if any, yet are required to be sufficiently familiar and skilled in the legislation to implement it fairly and lawfully. This is a significant cost for agencies.

¹⁰ This group includes Authorised Officers receiving and assessing potential disclosures, staff undertaking reprisal risk assessments and involved in actions to address reprisal risk, supervisors, and other staff who provide guidance and support to disclosers.

¹¹ See sections 20 and 65.

¹² PID Act, section 26(1), item 2.

30. Agencies reported **three aspects of the PID Act that made it difficult to implement:**
- The scope of disclosable conduct is so broad that it captures almost any instance of wrongdoing within the Commonwealth public sector, including personal-employment grievances and workplace conflict.
 - The PID Act's procedures hinder resolving allegations of wrongdoing. PID Practitioners reported difficulty understanding how to refer disclosures for resolution under more appropriate processes. They saw referral as particularly problematic for minor matters better dealt with through existing grievance or conflict resolution processes, such as Code of Conduct, minor fraud investigations or informal performance management.
 - Supervisors within agencies subject to the PID Act are sensitive to the risk of inadvertent non-compliance with their obligation to report PIDs received to an Authorised Officer within their agency.¹³ Supervisors appear to rarely understand or comply with this obligation: data collected by the Commonwealth Ombudsman that shows only approximately 10% of disclosures had been initially made to supervisors.¹⁴
31. Taken together, these three issues compromise the effectiveness and usefulness of the PID Act at encouraging disclosures, ensuring disclosures are investigated, and enabling agencies to respond effectively. The Review has made recommendations intended to resolve each of these challenges.

THE NATURE OF DISCLOSABLE CONDUCT BROUGHT FORWARD

32. The PID Act's intention is to enable the disclosure and investigation of wrongdoing that would not otherwise be brought to light. However, a common perception is that the scope of the PID Act is too broad. As a result, the PID Act is seen as a cumbersome, legalistic mechanism that complicates minor workplace disputes. Similarly, a case load of PIDs mainly concerned with personal employment-related grievances seems to have caused the value of PID, as an essential source of information for agencies, to be discounted.
33. The Review sought to understand the extent to which the PID Act has brought forward allegations of fraud, serious misconduct and corrupt conduct. Some agencies informed the Review that disclosures of this type of wrongdoing have been made under the PID Act in the two and a half years since its enactment. While disclosures of this kind were fewer than those related to workplace disputes, the PID Act is enabling disclosure of significant wrongdoing within the Commonwealth Public Sector.
34. Focussing the PID Act on facilitating the disclosure of fraud, serious misconduct and corrupt conduct addresses agency concerns that the PID Act's scope is too broad. The Review's recommendations for refining the PID Act's focus are discussed in Part 2.

¹³ PID Act, section 60A.

¹⁴ Supervisors may also inadvertently breach other provisions of the legislation as they attempted to resolve the matter disclosed, such as the secrecy offences.

A PRO-DISCLOSURE CULTURE

35. Legislation can play a normative role. Yet for cultural change to occur across the Commonwealth public sector, agencies have to commit to a pro-disclosure culture. Senior officers have to 'lead by example' and staff members must see PID as an important integrity mechanism.¹⁵
36. The PID Act applies to the Commonwealth public sector, including APS and non-APS employees, contracted service providers and their staff members, as well as agency heads, directors of Commonwealth companies, members of the Australian Defence Force and the Australian Federal Police, statutory officeholders, and individuals exercising statutory powers.¹⁶ These individuals are all engaged under different statutes and contracts which apply divergent standards of behaviour and professional obligations. In contrast, the PID Act applies consistently across the Commonwealth public sector, enhancing the integrity, accountability and behavioural standards of all public officials.
37. The Review has considered the culture around the reporting of wrongdoing that has developed in the Commonwealth public sector since the enactment of the PID Act and the extent to which the legislation has helped or hindered better practices. In making recommendations to amend the PID Act, the Review recognises that these amendments must be coupled with awareness-raising and education within agencies to succeed in creating and maintaining the required cultural change.
38. As the Accountability Round Table submitted, within the Commonwealth public sector, a 'pro-disclosure culture' is already expected by the codes of conduct and other standards of behaviour that apply.¹⁷ Public officials have a range of obligations under legislation and codes of practice to act ethically and to report concerns about wrongdoing. For example:
 - The *Public Service Act 1999* requires public servants to uphold certain values and to be ethical and accountable.¹⁸ A 2013 direction by the Australian Public Service Commissioner

¹⁵ This point was made during parliamentary consideration of the bill when both Senator Milne and Senator Sinodinos spoke of legislative change as distinct from cultural change within agencies, saying respectively that agencies must take 'active steps to encourage a new culture in their workplaces' and the 'very big responsibility ... placed on the chief executives of organisations and on their boards, to not only talk the talk but also to walk the walk when it comes to these matters.' Senate Hansard, 26 June 2013, pages 4108 and 4115 respectively.

¹⁶ PID Act, section 26 and defined in section 69. The PID Act also permits a member of the public to be deemed to be a 'public official' if the individual has information that concerns 'disclosable conduct' (section 70).

¹⁷ Submission of the Accountability Round Table, pages 1-4.

¹⁸ The Public Service Act covers about half of the public officials who are subject to the PID Act (approximately 150,000 people out of a total coverage of 300,000 people): unpublished data held by the Australian Public Service Commission drawn from the December 2015 Australian Public Service Employment Database survey and the Commonwealth Indigenous Employment Strategy survey in June 2015.

Introduction

requires all APS employees to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way.¹⁹

- Public officials may also have reporting obligations under their agency's fraud control guidelines and other agency instructions.
- An agency's arrangements under the *Work Health and Safety Act 2011* may require employees to report safety issues or hazards including workplace bullying.

39. The ethical duties that already apply to public officials are designed to ensure integrity and accountability. In this context, a positive obligation to report wrongdoing is based on ethical standards, for example:

- The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) imposes a range of duties upon public officials to support the efficient, effective, economical and ethical use of public resources. These duties include a duty to act honestly, in good faith and for a proper purpose, and a duty not to use their position, or information gained from it, for personal gain or to cause detriment to others. These duties are designed to be consistent with duties imposed upon individuals by the *Corporations Act 2001* and with the standards set by the APS Code of Conduct.
- The *Defence Force Discipline Act 1982*, which relates to members of the Australian Defence Force, includes a detailed set of offences and the investigation and penalty regime such offences would attract.
- The *Australian Federal Police Act 1979* and Commissioner's Orders under section 40RC set out the professional standards for Australian Federal Police members.

40. Despite these obligations to report concerns or alleged wrongdoing, the Review concludes that Commonwealth public sector is yet to achieve an 'if in doubt, can report' culture.²⁰ The aim is for a culture that acknowledges whistleblowing as an opportunity to uncover and address problems.

Under the PID Act, an agency with a healthy pro-disclosure culture would have:

1. Responsive and supportive leadership, and staff who are ethical in their own conduct and encourage open conversations about integrity within their organisation;
2. Available and accessible Authorised Officers to receive disclosures;
3. Invested in ongoing professional skills and training about integrity and accountability. This training would include explicit discussion of the PID Act's protections and mechanisms to report concerns.
4. Strong and collaborative relationships with the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security, as well as relevant specialist investigative

¹⁹ Failure to report suspected misconduct may be a breach of the Code of Conduct: *Australian Public Service Commissioner's Direction 2013*, clause 1.3(f).

²⁰ Submission of Professor AJ Brown, page 2.

41. The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security and their teams work to inspire and educate others about the need for cultural change and the opportunities a pro-disclosure approach represents for agencies. As oversight bodies for the PID Act, they lead PID awareness-raising and professional development activities for agencies as well as working to use their influence for the better.²¹ The Review concludes that these agencies must be better resourced to assist agency heads to instil pro-disclosure cultures across the Commonwealth public sector.
42. The Review's recommendations seek to enable the PID Act to perform its intended functions: to promote the integrity and accountability of the Commonwealth public sector; to encourage and facilitate the making of public interest disclosures by public officials; to ensure that public officials who make public interest disclosures are both protected and supported; and to ensure that disclosures by public officials are properly investigated and dealt with.²² The Review's recommendations also seek to address aspects of the legislation that undermine a pro-disclosure culture.

CONTINUOUS, EVIDENCE-BASED IMPROVEMENT

43. Periodic review of any legislation is essential. The PID Act established a framework for Commonwealth public sector whistleblowing in 2014, yet some states and territories have had similar legislation for over 20 years. These jurisdictions have looked periodically at their enactments to reassess them in the light of experience and new research.²³ The Review notes that after two and a half years of operation there is only limited information about the PID Act and the regime it seeks to establish.
44. This Review is the first formal assessment of the PID Act. It makes recommendations about the scope, oversight and regulatory approach of the legislation. If adopted, these would be significant changes to, and redrafting of, the legislation. It is essential that these changes are evaluated at a future point to ensure that the policy objective of promoting integrity and accountability within the Commonwealth public sector based on a pro-disclosure culture is being met. The Review has noted the states' and territories' experiences of managing their various public interest disclosure schemes. The Review has also noted those aspects that were excluded or included at the time of the PID bill's enactment.²⁴ The Review has further noted how the operation of the PID Act could

²¹ As enabled by PID Act, sections 62 and 63.

²² PID Act, section 6.

²³ For example, there are current reviews of the legislation in NSW, VIC, QLD and the NT, and a review was recently conducted in SA.

²⁴ Such as the inclusion of supervisors among those able to receive disclosures (Supplementary Explanatory Memorandum, page 9) and Parliamentary debate about the coverage of the intelligence and security agencies as well as Members of Parliament, Senators and their staff (see for example the Hon Andrew Wilkie MP, *Hansard*, House of Representatives 19 June 2013, page 6404-5; Senator Xenophon, *Hansard*, Senate, 26 June 2013, page 4114; and Senator Milne, *Hansard*, Senate, 26 June 2013, page 4106).

Introduction

be improved in light of experience, both agency and individual. Knowledge about public interest disclosure will continue to grow, and new research on organisational responses to whistleblowing in the public and private sector will be available in 2017.²⁵ For these reasons, the Review notes that there should be a review of the PID Act within three to five years.

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.

²⁵ Brown, AJ. (2016) *Whistling While They Work 2: Improving managerial responses to whistleblowing in public and private sector organisations*, Griffith University Centre for Governance & Public Policy.

PART 1: STRONGER OVERSIGHT

45. The focus of the PID scheme in the Commonwealth public sector is for disclosures about wrongdoing to be investigated within the agency concerned, unless it is more appropriate for an outside specialist investigatory agency to deal with the matter. In that respect, the PID Act provides for a decentralised framework with agencies being primarily responsible for dealing with PIDs. The PID Act was intended to complement and strengthen existing investigative and complaint-handling schemes in the Commonwealth public sector. This section of the report includes proposals to strengthen the existing oversight of agencies' implementation of the PID Act.
46. The Review considers that proactive engagement by additional investigative agencies is needed to scrutinise and strengthen agencies' implementation of the PID Act, as well as to encourage adoption of a pro-disclosure approach.

RECOGNISE MORE INVESTIGATIVE AGENCIES

47. At present, the PID Act recognises two investigative agencies, namely the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security. This recognition integrates the PID Act with the statutory functions of these agencies and their existing investigative schemes.
48. As an investigative agency, the Commonwealth Ombudsman and the IGIS can: receive an internal public interest disclosure (provided they already have the power to investigate the disclosure otherwise than under the PID Act);²⁶ consent to another agency allocating a disclosure to them for investigation;²⁷ and investigate disclosures under their own powers rather than the PID Act.²⁸
49. The ability of an investigative agency to investigate a PID under its own investigative powers is a key aspect of the PID Act framework. When investigating a PID under their own investigative regimes, investigative agencies do not need to comply with the provisions of the PID Act,²⁹ which includes the need to comply with all notification requirements,³⁰ time limits³¹ and the limited range of discretions not to investigate a matter,³² although the PID Act's secrecy and confidentiality provisions continue to have effect and an investigative agency must inform the relevant Principal Officer and the discloser when the investigation is complete.³³

²⁶ PID Act, section 34, item 1(d) or 2(b).

²⁷ PID Act, section 43(3)(iv).

²⁸ PID Act, section 49.

²⁹ PID Act, section 53.

³⁰ PID Act, sections 50-51A.

³¹ PID Act, section 52.

³² PID Act, section 48.

³³ PID Act, sections 20, 65 and 49(3).

Part 1: Stronger oversight

50. The Review supports the original intention to expand the number of investigative agencies under the PID Act to include the Australian Public Service Commissioner, the Merit Protection Commissioner and the Integrity Commissioner.³⁴ The Review recommends that several other statutory officeholders also become investigative agencies under the PID Act.³⁵ The role of each of these additional investigative agencies' would be limited to their existing statutory jurisdiction. The Commonwealth Ombudsman and the Inspector-General of Intelligence and Security would continue to share responsibility for the oversight of the PID Act scheme.
51. The Review has identified six statutory officeholders whose remit includes matters that may become the subject of a PID and that possess the power to compel information in certain situations. These officeholders and their relevant jurisdictions are below:
- The Australian Public Service Commissioner, who can inquire into alleged breaches of the Code of Conduct by an Agency Head,³⁶ or public interest disclosures to the extent they relate to alleged breaches of the Code of Conduct.³⁷
 - The Merit Protection Commissioner, who can inquire into public interest disclosures to the extent they relate to alleged breaches of the Code of Conduct.³⁸
 - The Integrity Commissioner, who can investigate 'corruption issues' within law enforcement agencies and their staff members.³⁹
 - The Inspector-General of Taxation, who can investigate administrative actions taken by a tax official or the administrative aspects of systems established by taxation law and receive complaints.⁴⁰
 - The Parliamentary Services Commissioner, who can inquire into public interest disclosures relating to alleged breaches of the Code of Conduct,⁴¹ after notifying the Presiding Officers.
 - The Parliamentary Services Merit Protection Commissioner, who can inquire into public interest disclosures to the extent they relate to alleged breaches of the Code of Conduct.⁴²

³⁴ This intention is reflected in the bill's Explanatory Memorandum, page 3. The expansion was intended to occur by legislative instrument.

³⁵ Since the existing jurisdiction of each of these investigative agencies is described as a power of the statutory officeholder (rather than their agency), it may be necessary to also prescribe these officeholders as 'agencies' within section 72 of the PID Act.

³⁶ Public Service Act, sections 41(2)(m) and 41A.

³⁷ Public Service Act, section 41(2)(o) and Regulation 6.1B.

³⁸ Public Service Act, section 50(1)(a) and Regulation 7.1A.

³⁹ *Law Enforcement Integrity Commissioner Act 2006*, section 15(a). The agencies subject to the Integrity Commissioner's jurisdiction are the Australian Criminal Intelligence Commission, the Australian Federal Police (including ACT Policing), the Australian Transaction Reports and Analysis Centre (AUSTRAC), and the Department of Agriculture and Water Resources, the Department of Immigration and Border Protection (including the Australian Border Force), and the former National Crime Authority.

⁴⁰ *Inspector-General of Taxation Act 2003*, section 7.

⁴¹ *Parliamentary Services Act 1999*, section 40(1)(c).

52. The Review considers that inclusion of these officeholders as investigative agencies supports a ‘no wrong doors’ approach for disclosers to come forward, especially for those who may lack detailed understanding of the legislation and jurisdictions. This approach would extend the PID Act protections to a discloser who reported wrongdoing to one of these investigative agencies in the Commonwealth public sector. This approach will also encourage disclosers who lack confidence in an agency’s internal investigation processes, or who may fear reprisal, to bring their concerns about wrongdoing to a relevant independent investigative body without altering the existing remit of these agencies beyond their current scope.
53. The Review also considers that the significant coercive or compulsory notice powers granted to potential investigative agencies by their own legislation would be of significant benefit to the oversight of PID-derived information, allowing them to fathom instances of fraud, corrupt conduct and serious misconduct brought forward under the PID Act, and to use their specialist jurisdictional knowledge and expertise to halt further instances of such wrongdoing.

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.

STRENGTHEN SCRUTINY BY THE COMMONWEALTH OMBUDSMAN AND THE IGIS

54. As mentioned earlier, the PID Act prescribes a decentralised approach, holding the Principal Officer and Authorised Officer within each agency responsible for receiving, assessing, allocating, investigating and responding to each disclosure.⁴³ Within the Commonwealth public sector, although there are reporting obligations to the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, wide reaching secrecy offences in the PID Act prevent any agency having a comprehensive overview of the legislation’s implementation, impact and effectiveness.⁴⁴
55. The Commonwealth Ombudsman and the IGIS receive notifications from agencies in particular instances, including when a disclosure is allocated,⁴⁵ a discretionary power not to investigate a PID is exercised,⁴⁶ or statistics are being collected for the annual report.⁴⁷ Both oversight bodies are

⁴² Parliamentary Services Act, section 48(1)(a).

⁴³ See for example, PID Act, sections 26, 43, 47, 51, 59 and 60.

⁴⁴ As a matter of practice, the IGIS currently requests and receives copies of all reports generated by the agencies which comprise the Australian intelligence community, as a part of the PID investigation process.

⁴⁵ PID Act, section 44.

⁴⁶ PID Act, section 50A.

Part 1: Stronger oversight

also informed when an agency in their remit seeks an extension of time to investigate a disclosure beyond 90 days.⁴⁸

56. From such information alone, it is difficult for the Commonwealth Ombudsman or the IGIS to scrutinise agencies' handling of PIDs, or to help agencies to instil a 'pro-disclosure' culture. It would be also difficult for these oversight agencies to scrutinise how the agencies within their respective remits are handling the PIDs they process, or are instilling a 'pro-disclosure' culture.
57. The Commonwealth Ombudsman's annual reports indicate instances of agency non-compliance with the PID Act, such as not publicising the ability of contractors to make a PID, not promoting the obligation of supervisors to report a PID they receive to an Authorised Officer, or appointing Authorised Officers who are inaccessible. This information about non-compliance is received long after the conduct has occurred, when its impact on a discloser, or would be discloser, is hard to reverse.
58. Some states and territories have a strongly centralised model in which one body assesses, and may even investigate, all PIDs. Variations of this approach have been adopted in VIC and the NT⁴⁹, and were recommended in SA.⁵⁰ These jurisdictions identified their centralised model as key to ensuring consistent treatment of PIDs. They saw it as a way to ensure that their legislation targets the kinds of wrongdoing it is intended to address and limits the administrative burden on smaller agencies. Both issues challenge the administration of the PID Act in the Commonwealth public sector.
59. The Review considered whether aspects of the way a PID is handled should be centralised within the proposed enlarged group of investigative agencies, or the two existing oversight agencies. The

⁴⁷ PID Act, section 76.

⁴⁸ PID Act, section 52(3) and (4).

⁴⁹ In VIC, public bodies who receive disclosures must refer them to the IBAC to be assessed as a PID, before the IBAC decides whether to dismiss, investigate or refer the disclosure to certain agencies, including the Victorian Ombudsman, the Auditor-General, and Victoria Police. In the Northern Territory, a PID can only be made only to the Commissioner for Public Interest Disclosures, or the person responsible for the administration and management of the relevant entity. All PIDs must be referred to the Commissioner who will investigate, unless an exemption applies, or refer it to a limited range of other investigative bodies which would deal with the disclosure under their own powers. When the Commissioner completes the investigation, the findings are reported to the head of the relevant agency and the discloser. The Commissioner can also require a report on the implementation of any recommendations.

⁵⁰ In SA, the Lander report (2014) recommended adopting a similar model to VIC, requiring all recipients of PID to refer them to the Office for Public Integrity which would deal with them like a complaint or report to SA's Independent Commission Against Corruption. As per the Lander Report's recommendations, the SA Government announced on 6 July 2016 that it will repeal its *Whistleblower Protection Act 1993* and replace it with public interest disclosure legislation.

Review was not persuaded that a centralised model was the most effective way to achieve greater consistency or stronger scrutiny of agencies' decisions for two reasons.

- To improve administration or pre-empt future wrongdoing, agencies and their staff members must be able to learn from information disclosed and investigated under the PID Act. Disclosures and complaints provide important opportunities for agencies to understand where to concentrate efforts to improve outcomes for the organisation, its administration and its people.
- There is a possibility of multiple handling if an agency receives a disclosure and must then refer it to a third party for assessment and/or investigation, before taking action to respond to any outcomes. For some kinds of alleged wrongdoing, like criminal or corrupt conduct, such handling requirements may jeopardise the security of an ongoing investigation by increasing the number of people who become aware of the allegations.

60. Instead of centralising aspects of the PID processes, the Review recommends enhancing the notification obligations on agencies handling PIDs to provide more detailed prompt information about the disclosures they have received and how they have responded. A similar approach applies in the ACT, where the Commissioner for Public Administration has a specific role in overseeing the action taken once a PID has been received, and in ensuring all disclosures are handled appropriately.⁵¹

61. In addition to the existing notification requirements within the PID Act, the Review recommends that the PID Act be amended to require the Principal Officer to provide the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security with a copy of the PID investigation report within a reasonable period of time.⁵² The investigation report should provide sufficient detail to enable scrutiny of the agency's decision, without imposing an extensive additional compliance burden upon the agency. The Review intends that the information provided to the oversight agency in the investigation report can assist the oversight agency to determine whether to intervene in an agency's decision making to protect an individual or to remedy an error. This amendment would also inform the Commonwealth Ombudsman's or the Inspector-General of Intelligence and Security's ability to scrutinise and monitor agency procedures, regulating their compliance with the PID Act's procedures. This approach balances the

⁵¹ In the ACT, when an authorised person receives a disclosure, that person is responsible for assessing whether the complaint or misconduct meets the definition of disclosable conduct, whether it should be investigated or dealt with in another way, which entity should investigate if need be, the outcome of the investigation, as well as notifying both the discloser and Commissioner for Public Administration of progress every 3 months. In practice, most PIDs are investigated by the head of the public sector entity to which the disclosure relates.

⁵² The Principal Officers are already required to prepare this report and must provide a version of the report to the discloser within 'a reasonable period of time': PID Act, section 51.

Part 1: Stronger oversight

decentralised nature of the scheme with ensuring that agencies consistently apply allocation, investigation, notification and reporting requirements.

62. The Review notes that effective scrutiny of any agency's handling of a PID would also include the actions taken in response to the findings of a PID investigation. This function is important when an investigation report may recommend that aspects of a PID be investigated under another statutory framework, such as Code of Conduct or fraud guidance, or an investigation is ceased because it is being considered in parallel. The Commonwealth Ombudsman's Annual Report on PID is already required to include information about such actions in response to an investigation.⁵³ The Review encourages the Commonwealth Ombudsman to use his or her existing powers to seek information and assistance from agencies when preparing the annual report to support scrutiny of this aspect of an agency's response to a PID.
63. As an additional safeguard, the Commonwealth Ombudsman should share information they receive about the handling of, or response to, a PID with any relevant investigative agency. This approach is intended to ensure that the oversight bodies retain a comprehensive view of the scheme's implementation, yet also ensure investigative agencies are appropriately informed about matters that fall within their remit and could inform their decisions to conduct further investigation or review. Depending upon the volume of disclosures in the future, the Commonwealth Ombudsman and the IGIS may require additional resources for this information-sharing role.

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.

Recommendation 4: That the Commonwealth Ombudsman share information about the handling of or response to a PID with relevant investigative agencies.

⁵³ PID Act, section 76(2)(iv).

PART 2: A STRONGER FOCUS ON SIGNIFICANT WRONGDOING

64. The scope of wrongdoing that a public official can disclose under the PID Act is broad to encourage public officials to speak up on all forms of wrongdoing in the workplace. This intention is commensurate with a transparent and accountable public sector. However, the PID Act's processes and procedures are not well adapted to resolving allegations of less serious disclosable conduct. For example, the extensive protections against reprisal and secrecy offences can have an adverse effect upon best practice conflict-management solutions that emphasise alternative dispute resolution or merits review processes, rather than formal investigation.
65. The policy intention of the PID Act is to bring forth disclosures about wrongdoing and maladministration which the Review characterises as fraud, serious misconduct and corrupt conduct. There were approximately 1080 disclosures reported in the Commonwealth Ombudsman's Annual Reports between 2013 and 2015.⁵⁴ To understand whether the PID Act brings forth such disclosures, the Review contacted all Departmental Secretaries, asking them to identify the most significant PIDs within their portfolio. Secretaries told the Review of a number of instances where the PID Act had been used to report significant wrongdoing, such as:
- inappropriate pressure from an organisation's CEO to falsify financial reporting;
 - allegations of corruption within departments and portfolio bodies, including 'kick backs' for using preferred suppliers;
 - serious criminality, including drug trafficking and theft of departmental IT equipment;
 - making a security incident report about and recording as a person of interest on alert lists without proper investigation or evidence a person who had made a disclosure; and
 - systemic patterns of wrongdoing amongst a group of public officials posted together, such as allocating responsibilities to untrained staff, consumption of alcohol while on duty, and fraudulently recording hours.
66. These instances indicate that the PID Act has enabled disclosure of fraud, serious misconduct and corrupt conduct, but only to a limited extent.

EXCLUDE DISCLOSURES SOLELY ABOUT PERSONAL EMPLOYMENT-RELATED GRIEVANCES

67. Submissions received from agencies noted that the overwhelming majority of disclosures concerned issues like workplace bullying and harassment, forms of disrespect from colleagues or managers, or minor allegations of wrongdoing. It is difficult to identify clearly within the Commonwealth Ombudsman's annual report statistics what proportion of disclosures primarily relate to interpersonal conflicts at work or a personal employment-related grievance.⁵⁵ These

⁵⁴ Commonwealth Ombudsman's Annual Report, 2014-2015, Page 67 and Commonwealth Ombudsman's Annual Report, 2013-14, page 69.

⁵⁵ At the Community of Practice forums and in written submissions, agencies noted that disgruntled employees or employees in conflict may cite as disclosable conduct by a senior officer maladministration, abuse of public

Part 2: A stronger focus on significant wrongdoing

kinds of issues can present as one of several different prescribed kinds of disclosable conduct under the legislation.⁵⁶

68. A public official may allege wrongdoing that can be categorised as disclosable conduct under the PID Act, yet is not significant or serious enough to warrant protection or investigation under the PID Act. As noted in the Merit Protection Commissioner's submission, experienced human resource practitioners and managers can make sound *prima facie* judgments about the value of information about wrongdoing. The PID scheme does not permit these people to make such judgements. As submissions from agencies and the Merit Protection Commissioner have highlighted it is in the interests of all parties to arrive at an efficient and effective resolution. The PID Act does not provide resolution for grievances, and the allocation and investigation process (which, under the statutory framework, may take up to 104 days to complete in total and longer if the Commonwealth Ombudsman or the IGIS grants the agency an extension)⁵⁷ can prolong the discloser's exposure to the situation that they have reported.
69. The Review recommends that the legislation redefine the scope of disclosable conduct to focus on fraud, serious misconduct and corrupt conduct. This approach is not to suggest that agencies should ignore other forms of wrongdoing or workplace conflict. The Review notes that such matters are better resolved through less formal processes available through existing administrative and statutory schemes, such as performance management, merits review, or disciplinary conduct procedures.⁵⁸

trust, conduct that could, if proved, give reasonable grounds for disciplinary action against the public official, or danger to health and safety, and conduct that is contrary to law. While all states and territories have provisions within their whistleblowing legislation to capture conduct that constitutes a criminal offence, the Commonwealth legislation also includes conduct that contravenes Commonwealth or state and territory law, which includes the Defence Force Disciplinary Act, Public Service Act, Parliamentary Service Act and the PGPA Act, amongst other legislation.

⁵⁶ The Review noted reports of agencies receiving dozens or even scores of PIDs from the same person about related aspects of alleged minor wrongdoing in a particular situation. In many of the examples, the discloser's employment had already been terminated before they made their disclosures, or that termination of their employment was imminent. This tactic can impede an agency's ability to resolve the issue as each PID must be allocated and the notification requirements met separately, even if they are often investigated together.

⁵⁷ PID Act, sections 43 and 52.

⁵⁸ For example, the Australian Public Service Employment Principles provide that the APS makes fair employment decisions with a fair system of review (Public Service Act, section 10A(1)(a)) and there is a statutory scheme for review of actions. Similar procedures exist within the Australian Defence Forces, the Australian Federal Police and agencies with staff employed under their own legislation, such as Air Services Australia, ASIO and ASIS. If a grievance resolution process reveals evidence of wrongdoing or reprisal for reporting wrongdoing, this information should then be investigated by the agency and can be under existing

70. While almost all jurisdictions struggle with this challenge, it is made especially problematic in the Commonwealth public sector. First, the categories of disclosable conduct are more comprehensive than other jurisdictions.⁵⁹ Second, internal disclosures under the PID Act are not otherwise limited to wrongdoing that is serious, substantial or significant.⁶⁰ The jurisdiction that has had most success in better targeting the scope of disclosable conduct uses a general exclusion. In the NT PID Act, a public interest disclosure ‘cannot be based solely or substantially on ... an employment related grievance (other than a grievance about an act of reprisal) or other personal grievance.’⁶¹
71. The Review recommends that the PID Act be amended to adopt a general exclusion for personal employment-related grievances. These amendments will need to ensure that in cases when a disclosure that includes both an element of personal employment-related grievance, as well as an element of other wrongdoing, the latter element could still be the subject of a PID. These amendments should also be reviewed after their implementation to ensure that they achieve the policy intention. If these amendments significantly increase the volume of matters considered by the Merit Protection Commissioner in his or her existing jurisdiction, he or she may require additional resourcing.
72. The Review became aware that, occasionally, a personal employment-related grievance can be symptomatic of a larger, systemic concern, such as discriminatory employment practices or nepotism. Such concerns should attract the protection of the PID Act. To ensure that these matters can be the subject of a disclosure, the Review recommends that Authorised Officers be granted discretion to treat a personal employment-related grievance as a disclosure under the PID Act if they consider it relates to a systemic issue.

Recommendation 5: 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

mechanisms including an agency’s general employer powers or specific provisions such as the Australian Public Service Code of Conduct.

⁵⁹ PID Act, section 29. Despite this breadth, the PID Act excludes specific topics from becoming disclosable conduct, for example: conduct that relates to disagreements with government policies, expenditure or actions of a Minister or Presiding Member (section 31); conduct of a member of a court of tribunal who is exercising judicial power (section 32); and conduct of intelligence agencies or their staff in the proper exercise of their functions and powers (section 33).

⁶⁰ Variations of these tests are applied, however to external and emergency disclosures: section 26(3)(ab) requires that a disclosure would expose a failure to address serious wrongdoing in the Commonwealth public sector and section 26(3)(ae) requires the nature and ‘seriousness’ of disclosable conduct to be proved. An emergency disclosure can be made where there is a substantial danger to the health or safety of one or more persons or to the environment (section 26(1) item 3).

⁶¹ NT PID, section 10(2)(b).

Officer considers that it relates to systemic wrongdoing. Other existing legislative frameworks are better adapted to dealing with and resolving personal employment-related grievances.

73. In coming to this conclusion, the Review considered a number of different ways to narrow the scope of disclosable conduct to target serious wrongdoing, as set out below.
- The Review considered linking the scope of disclosable conduct to the motivations of the discloser. NSW amended its legislation in 2010 to use a similar approach, excluding PIDs motivated to circumvent disciplinary action.⁶² Yet the NSW Ombudsman often advises agencies not to rely upon this provision as even a malicious disclosure could contain information that warrants investigation as a PID.⁶³ The Review thinks that attempts by agencies to consider a discloser's motivation could expose the discloser to a greater risk of being discredited as 'troublemakers'.⁶⁴ This view was also expressed in individual submissions to the Review.
 - The Review also considered agency calls for a 'seriousness' test on the kinds of disclosable conduct that could be the subject of a disclosure. While states and territories include some form of 'seriousness' test within at least some grounds of disclosable conduct,⁶⁵ they have found the test vague and hard to apply in practice. 'Serious' or 'significant' can have different meanings to different people. For example, an agency decision-maker may view a disclosure about workplace bullying as not 'serious', while the discloser sees this issue as a threat to their mental and physical well-being. This issue is even harder to judge at an early stage of the disclosure when only limited information may be available to the decision-maker to corroborate the discloser's report. Given these difficulties in applying a

⁶² NSW PID, section 18.

⁶³ NSW Ombudsman, *Public Interest Disclosure Guideline: What's not a public interest disclosure?* page 2. The NSW Ombudsman's office advised the Review that they took this view as it was difficult to determine the motivations for a disclosure at the assessment stage, and that the threshold for wrongdoing to be disclosable conduct in NSW was high enough that any disclosure should be considered, regardless of discloser's motive.

⁶⁴ While the Review was underway, media coverage reported that a QLD police whistleblower who released CCTV footage of a colleague he claims was 'washing away blood' after 'bashing' a person while he was handcuffed to a police vehicle. QLD police was reported to have charged the whistleblower with 'misconduct in public office', and prosecutors alleged that the official who released the footage was not a genuine whistleblower because he held a grudge against his colleague and was under investigation by Ethical Standards Command. Irrespective of relationships at work or the motives of any whistleblower, the Review considers that the disclosure of alleged police brutality is in the public interest. (Greg Stolz, 'Cop defends releasing 'brutal' video to media: 'I was shining a light'' *Courier Mail*, 21 May 2016, page 2; see also AAP, 'QLD magistrate reserves decision on police leak', *Brisbane Times*, 20 May 2016.)

⁶⁵ See for example: NSW PID, sections 11-12, 12B-12C, 12D-14; VIC PD, section 4(2)(f); QLD PID, sections 12-13; WA PID, section 5(3)(b); SA WP, section 4, definition of 'public interest information'; TAS PID, section 1, definition of 'improper conduct'; NT PID, section 5; ACT PID, section 8.

‘seriousness test’, the Review decided against a ‘serious’ test to narrow the definition of disclosable conduct.

- Finally, the Review considered a public interest test for internal disclosures. At present, the PID Act includes a public interest test only for external and emergency disclosures.⁶⁶ While it is intuitively appealing to extend a similar test to raise the threshold for internal disclosures, the ‘public interest’ is a term that can be hard to define.⁶⁷ For example, the NSW Ombudsman has stated that ‘what is in the public interest is incapable of precise definition as there is no single and immutable public interest’: in practice, the perceptions of disclosers and agency decision makers often diverge.⁶⁸ No state or territory has a public interest test within its legislation, although several include the undefined term ‘public interest’ as a criterion to determine whether a report of wrongdoing is a ‘public interest disclosure’ or a ‘protected disclosure’. Because it is difficult to define and thus open to subjective interpretation by those who administer the PID Act, the Review does not suggest inserting a public interest test for internal disclosures. The Review also suggests that future reviews of the legislation consider whether the current ‘public interest test’ for external disclosures could be simplified: there was not enough experience to assess the operation of this test at this point.

74. A reprisal against a discloser is an offence under the PID Act as well as grounds for disclosable conduct (as a breach of Commonwealth law). If **Recommendation 5** is adopted, Government should ensure that disclosures about reprisal are not excluded from the PID Act as a consequence of the recommended exclusion of personal employment-related grievances. This issue is important because 75 percent of respondents to the Review’s online survey who had made an internal disclosure stated they had experienced reprisal after making a PID.⁶⁹ For clarity, the Review recommends explicitly including reprisal within the definition of disclosable conduct. This approach has been adopted in the NT legislation, as well as in QLD and TAS.⁷⁰

Recommendation 6: 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.

⁶⁶ Section 26(3).

⁶⁷ For a helpful discussion see Peter Bowden (2014) *In the Public Interest. Protecting Whistleblowers and Those Who Speak Out*, Tilde Publishing, Prahran, page 24-25.

⁶⁸ NSW Ombudsman (2010), *Public Interest* factsheet, accessed 13 May 2016, https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0014/3713/FS_PSA_16_Public_interest.pdf.

⁶⁹ Sixteen respondents reported experiencing reprisal as a result of making their disclosure, while only 5 respondents did not. The Review’s online survey did not seek further information about the alleged reprisal.

⁷⁰ NT PID, sections 5 and 15; QLD PID, section 12(1)(d) and 41; and TAS PID, sections 3, definition of ‘improper conduct’ and 19.

Part 2: A stronger focus on significant wrongdoing

75. In addition to the general exclusion of personal employment-related grievances or workplace conflict, the Review also considered changes to specific kinds of disclosable conduct to shift the focus of the PID Act to significant wrongdoing.

DEFINE CONDUCT THAT COULD RESULT IN 'DISCIPLINARY ACTION' AS TERMINATION OR DISMISSAL

76. Any 'conduct engaged in by a public official that could, if proved, give reasonable grounds for disciplinary action against the public official' is a kind of disclosable conduct.⁷¹ This kind of conduct is one of the most common reported under the PID Act.
77. Technically, this ground can include any behaviour that breaches the Defence Force Discipline Act such as an ADF member who is late to parade, the public and parliamentary service Codes of Conduct or other specific employment arrangements. The Commonwealth Ombudsman has issued guidance to agencies that 'disciplinary action' for the purposes of the PID Act excludes performance development and improvement activities for an employee, such as performance management, mediation or training.⁷² Yet, agencies are reluctant to rely upon this advice for fear of breaching the PID Act.
78. In VIC and the ACT, the equivalent legislation requires that the conduct must constitute reasonable grounds for termination or dismissal, not just any disciplinary action. While it is difficult to prescribe an appropriate management response to each type of wrongdoing, the APSC has previously listed examples of the kinds of wrongdoing in the Australian Public Service that would constitute reasonable grounds for termination. These kinds of wrongdoing include 'fraud, theft, misusing clients' personal information, sexual harassment, or leaking classified documentation.'⁷³ A similar standard is likely to apply within other Commonwealth public sector employment frameworks outside the Public Service Act.
79. This approach would assist in excluding some less serious disclosures of wrongdoing from the PID Act. To give a sense of the scale of this reduction, the APSC's most recent *State of the Service Report* noted that in 2014-15, 81 public servants had their employment terminated for a Code of Conduct breach, compared to approximately 467 employees who were found to have breached the Code of Conduct in the same period. Even more transgressions are likely to have been handled through less formal processes like performance management, mediation or training.

Recommendation 7: 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.

⁷¹ PID Act, section 29(2)(b).

⁷² Commonwealth Ombudsman, Agency Guide, version 2, page 7.

⁷³ Australian Public Service Commission, State of the Service Report 2012-13, page 59.

OTHER ISSUES THE REVIEW CONSIDERED TO STRENGTHEN THE FOCUS ON SIGNIFICANT
WRONGDOING

IS 'MALADMINISTRATION' TOO BROAD?

80. Some agencies have suggested defining the term 'maladministration' as a kind of disclosable conduct to avoid including more minor examples and provide greater clarity. The Review was not persuaded by this view. Maladministration is included as a form of disclosable conduct in the NSW, QLD, ACT, TAS, and NT legislation. The ordinary meaning of maladministration concerns poor governance, which encompasses conduct that although not criminal, amounts to wrongdoing in the administration of an organisation. While some jurisdictions have defined maladministration in their legislation,⁷⁴ it is difficult to specify all conduct that could be considered 'maladministration' for the purposes of the PID Act. The Review considers it appropriate to continue to rely upon the above stated meaning of maladministration as a kind of disclosable conduct.

DOES 'DANGER TO HEALTH AND SAFETY' PUT PEOPLE AT RISK?

81. The Review considered a joint submission from the Australian Nuclear Science and Technology Organisation, the Commonwealth Scientific and Industrial Research Organisation and the Australian Institute for Marine Science which sought the removal of 'danger to health and safety' as a kind of disclosable conduct. These agencies submitted that this aspect of the PID Act effectively created alternative reporting channels for health and safety issues that could create confusion and weaken existing, organisation-specific health and safety reporting.⁷⁵
82. The Review considers there is a risk that retaining 'danger to health and safety' duplicates and complicates the existing operation of the Work Health Safety Act,⁷⁶ which imposes significant positive obligations and a duty of care upon all people within workplaces that are broader than the obligations of the PID Act.⁷⁷ A PID process will often be ill-adapted to initiating a quick enough

⁷⁴ See for example, QLD PID, schedule 4 and the SA ICAC, section 3(a)(ii).

⁷⁵ The joint submission emphasised that the procedural requirements of the PID Act such as reporting, escalation and confidentiality hinder a fast response to health and safety risks and add an extra layer of administration which could reduce safety. The submission also stressed that a 'no blame' safety culture is imperative in ensuring these risks are addressed quickly and effectively. However, the procedural requirements of the PID Act may discourage public officials from reporting incidents as it emphasises wrongdoing.

⁷⁶ See for example the submissions from the Commonwealth Ombudsman, page 42, and the joint submission from ANTSO, CSIRO and AIMS, page 3.

⁷⁷ These include a primary duty of care owed to workers by a person conducting a business or undertaking (section 19), a duty on workers to take reasonable care for their own health and safety as well as ensure their actions don't endanger others (section 28), and a positive obligation to notify the regulator of particular kinds

Part 2: A stronger focus on significant wrongdoing

response to prevent or minimise health and safety risks. Moreover, secrecy offences may deter information sharing within an agency to manage these risks.

83. The Commonwealth Public Sector Union and the Commonwealth Ombudsman both suggest that there are situations in which the ability to make a protected internal disclosure about a danger to health and safety is necessary and appropriate, such as when a workplace has exposed its staff to physical and mental risk by refusing to permit them to call police in response to threatening customers.
84. So far, only a small minority of disclosures have concerned threats to public health and safety.⁷⁸ Instead of removing this kind of disclosable conduct, the Review considers that concerns about the overlap with existing health and safety law and administrative regimes should be considered in a future review of the PID Act, including consultation with the Safety, Rehabilitation and Compensation Commission.⁷⁹ The Review also considers that **Recommendation 31** will assist in managing the interaction between health and safety legislation and the PID Act within workplaces by creating a new discretion not to investigate a PID on the basis that it would be better investigated under other legislation or executive powers.

SHOULD THE STANDARD OF PROOF BE HIGHER?

85. The Review considered whether a discloser should have greater certainty that information reveals disclosable conduct. At present, the legislation has two alternative tests to ascertain whether a matter is a PID: whether information ‘tends to show’ disclosable conduct; or whether the discloser ‘believes on reasonable grounds that it tends to show’ disclosable conduct.⁸⁰ The Review received submissions from agencies who found these tests subjective and uncertain.⁸¹
86. The Review considers that raising the level of knowledge required to make a public interest disclosure may deter from reporting disclosers who may want to report concerns, yet who lack sufficient information or evidence. This situation would undermine the aim of a pro-disclosure

of serious incidents (section 38). There are also strict-liability offences of failing to comply with these duties and for being reckless about particular risks to others (sections 31-33).

⁷⁸ According to statistics published by the Commonwealth Ombudsman in their Annual Reports, only 5% of disclosures in 2013-14 raised threats to public health and safety, and only 6% in 2014-15.

⁷⁹ As established by the *Safety, Rehabilitation and Compensation Act 1988*, section 89A

⁸⁰ Either test must be satisfied for the discloser to make an internal or external disclosure, although only the latter test is required for an emergency disclosure.

⁸¹ Some agencies appear to be confused about whether they should conduct an initial investigation to judge whether the discloser has ‘reasonable grounds’, yet also fear breaching the confidentiality and secrecy offences if the report of wrongdoing is actually a ‘public interest disclosure’. Despite guidance from the Commonwealth Ombudsman, this approach can lead agencies to wrongly apply the discretions not to investigate in section 48 when considering whether the disclosure is a valid PID.

culture inherent in the legislation and weaken the utility of the PID Act framework. The Review considers also that these concerns would be better addressed through training and guidance.

GROUNDS FOR MAKING AN EXTERNAL DISCLOSURE

87. The Review heard several arguments seeking to expand or clarify the grounds on which a public official can make an external disclosure.
88. Submissions and online survey responses have criticised the external and emergency disclosure provisions (section 26(1), items 2 and 3) as **confusing and hard to apply** in practice. The Review is aware of only a few situations in which disclosers have sought the protections of the PID Act for external or emergency disclosures of information. The Review is not aware of any of these disclosures being challenged by the agencies concerned. Accordingly, it is hard to draw conclusions about the success or otherwise of the external and emergency disclosure provisions. The Review recommends that the drafting of 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.

Recommendation 8: 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.

89. The Review notes that there are a range of channels available to discloser who feels that their PID has not been handled by the agency in accordance with the PID Act. They could choose to make another internal PID to an investigative agency, they could choose to make a complaint about the handling of their existing PID to the Commonwealth Ombudsman or the IGIS, or they could choose to raise their concern under another legislative or administrative framework.
90. Despite these channels, the Review considers that failure by an agency or supervisor to comply with the requirements of the PID Act would be a threat to the integrity of the PID Act scheme, and by extension the effectiveness of the Commonwealth public sector's integrity and accountability. The Review considers there is a need to allow for external disclosure to include instances when an Authorised Officer has failed to allocate a PID,⁸² or when a supervisor has failed to report information they received from a public official about disclosable conduct to an Authorised Officer.⁸³ The Review recommends that these grounds for external disclosure be inserted into section 26(1), item 2(c) of the PID Act.
91. This approach would be consistent with the existing grounds to make an external disclosure based on agencies' failure to conduct an adequate or timely investigation, as well as to adequately

⁸² The obligation to allocate a PID is imposed by section 43 and requires an authorised officer to use his or her 'best endeavours' to decide the allocation within 14 days.

⁸³ PID Act, section 60A.

Part 2: A stronger focus on significant wrongdoing

respond to the findings of an investigation.⁸⁴ It would also ensure that public officials who make PIDs that fail to reach the investigation stage under the PID Act due to breaches of statutory obligations have grounds to make an external disclosure.

Recommendation 9: 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.

92. The Review received a call to expand the grounds for external disclosure to include situations in which there was **no safe way to make an internal disclosure**.⁸⁵ The Review considers that by expanding the number of investigative agencies, this situation would be unlikely because disclosers could raise their concerns with any relevant agency, an investigative agency, as well as the Commonwealth Ombudsman and the IGIS.
93. The Review also received calls to expand the scope of the external disclosure provisions. The submission from the Joint Media Organisation stated that the PID Act had “inadequate protections for whistle-blowers” and, combined with other **national security legislation**, would have a “chilling effect” and weaken the media’s ability to hold Government to account.⁸⁶ Submissions and input from Mr Andrew Wilkie MP, Senator Nick Xenophon, and civil society organisations echoed these concerns. The Review notes that this view is based on concern about the operation of laws other than the PID Act, such as the restrictions placed on journalists by section 35P of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) and section 79 of the *Crimes Act 1914*.⁸⁷ It is beyond the scope of this Review to consider the impact of national security legislation on journalists; the Independent National Security Legislation Monitor can review any legislation that relates to Australia’s national security and counter-terrorism legislation.

⁸⁴ PID Act, section 26(1), item 2(c).

⁸⁵ Submission by Professor AJ Brown, p. 7-8.

⁸⁶ Submission by the Joint Media Organisations, pages 1 and 5.

⁸⁷ See for example, further discussion of this issue in the Independent National Security Legislation Monitor’s October 2015 *Report on the impact on journalists of section 35P of the ASIO Act*, page 16.

PART 3: SIMPLER LEGISLATIVE PROCEDURES

94. The Review notes that the PID Act imposes a prescriptive process upon decision-makers which can obscure the policy intention of the legislation.⁸⁸ This prescriptive approach actively undermines the policy goal – a ‘pro-disclosure’ culture within the Commonwealth public sector – and produces lesser outcomes for individuals. Decision-makers need to focus less on procedural compliance, and more on realising the policy aims of the legislation.

A PRINCIPLES-BASED APPROACH

95. The Review recommends the adoption of a ‘principles-based’ approach to the procedural aspects of the PID Act. Research suggests that a prescriptive approach can result in ‘box-checking’ rather than the policy intention being achieved.⁸⁹ This risk is further exacerbated because the PID Act’s scope of disclosable conduct is so broad.
96. Forms of principles-based regulation are routinely applied in sectors as diverse as banking, residential care and environmental protection.⁹⁰ Within the Commonwealth public sector, variations of principles-based regulation have been adopted, including: the *Privacy Act 1988*, the *Fair Work Act 2009*, the *Income Tax Assessment Act 1997*, Infrastructure Australia’s ‘Infrastructure Plan’, and in 2015 amendments to the *Telecommunications Act 1997* to manage national security risks across the sector. In all of these examples, the balance struck between prescriptive rules and principles reflects the particularities of the topics covered by legislation.
97. The Review considers that adopting a ‘principles-based’ regulatory approach to the procedural aspects of the legislation will be a) better adapted to achieving cultural change because the legal obligations are the starting point for outcome-focussed conversations between regulators and decision-makers, as well as amongst peers about how to comply; and b) better adapted to

⁸⁸ As examples, the PID Act takes a prescriptive approach to the allocation of disclosures (sections 43-45), timing and reporting of investigations, and notification obligations (sections 50-54). Other provisions regulate the use of information, including the discloser’s identity (sections 20-12, 24, 65, 67, 75). The PID Act also requires Principal Officers to establish procedures for facilitating and dealing with disclosures relating to their agency (section 59(1)). Agencies must also appoint enough Authorised Officers to ensure that public officials are aware of their identity and that these Authorised Officers are ‘readily accessible’ (section 59(3)).

⁸⁹ For a helpful example, see the landmark study of nursing home regulation in the US and Australia which compared the effectiveness of principles-based and rule-based regulatory systems: J Braithwaite & V Braithwaite, ‘The Politics of Legalism: Rules versus Standards in Nursing-Home Regulation’ *Social & Legal Studies* (1995). See also S Arjoon, ‘Striking a balance between rules and principles-based approaches for effective governance: A risk-based approach’ *Journal of Business Ethics* (2006) 68, page 53-82; G Narayanamoorthy, A Arya, J Glover and B Mittendorf, ‘Unintended consequences of regulating disclosures: The case for regulating fair disclosure’ *Journal of Accounting & Public Policy* (2005) 24, page 243.

⁹⁰ Use of this approach has often been partnered with attempts in countries to monitor and systematically review the regulatory burden imposed by government. This issue is discussed at length in Productivity Commission Research Report (2011) *Identifying and Evaluating Regulatory Reforms*, Appendix K.

Part 3: Simpler legislative procedures

providing consistent and fair decisions for those affected because they deter legalistic or procedural decision-making in favour of decisions that focus on the best outcome. The Review does not recommend a principles-based approach for the convenience of agencies, but rather to ensure that decision-makers extend the 'highest degree of consideration for the welfare and interests of disclosers',⁹¹ as well as investigate and respond to reports of wrongdoing more effectively.

98. A principles-based approach in relation to PIDs has been adopted to guide confidentiality and procedural fairness in NSW. Section 22 of the NSW PID legislation requires an agency not to disclose identifying information about a disclosure unless: the person has consented or voluntarily identified themselves; it is essential to provide the alleged wrongdoer with procedural fairness; or, it is necessary to investigate the matter effectively.⁹² Disclosers and agencies both report that the approach allows them to understand the purpose of confidentiality within the legislation and encourages compliance without it being seen as a burdensome requirement.
99. The Review considers that the PID Act's prescriptive procedural requirements should be redrafted to reflect a principles-based approach.⁹³ In practice, the Review expects that this approach will include a combination of outcome-focussed statements about the intended result of the legislation (e.g. that the agency best able to respond to the reported wrongdoing should investigate the disclosure, that investigations should be conducted fairly and impartially) and simple procedural requirements (e.g. investigations must be completed within 90 days unless the Commonwealth Ombudsman or the IGIS have agreed to an exemption). The effectiveness of this approach should be evaluated periodically, to allow the experience of those using and implementing the PID Act to continue to inform the procedural obligations.
100. The Review considers that the following procedural areas of the PID Act would particularly benefit from a principles-based approach:
 - the procedures to allocate or reallocate a disclosure (sections 42-45);
 - an agency's obligation to notify a discloser about the progress of a disclosure and its investigation (sections 44, 50, 50A);
 - an agency's obligation to notify the Commonwealth Ombudsman or the IGIS about the progress of a disclosure and its investigation (sections 44, 50, 50A); and

⁹¹ Submission by Professor AJ Brown, page 2.

⁹² NSW PID, section 22.

⁹³ This approach is consistent with the key findings of the Belcher Review into Whole-of-Government Internal Regulation. Ms Belcher recommended that all regulation within and across entities be: the minimum necessary to achieve the outcomes; proportional to the inherent risks; coherent across government; clear and simple to apply and designed with stakeholders; and reviewed periodically for relevance and impact. We see a principles-based approach to regulation under the PID Act as supporting Ms Belcher's key findings as they would be a less prescriptive way to achieve the aims of the legislation and simpler to apply for decision-makers and individuals.

- an agency's obligations to investigate; and, the timeframes for investigation.

101. This approach has also informed the Review's recommendations on the balance between confidentiality, transparency and procedural fairness, as well as the secrecy offences.

Recommendation 10: That the procedural requirements of the PID Act be amended in order to adopt a principles-based approach to regulation.

Recommendation 11: That the effectiveness of the principles-based approach to regulation be evaluated periodically to assess the experience of individuals, agencies and investigative agencies.

102. The Review supports the Commonwealth Ombudsman's suggestion that guidance they issue under the PID Act should receive statutory recognition.⁹⁴ In a principles-based regulatory approach, this guidance material can help agencies to understand how the Commonwealth Ombudsman and the IGIS interpret the requirements of the legislation, leading reform and improvement within agencies' decision-making through discussion and illustrative examples, not by creating detailed procedural requirements.⁹⁵ A similar model for statutory recognition of administrative guidance is reflected in section 93A of the *Freedom of Information Act 1982*, which recognises guidance issued by the Australian Information Commissioner.

Recommendation 12: 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 *Freedom of Information Act 1982*.

103. For a principles-based approach to be effective at changing behaviour and instilling a pro-disclosure culture, there needs to be a regulator with the powers to scrutinise agency decision-making.⁹⁶ The strength of this approach is in the kinds of substantive, detailed conversations that

⁹⁴ Before issuing this guidance, the Review expects that the Commonwealth Ombudsman would consult with all investigative agencies.

⁹⁵ The Review notes that the Commonwealth Ombudsman also holds a statutory power to make 'standards' about aspects of the PID Act's implementation (section 74). The nature of standards is usually to compel compliance with detailed procedural requirements, rather than explain or illustrate how a principles-based regulation could be appropriately applied in different situations. For this reason, the Review recommends inclusion of statutory recognition of guidance material, rather than rely on this existing power.

⁹⁶ The importance of this point is underlined by research into the efficacy of the UK's Financial Services Authority (FSA). An early and enthusiastic adopter of principles-based regulation, the FSA used a principles-based approach to regulation through its dealings with the industry. In the immediate aftermath of the crisis, Hector Sants, the then chief executive of the FSA rebranded its approach saying a 'principles based approach does not work with people who have no principles.' At the time the FSA was being strongly criticised for not taking a more interventionist approach in financial services regulation, such as by challenging business decisions instead of presuming the market would step in to manage risks, or imposing a more onerous regulatory burden than competitor financial markets. In contrast, similar institutions in countries like Australia

Part 3: Simpler legislative procedures

are held about whether an agency's conduct accords with the intention of the regulation; the approach requires regulators who are engaged, understand their industry well, and whose views are respected.

104. Within the Commonwealth public sector, the Commonwealth Ombudsman and the IGIS share 'oversight' of the PID Act. To ensure that a principles-based approach in the PID Act enhances a pro-disclosure culture, the Review suggests that the Commonwealth Ombudsman and the IGIS should proactively monitor agencies' use of the PID Act. This kind of engagement and oversight requires additional resourcing, as well as formal powers.

Recommendation 13: 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.

105. During the first two and a half years of the PID Act scheme, the Commonwealth Ombudsman's Annual Report on PID has noted, instances of agencies' non-compliance with the PID Act. To date, the Commonwealth Ombudsman has chosen not to use own motion powers to review such instances, yet keeps this option in mind. The Review considers that systematic instances of non-compliance with the PID Act need to be scrutinised and acted upon. The Review envisages that the oversight agencies would, where necessary, take a progressively rigorous approach to agency non-compliance. This compliance and regulatory role is important because it would help disclosers feel confident in the administration of the PID Act and feel supported in making their disclosure.
106. The Review considered whether the Commonwealth Ombudsman and the IGIS should be granted additional powers to allow them to monitor agency compliance. In some jurisdictions, the PID oversight role includes intrusive powers to investigate the handling of PIDs by other agencies.⁹⁷

and Canada were willing to actively intervene in business decisions, such as by limiting the ratio of asset value to loan amounts to 105% and maintaining a public perception of active audits. In these countries, the financial services sector was far more stable, partly due to this more 'muscular' regulatory approach. The UK FSA example demonstrates that, to succeed, principles-based regulation actually requires regulators to be engaged with decision-making within the bodies they regulate and to have the clout to compel compliance with their views. See for example, J Black 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' *Modern Law Review* (2012) 75(6) pages 1037-1063; J Black 'The Rise, Fall and Fate of Principles Based Regulation' in K Alexander and N Moloney (eds) *Law Reform and Financial Markets* (2011) Edward Elgar; K McPhail, 'Professions, Integrity and Regulatory Relationship: Defending and Reconceptualising Principles-based Regulation and Associational Democracy' in *The Future of Financial Regulation*, I MacNeil and J O'Brien (eds) (2010), Ashgate.

⁹⁷ In the ACT, NSW and QLD, the oversight agencies have the power to actively monitor and review investigations and decisions (ACT PID, section 29; NSW PID section 6B(f); QLD PID, section 59(b)). NSW and the ACT can also report on agency's handling of a specific PID directly to the relevant Parliament (ACT PID,

The PID Act does not take this approach as both the Commonwealth Ombudsman and the IGIS already hold extensive 'own motion', compulsory and coercive powers that could be used to inquire into the handling of PIDs by agencies under their own legislation.⁹⁸ Hence, the Review does not consider that further powers are warranted.

107. Some jurisdictions also include an explicit power for the oversight agency to review an agency's PID procedures. Often described as 'meta-regulation', this kind of regime requires agencies to demonstrate how the procedures they have in place meet their obligations.⁹⁹ This approach can be an efficient use of resources as it allows the oversight agency to have a significant impact on an agency's compliance without examining particular cases.¹⁰⁰ Both the Commonwealth Ombudsman and the IGIS already have these powers in relation to agencies within their jurisdiction.
108. The Review also considered whether the additional investigative agencies proposed at **Recommendation 2** should be granted additional powers in relation to their role under the PID Act. The Integrity Commissioner and the Inspector-General of Taxation already have extensive powers to inquire into matters on their own motion or review,¹⁰¹ while the Australian Public Service Commissioner and the Merit Protection Commissioner and the equivalent officers for the parliamentary departments have broad compulsory powers in relation to inquiries within their PID jurisdiction.¹⁰² The Review does not consider further powers are warranted.

section 30; NSW PID section 6B(f)). In the ACT, the power to review investigations and decisions includes the power to change the outcomes of decisions for individuals (section 29(4-5)). WA and TAS also lack these more intrusive powers, instead adopting the current Commonwealth approach (WA PID, sections 19 and 21; TAS PID, section 84).

⁹⁸ *Ombudsman Act 1976*, section 5(1)(b); *Inspector-General of Intelligence and Security Act 1986*, section 8.

⁹⁹ For example, the VIC IBAC has 'meta-regulatory' powers to review and make recommendations about the procedures of agencies at any time (section 60). If a recommendation is not followed, IBAC can choose to send those recommendations to the responsible Minister (section 61). IBAC told the Review that these powers were essential in helping them to improve the implementation of the VIC PD Act. As another example, one of the Australian Public Service Commissioner's explicit functions is to evaluate the adequacy of systems and procedures in agencies for ensuring compliance with the Code of Conduct (Public Service Act, sections 41(2)(m) and 41A).

¹⁰⁰ It can also create risks if the procedures created run parallel to the agency's core operations, or are completely ignored by the agency in practice. See the detailed discussion in J Black 'Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis' *Modern Law Review* (2012) 75(6) page 1045-6.

¹⁰¹ *Law Enforcement Integrity Commissioner Act*, Part 9 and *Inspector-General of Taxation Act*, sections 15-18.

¹⁰² *Public Service Act*, sections 41-41A and 50-50A; and *Parliamentary Service Act*, sections 40-41 and 48-48A.

RETAIN SIMPLE PROCEDURES TO MAKE PIDS?

109. The Review considered submissions from agencies suggesting that a discloser be required to state that a PID is being made.¹⁰³ This suggestion was intended to provide greater clarity for decision-makers,¹⁰⁴ as well as to prevent a range of other reporting obligations, or reports in the ordinary course of business being captured as PIDs when the discloser may have had no intention of making a PID.¹⁰⁵ This situation can be common in fraud and compliance areas, human resources, or complaint-handling areas.
110. The Review considers that this proposal would transfer the risk of failing to comply with the procedural requirements of the PID Act from the agency to the individual discloser. It would also make it hard for a discloser to gain the protection of the PID Act if he or she was unaware it existed or lacked simple knowledge about its framework. This situation is inappropriate given an agency's greater capacity than individuals to comply with the PID Act regime.
111. The Review considers that agency concerns about difficulties identifying a PID in some contexts would be better addressed through staff training. The Commonwealth Ombudsman has experience in advising agencies on how to reduce the number of inadvertent disclosures made in the ordinary course of business through strategic placement of Authorised Officers outside compliance or complaints-handling areas. The Review notes that recommendations made about narrowing the scope of disclosable conduct (**Recommendation 5**) will assist agencies to be more certain about when a PID has been made.

INSERT A POWER TO REFER PIDS TO A DEPARTMENT FOR INVESTIGATION

112. At present, the PID Act requires all agencies to handle and respond to their own PIDs to ensure that allegations of wrongdoing are dealt with by the agency that can best respond. This situation is most challenging for individuals within small or micro agencies.¹⁰⁶ Disclosers may be deterred from making disclosures within a small group;¹⁰⁷ and PID decision-makers reported high levels of

¹⁰³ In contrast to section 28(3).

¹⁰⁴ See for example, the submissions from the Department of Agriculture and Water Resources and the Department of Education and Training, and the joint submission from ANSTO, AIMS and CSIRO.

¹⁰⁵ See for example, Commonwealth Ombudsman's submission, page 21.

¹⁰⁶ Statistics collected by the Australian Public Service Commission in June 2015 give a sense for how many small and micro agencies exist within the Commonwealth public sector: 6 agencies with 10 or fewer staff; 21 agencies with 30 or fewer staff; 28 agencies with 50 or fewer staff; 48 agencies with 100 or fewer staff. This count is likely to be an underestimate of the number of small and micro agencies subject to the PID Act as coverage excludes Commonwealth entities under the PGPA Act. (Unpublished data held by the Australian Public Service Commission drawn from the Australian Public Service Employment Database survey and the Commonwealth Indigenous Employment Strategy.)

¹⁰⁷ Several individuals who completed the Review's online survey commented that they would have liked to disclose conduct within their agency, but felt that it was too small to be able to maintain their confidentiality, putting them at risk of reprisal, or that the agency will lack the capacity to meaningfully investigate.

personal anxiety and concern that they may not have significant institutional capacity or skills to fulfil their PID Act obligations, particularly in situations when assistance with human resourcing issues is usually provided by the agency's portfolio department.

113. To assist smaller agencies, the Review recommends that the PID Act include a discretion for the Principal Officer or Authorised Officers of an agency to refer a PID for investigation to the agency's portfolio department, with the consent of that department.¹⁰⁸ This discretionary referral would enable agencies to determine whether they were able to perform their obligations under the PID Act on a case by case basis. While this approach would benefit all portfolio bodies, regardless of size, the Review anticipates that this option will be used by the small agencies rather than larger portfolio bodies.

Recommendation 14: 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.

¹⁰⁸ While 'portfolio department' is not a defined term within the Commonwealth public sector, the Review considers that it has a settled and clear meaning for agency decision-makers based on interpretation of the current Administrative Arrangements Order and the Public Service Act.

PART 4: BALANCE BETWEEN TRANSPARENCY, CONFIDENTIALITY AND PROCEDURAL FAIRNESS

114. The Review considered the issue of the transparency accorded to a discloser compared with the lack of information provided to those accused of wrongdoing. The PID Act provides disclosers with transparency about the handling of their disclosure.¹⁰⁹ However, there is no statutory recognition of the need to provide procedural fairness to those accused of wrongdoing. Broad secrecy offences in the PID Act can also make it hard for those accused of wrongdoing to defend themselves against allegations,¹¹⁰ leaving some people ‘under a permanent cloud’. Agencies have interpreted these secrecy offences so broadly that they may often impede their ability to respond effectively to prevent future wrongdoing. The Review has made a range of recommendations designed to achieve a better balance between transparency and confidentiality.

RECOGNISE THE EXISTING REQUIREMENT TO PROVIDE PROCEDURAL FAIRNESS

115. Some state and territory jurisdictions have an explicit requirement for people accused of wrongdoing under similar legislation to be afforded procedural fairness.¹¹¹ In the Commonwealth, the administrative and common laws imply a duty to provide people who have had allegations made against them (that are likely to result in an adverse finding) with procedural fairness in all administrative investigations. The Commonwealth Ombudsman’s guidance on PID and procedural fairness recognises that these requirements will differ depending upon the situation.¹¹²

116. The Review considers that it would benefit both individuals and agency decision-makers to include a specific requirement for procedural fairness within the PID Act to reflect the existing administrative law obligations.

Recommendation 15: 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.

BETTER TARGET THE SECRECY OFFENCES TO INFORMATION THAT REQUIRES PROTECTION

117. The Review considers that the scope of secrecy obligations within the PID Act is too broad. These provisions are intended to encourage disclosers to come forward without fear that they will be ‘outed’ during the course of the investigation. Yet the provisions can also give disclosers

¹⁰⁹ See for example, sections 44-45, 50-54.

¹¹⁰ See for example, section 20 and 65.

¹¹¹ NSW PID, section 22; QLD PID, section 65(4); WA PID, section 16(1)(b); TAS PID, section 55; NT PID, section 30. In contrast, the ACT and VIC rely upon the general law to import procedural fairness into their legislation.

¹¹² Agency Guide, version 2, page 50.

unrealistic expectations as many disclosures are almost impossible to investigate without sharing information which could identify the discloser.

118. The PID Act includes two offences for disclosure of information about a PID. Section 20 is concerned with protecting the identity of disclosers, while section 65 is concerned with the treatment of information obtained through a disclosure investigation or the exercise of a power or function ('protected information'). These provisions apply different penalties and recognise different exemptions.¹¹³
119. The Review considers that the section 65 prohibition on the use or disclosure of '**protected information**' has hampered agencies' ability to respond to disclosures, or to fulfil their ordinary administrative obligations. It has also impeded the ability of senior management to access information about the performance of their agency to guide their management decisions, brief Ministers, or to respond to media enquiries.¹¹⁴ When agencies seek legal advice on the operation of section 65, the advice is often cautious due to the risk of criminal penalties for breaching the secrecy offences.¹¹⁵ This conservative approach persists, despite the PID Act's explicit good faith protections for officials who make errors or omissions when exercising powers under the PID Act.¹¹⁶
120. Given the practical effect of the general secrecy offence on an agency's perceived ability to carry out a range of ordinary business actions, the Review considers that this provision should be repealed. This approach would also resolve the complexity some agencies identified in their submissions about overlap and inconsistent exemptions between the two secrecy provisions.¹¹⁷

Recommendation 16: 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.

¹¹³ As a comparison, NSW, WA and the ACT only have provisions that relate to the use of identifying information. Provisions in QLD and TAS's provisions only relate to the treatment of disclosure information more generally, rather than treating identifying information and protected information separately. Like the Commonwealth, VIC and the NT have provisions about the treatment of both kinds of information.

¹¹⁴ The Commonwealth Ombudsman's submission provides other addition examples on page 32.

¹¹⁵ Commonwealth Ombudsman's submission, page 35. The Review considers that reasonable arguments might be made that the first three circumstances, which are concerned with an agency's implementation or administration of the scheme, are reasonably connected to the exception dealing with the purposes of the Act. The fourth situation would be resolved by including an exemption to the use of information about a PID that was for the purposes of a law of the Commonwealth, not just the PID Act itself.

¹¹⁶ Refer section 78.

¹¹⁷ For example, AGD's submission points out that the kinds of information protected under the general secrecy offence (section 65) would also include information that identifies a discloser (section 20), creating duplication and inconsistency as the grounds for exemption of each offence are different. Similar concerns were expressed by the Commonwealth Ombudsman and the joint submission of ANSTO, AIMS and CSIRO.

Part 4: Balance between transparency, confidentiality and procedural fairness

121. To provide clarity about the continued operation of existing secrecy offences in other legislation, the Review recommends that a new provision or legislative note be included. Such a measure is intended to clarify that existing secrecy offences in other legislation continue to apply to the use or disclosure of information,¹¹⁸ unless the use or disclosure was a public interest disclosure under section 26 of the PID Act, the purposes of the PID Act, or performing a function or exercise of a power of the Act. If **Recommendation 16** is accepted, this additional measure will confirm the continued protection for intelligence information and national security classified information from unlawful disclosure or misuse, reflected in section 65(2)(e-f) of the PID Act, without the need to mirror these offences within the PID Act.

Recommendation 17: If Recommendation 16 is accepted, that the PID Act be amended to clarify that existing secrecy offences, such as those in the *Crimes Act 1914*, the *Australian Security and Intelligence Organisation Act 1979* and the *Intelligence Services Act 2001*, 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.

122. For clarity, the offence in section 20 of the PID Act concerning the use or disclosure of **identifying information** and other offence provisions should be simplified. The exemptions to the offence should include explicit reference to the good faith actions or omissions by a public official exercising powers or performing functions under the PID Act. The other existing exemptions should also continue to apply.

Recommendation 18: That the PID Act be amended to simplify the offence about use or disclosure of identifying information by including within its exemptions: 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); 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 other existing exemptions.

123. The Review considered whether the protections for discloser's identifying information should also be expanded to include information that could identify a witness or a person accused of wrongdoing. While the NT and ACT have adopted more expansive protections for identifying information,¹¹⁹ the Review considers that the Commonwealth *Privacy Act 1988* and the obligation to provide procedural fairness offer sufficient protections to these groups of people that are more appropriate and adapted to the situations they may experience. The Review considers that agency decision-makers are already familiar with applying these principles and it would impose

¹¹⁸ Such as the *Crimes Act*, section 70 and section 79; the *ASIO Act*, sections 18-18B and 35P; the *Intelligence Services Act*, sections 39-41; and the *Border Force Act 2015*, section 42.

¹¹⁹ NT PID, section 53; ACT PID, section 44. In contrast, NSW, VIC, WA and SA adopt a similar approach to the Commonwealth.

unnecessary complexity to create new offences about the treatment of identifying information for a wider class of people under the PID Act.

124. The Review also considered whether it was necessary for the PID Act to include criminal offences for the misuse of identifying information. The states and territories take a variety of approaches in their legislation. In NSW, the confidentiality obligations are expressed as a 'guideline', rather than either a criminal offence or entitlement to civil remedy.¹²⁰ There is also no penalty for breach, beyond the possibility of public disapproval by the NSW Ombudsman. A similar approach is taken in SA.¹²¹ In QLD, the confidentiality obligation includes an entitlement to civil remedy,¹²² while in VIC, WA, TAS, NT and the ACT it is a criminal offence to breach the confidentiality obligations, like in the Commonwealth.¹²³
125. The Review suggests retaining a secrecy offence within the PID Act. Disclosers who feel apprehensive about coming forward may be reassured by the existence of a secrecy offence. If this offence were merely framed as obligations or guidelines, many of these disclosers may choose to report their concerns anonymously, which would make investigation more difficult, or not to report at all. An offence provision also provides clarity in relation to the expectations and emphasises importance of the obligations it contains.
126. Finally, several agencies reported instances of disclosers identifying themselves within their workplace, or publishing information about their disclosure.¹²⁴ Under the PID Act, the agency is still required to maintain confidentiality of such a discloser's identifying information and other information about the disclosure. Implied consent is explicitly recognised in the *Privacy Act 1988* within the definition of consent.¹²⁵ The Review considers that the PID Act should also recognise implied consent as an exemption to the secrecy offence relating to identifying information as this offence is intended to protect the discloser from harm. If the discloser has chosen to identify himself or herself this protection is no longer needed.

Recommendation 19: That the PID Act be amended to recognise implied consent as an exemption to the secrecy offence relating to identifying information.

¹²⁰ NSW PID, section 22.

¹²¹ SA WP, section 7.

¹²² QLD PID, section 65.

¹²³ VIC PD, section 52; WA PID, section 16; TAS PID, section 23; NT PID, section 53; ACT PID, section 44.

¹²⁴ Submissions from Clayton Utz and Ms Noni Cadd, as well as discussion from representatives of other agencies at Community of Practice forums.

¹²⁵ *Privacy Act 1988*, section 6. The NSW confidentiality guideline also includes a variation of an exemption for implied consent (NSW PID, section 22(1)(a)).

THE TREATMENT OF 'INTELLIGENCE INFORMATION' AND THE INTELLIGENCE COMMUNITY

127. A number of submissions from civil society organisations invited the Review to expand accountability within the intelligence community under the PID Act, such as by narrowing the definition of intelligence information or changing its treatment.¹²⁶ The Review was not persuaded by these submissions. At present, disclosure of 'intelligence information' would be protected under the PID Act if it was made to an authorised recipient, such as the Inspector-General of Intelligence and Security, an Authorised Officer within the relevant agency, or a supervisor.¹²⁷ However, intelligence information cannot be included within any public disclosure.
128. The Review considers that under the PID Act it is necessary to treat intelligence information differently to other government information. The inappropriate disclosure of intelligence information may compromise both national and international security, damage relationships with foreign partners and potentially place lives at risk. The intelligence community also has a duty to protect information shared by foreign partner agencies so that those agencies may fulfil their national security functions. The Review considers that the arguments for greater transparency do not override the potential for damage to Australia's national security interests and international relations, were intelligence information inadvertently mishandled. The intelligence community is already subject to the oversight of the Inspector-General of Intelligence and Security and the Parliamentary Joint Committee on Intelligence and Security.¹²⁸ The Review does not recommend expanding accountability of the intelligence community through the PID Act.
129. In coming to this view, the Review considered the development of new principles by civil society organisations about national security and freedom of information (the Tshwane Principles).¹²⁹ Citing these principles, Professor Brown submitted that the definition of 'intelligence information' in section 41 of the PID Act wrongly excludes from disclosure *any* information from an intelligence agency, not just information whose release might carry an actual risk of harm to security,

¹²⁶ Submissions to the Review from the Accountability Round Table, Blueprint for Free Speech, Professor AJ Brown, Mr. Andrew Wilkie MP, the Law Council of Australia and the Human Rights Law Council reflected similar concerns. Much of this concern was foreshadowed during parliamentary debate on the bill in 2013 where the intelligence community was wrongly perceived to be excluded from the legislation (see for example, Senator Xenophon, *Hansard*, Senate, 26 June 2013, page 4114; and Senator Milne, *Hansard*, Senate, 26 June 2013, page 4106.)

¹²⁷ PID Act, section 26(1), item 1.

¹²⁸ The *Inspector-General of Intelligence and Security Act 1996* empowers the IGIS to investigate complaints made against the Australian intelligence agencies, to review their compliance with the laws of the Commonwealth, states and territories, and to conduct inquiries into matters which fall within their prescribed functions. All intelligence and security agencies are subject to administrative and financial review by the *Parliamentary Joint Committee on Intelligence and Security* (PJCIS).

¹²⁹ The Tshwane Principles (2013) were developed by academics and civil society group members who consulted extensively with transparency and accountability experts. The Principles have yet to be incorporated into any whistleblower legislation, but they are used to inform consideration of new secrecy laws.

intelligence or law enforcement.¹³⁰ The Review was not persuaded that this exclusion was inappropriate. The disparate nature of intelligence information means that information, when viewed discretely, may not appear sensitive. However, when viewed as part of a broader context, this information may be revealing. Disclosure of information can enable other parties to develop their understanding of the operational capabilities, activities, and strategies of intelligence agencies, which in turn, may inhibit these agencies from performing their functions properly. One clear way to define this information is by referring to its source. Hence, the Review does not support any change to the definition or treatment of intelligence information under the PID Act.

130. The Review also considered the effect of its recommendations to narrow the scope of the disclosable conduct to exclude personal employment-related grievances of the intelligence security agencies. The Review notes that disclosures about a range of wrongdoing within the Australian Intelligence Community would continue to receive the protection of the PID Act. Such matters would include maladministration and conduct that is an 'abuse of public trust' (s.29, item 4-5); for example, a public official committing fraud when procuring office equipment; an IT administrator abusing the privileges of his or her office to invade the privacy of colleagues; or, failure by an agency to protect a staff member from assault in the line of duty.
131. Under the provisions of the PID Act, all disclosures resulting in the allocation of a PID within the intelligence and security agencies will continue to be reported to the Inspector-General of Intelligence and Security. The Review is confident that the IGIS already actively monitors how the intelligence and security agencies to ensure that they perform their functions legally, with propriety and with respect for human rights. To perform this role, the IGIS uses a wide range of information and powers under the *Inspector-General of Intelligence and Security Act 1986*. Removing the PID Act's focus from person employment-related grievances to significant wrongdoing would not affect the IGIS' wider ability to scrutinise the Australian Intelligence Community.

¹³⁰ Professor AJ Brown submission, pages 8-9. This position reflects Tshwane Principle 5, which contends that no public authority, including intelligence agencies, should be exempted from disclosure requirements and that no information should be withheld simply because of where it originated. A similar argument was put by Dr Peter Bowden in his 2014 book, *In the Public Interest: Protecting Whistleblowers and Those Who Speak Out*.

PART 5: MAKE IT EASIER FOR PEOPLE TO GET ADVICE AND HELP

132. One of the consistent themes throughout the Review's consultations with individuals, both those implementing the PID Act on behalf of their agency, as well as those seeking its protections, was how little support they felt they received. While the Commonwealth Ombudsman and the IGIS assist both these groups of public officials as they attempted to navigate the legislation, few report feeling well-supported or confident in the process.¹³¹ The Review has considered a range of proposals to make it easier for people to get help and advice from a wider range of sources.

SUPPORT FROM PEOPLE WITHIN AN AGENCY

133. At the suggestion of the Commonwealth Ombudsman, the Review recommends including a positive obligation upon Principal Officers within the PID Act to take reasonable steps to support their public officials and others involved in the PID process. This obligation could be included within section 59 which lists related obligations upon Principal Officers, such as to protect their public officials from detriment. Such a provision would require Principal Officers to offer the support of the agency to those making a disclosure, as well as those implementing the legislation – a powerful benefit which could include providing access to support people, providing clearer guidance, and active promotion of a pro-disclosure culture.

Recommendation 20: 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.

134. In a similar vein, the Review recommends that the additional obligations of public officials be broadened to include using their best endeavours to support an agency or a public official to use the legislation, or perform a function or role under the PID Act. This aim could be achieved by expanding the existing obligation to assist the Principal Officer to conduct an investigation in section 61. This new provision would provide further legislative support for a 'pro-disclosure culture' across the Commonwealth public sector.

Recommendation 21: 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.

135. At present, a public official can make a disclosure to any agency supervisor. Supervisors are required to give information they receive from a public official to an Authorised Officer if they have reasonable grounds to believe that the information concerns, or could concern disclosable conduct.¹³² This provision has been rarely used,¹³³ partly because disclosers often prefer the

¹³¹ Seventy (70) percent of responses to the Review's online survey came from disclosers who felt unsupported, vulnerable to adverse consequences or that their agency was not committed to the PID Act.

¹³² PID Act, section 60A. This obligation was inserted by Government amendments in response to concerns that public officials may not be able to identify the Authorised Officers in their organisation or may prefer to

certainty of making a PID to an Authorised Officer, and partly because supervisors who are told about concerns that meet the PID requirements may not recognise them or may not comply with their obligation.

136. The Review considers that supervisors have a responsibility to support disclosers: such support is intrinsic to a pro-disclosure culture. To enable supervisors to support disclosers, Commonwealth public sector agencies should invest in ongoing professional integrity and accountability training for all public officials, which includes explicit reference to the PID Act's protections and mechanisms to report concerns. Further rigorous training in integrity and accountability skills should be required when a public official takes on a supervisory role or is promoted.

Recommendation 22: 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.

137. The mandatory obligation for supervisors to report a PID to an authorised officer does not appear to be well-used. In many workplaces, the supervisor obligation has had the unintended effect of impeding the free flow of information among staff about concerns, thus undermining efforts to create a pro-disclosure culture.¹³⁴ In many situations, the most appropriate course of action for an employee who has a concern about something that they have seen or experienced in the workplace is to raise that issue with their immediate supervisor or another senior colleague. Public officials should be able to discuss their concerns with supervisors, and supervisors should be able to support their staff.
138. To support the establishment of conversations about integrity and accountability, the Review recommends creating a new obligation upon supervisors to explain their existing mandatory reporting obligations to public officials who give them information that concerns disclosable

choose to disclose to someone they know and trust – see for example discussion of this issue in the Senate Standing Committee on Legal and Constitutional Affairs report into the Public Interest Disclosure Bill, tabled 13 June 2013, pages 16-18.

¹³³ Less than 10 per cent of PIDs are made to a supervisor at first instance (87 of 1191 matters assessed, Commonwealth Ombudsman's annual report 2014-15, page 79). Both the Commonwealth Ombudsman's office and the Review consider that this low proportion reflects low levels of compliance with the existing obligation. The Commonwealth Ombudsman's submission also reports that agencies may often be reluctant to promote and enforce the supervisor's obligations under the PID Act "for fear of opening the 'floodgates' to an unmanageable number of disclosures", page 20.

¹³⁴ Consultation with agencies PID Act administrators at the Commonwealth Ombudsman PID Community of Practice forums, submissions from agencies and individuals, and responses to the PID Review's online survey.

Part 5: Make it easier for people to get advice and help

conduct. These conversations are an invaluable way for leaders in an agency to train other public officials and be seen to embody a pro-disclosure culture.

Recommendation 23: 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.

139. The Review recommends retaining the existing obligation upon supervisors to report information they receive about disclosable conduct to an Authorised Officer.¹³⁵ While agencies have identified compliance with this obligation as challenging given the volume of people who are supervisors within the Commonwealth public sector, the Review considers that this difficulty is outweighed by the opportunity to extend protections to disclosers from the earliest point they may raise a concern about wrongdoing within the public sector – often a conversation with a supervisor.
140. To encourage compliance with this obligation, the Review also recommends that a supervisor’s failure to comply with their existing obligation to report information they receive about disclosable conduct to an Authorised Officer should be grounds for the original discloser to make an external disclosure.¹³⁶

SUPPORT FROM PEOPLE OUTSIDE AN AGENCY

141. When experiencing a concern at work, a public official may want to seek professional assistance before raising the matter formally. At present, the PID Act recognises and protects the disclosure of information for the purposes of seeking advice outside an agency in two circumstances. The first is if the disclosure satisfies the requirements for an external or emergency disclosure. The second is if the disclosure is to a legal practitioner.
142. The PID Act protects disclosures to Australian legal practitioners when legal advice is sought.¹³⁷ **Lawyers** can be a helpful source of advice for disclosers: several of the Review’s online survey respondents noted that they would never choose to make a disclosure, particularly an external disclosure, without legal advice. Yet individuals seeking legal advice in relation to a disclosure of security classified information have difficulty using this provision as the PID Act requires them to ensure that their legal practitioner ‘holds the appropriate security clearance’.¹³⁸ The Review recommends removing this requirement for lawyers to hold a security clearance and instead adopting the approach reflected in the Attorney-General’s Department’s guidance material for health professionals whose patients may need to discuss security classified information, such as

¹³⁵ PID Act, section 60A.

¹³⁶ Refer **Recommendation 9**.

¹³⁷ PID Act, section 26(1), item 4.

¹³⁸ PID Act, section 26(1), item 4(b). This issue was raised by the Law Council of Australia and Blueprint for Free Speech and in several individual submissions.

military operations, as part of their treatment.¹³⁹ Existing criminal offences for members of the public prevent unauthorised disclosure of classified information by these health practitioners.¹⁴⁰ This approach will permit people to seek advice from their own trusted lawyer.

143. In consultation with the Attorney-General's Department, the Commonwealth Ombudsman's guidance should include advice for individuals to reduce the amount of information disclosed, how such information should be recorded and stored, and advice about the continued application of existing secrecy laws and offences to any subsequent disclosure of that information by the recipient.
144. This recommendation would not alter the existing provision preventing legal practitioner disclosures about intelligence information. Where necessary, the IGIS can assist a member of the intelligence community to seek authorisation from the relevant intelligence agency to disclose intelligence information to a lawyer. This situation would ordinarily involve the agency briefing the lawyer.

Recommendation 24: 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.

145. The special protection for disclosers to lawyers is inconsistent with the recognition under other workplace laws given to such sources of professional advice as **unions, Employee Assistance Programmes, and professional associations**. For example, unions are recognised as a source of advice to their members and the wider industry under the Workplace Health and Safety Act,¹⁴¹

¹³⁹ *Australian Government protective security better practice guide—Handling information security as part of mental health medical services* (accessed 14 July 2016) available at <https://www.protectivesecurity.gov.au/informationsecurity/Pages/Handling-information-security-as-part-of-mental-health-services.aspx>. Former service personnel may prefer to seek care from their own trusted psychologist for post-traumatic stress disorder, and may need to recount an experience from their deployment as part of their treatment. The guidance acknowledges that disclosures of security classified information may be necessary for a person's care, while encouraging the patient to disclose the minimum necessary and the health professional to avoid keeping records about security classified information. Any records that are kept should be stored securely. This approach will permit people to seek advice from their own trusted lawyer. This revised approach acknowledges that unmanaged employee mental health conditions pose a risk to an agency's ongoing information security, and takes a pragmatic approach to managed disclosures of classified or sensitive information as part of medical care.

¹⁴⁰ Such as the Crimes Act, section 79.

¹⁴¹ See for example, the Work Place Health and Safety Act's recognition of their right of entry to workplaces to consult on health and safety matters (sections 121 and 131) and the requirement that a Minister consult with unions in developing or varying codes of practice (section 274).

Part 5: Make it easier for people to get advice and help

while other legislation recognises unions' ability to seek remedies on behalf of their members.¹⁴² Other professional associations also provide ethics and integrity advice services, such as the Australian Public Service Commission's Ethics Advisory Service and similar programs run by Certified Practising Accountants Australia and the law societies. Employee Assistance Programmes are commonly used in workplaces throughout the public sector and provide mental health and counselling to support and assist employees.¹⁴³ The Review recommends that the PID Act be amended to protect disclosures for the purposes of seeking advice and professional assistance about using the PID Act in the same way that disclosures to lawyers are protected.

Recommendation 25: That the PID Act be amended to protect disclosures for the purpose of seeking professional advice about using the PID Act.

RETAIN ACCESS TO REMEDIES FOR REPRISAL AND DETRIMENT

146. When things go wrong in the handling or response to a disclosure, one of the most essential sources of help for a discloser is their ability to seek legal redress and compensation. Professor Brown's submission questioned noted that the existing remedies available under the PID Act and the Fair Work Act contained significant improvements on previous state legislation, but questioned whether these were adequate. It is difficult to determine the effectiveness of these remedies definitively as they are so far untested in litigation.
147. The PID Act creates both criminal offences and entitlements to civil remedies for taking, or threatening, reprisal against a discloser. According to Professor Brown, it is problematic that 'the definitions of criminal reprisals and civilly-actionable reprisals are the same – raising the problem of whether only reprisals of sufficient seriousness to sustain criminal action can also give rise to civil remedies'.¹⁴⁴ While the definition of reprisal under the PID Act is consistent, the standard of proof imported from the general law is different for the criminal offence and the entitlement to civil remedies. Professor Brown suggests separating the criminal offence of reprisal from circumstances that give an entitlement to civil remedies, in order to clarify the basis on which civil remedies may be obtained. There is no evidence that the grounds upon which a person can seek civil remedies is unclear or that a consideration of 'seriousness' has been imported into the definition of criminal or civilly-actionable reprisal. The Review considers that this issue should be examined again when more evidence about the application of these offence provisions is available through the Commonwealth Ombudsman and the IGIS, or through litigation.

¹⁴² The Fair Work Act provides for employee associations to be able to seek civil remedies for a wide range of breaches on behalf of their members (section 539), while the QLD PID Act gives unions standing to seek injunctions against reprisal (QLD PID Act, section 48).

¹⁴³ The Employee Assistance Program (EAP) is a work-based intervention programme designed to enhance the emotional, mental and general psychological wellbeing of all employees and includes services for immediate family members. The Employee Assistance Professional Association of Australasia (Inc) is the Peak Australasian Body representing provider and user members that supply Employee Assistant Programmes in the workplace.

¹⁴⁴ Submission by Professor AJ Brown, p. 2.

148. The Review has noted the experience of other jurisdictions, in which **criminal conviction for reprisal** offences has been rare.¹⁴⁵ However, the test for the offence is easier to prove in the Commonwealth, than in other jurisdictions as it must be only 'part of the reason' for the act or omission which caused detriment.¹⁴⁶ The Review considers that the criminal offence provisions within the PID Act are effective at encouraging agencies to protect individuals from the risk of reprisal. The attitude of agencies, in which apprehension of personal criminal liability leads PID administrators to cautiously interpret the legislation, is evidence of the power of these provisions to change behaviour within the Commonwealth public sector.¹⁴⁷
149. Professor Brown observed that both criminal offences and the entitlement to civil remedies under the PID Act require that a person intend to cause detriment to a discloser. The PID Act does not recognise a compensable **duty of care** owed by agencies to provide a safe and supportive environment for their public officials.¹⁴⁸ The Review agrees that such an approach would broaden the grounds for civil remedy for any detriment experienced due to making a PID (regardless of the wrongdoer's intention). However, this approach would also be inconsistent with the approach taken to other grounds for remedy in the workplace, such as the rights and remedies set out in the Fair Work Act, which require subjective intention to take adverse action, rather than failure of a duty of care.¹⁴⁹ While there is a clear duty of care owed by employers to their staff in relation to workplace health and safety under the Workplace Health and Safety Act,¹⁵⁰ breaches of this duty do not create a statutory entitlement to compensation.¹⁵¹

¹⁴⁵ For example, while the Review was underway, a former Commissioner of the NSW State Emergency Services, Mr Murray Kear, was acquitted of allegedly taking reprisal against a deputy who reported wrongdoing by one of Mr Kear's long-term colleagues and friends. (Michaela Whitbourn, 'Criminal charges dismissed against former SES Commissioner Murray Kear following ICAC probe', *The Sydney Morning Herald*, 16 March 2016.)

¹⁴⁶ PID Act, section 13(1). For comparison the equivalent test in NSW, QLD and TAS which requires that the detrimental action be 'substantially' in reprisal (NSW PID, section 20(1); QLD PID, section 40(5); TAS PID, section 19(3)). The test in WA appears to be stronger again (WA PID, section 14).

¹⁴⁷ See for example the discussion of the conservative nature of legal advice on the secrecy offences; Commonwealth Ombudsman Submission, pages 15 and 35.

¹⁴⁸ By way of example, Professor Brown suggests that could be achieved by including a provision which states 'a person (including an agency) is liable for compensation for a detrimental act or omission ... [if it] is the result of: a) a failure to fulfil an obligation under this Act; or b) a failure to follow procedures established under this Act; irrespective of whether any particular person responsible for the act or omission knows, believes or suspects that the person who suffered the detriment made, may have made or proposes to make a public interest disclosure'. Submission of Professor AJ Brown, page 4.

¹⁴⁹ See for example, Fair Work Act, section 340.

¹⁵⁰ Workplace Health and Safety Act, section 19; see also *O'Connor v Commissioner for Government Transport* (1959) 100 CLR 225.

¹⁵¹ The Workplace Health and Safety Act does include an entitlement for civil remedies for engaging in or inducing discriminatory or coercive conduct, however this entitlement requires that a 'prohibited reason' was

Part 5: Make it easier for people to get advice and help

150. Creating a new compensable statutory duty of care would affect the ability of agencies and managers to make ordinary management decisions about a staff member who may also have made a disclosure. Such management decisions would include actions to redeploy staff or alter working conditions in response to operational need. Changes like these may cause detriment to some people, yet not have any connection to the person's disclosure. The Review considers it appropriate to retain subjective intention to cause detriment as an element of the criminal offence and entitlement to civil remedy. The Review notes that it may still be open to a person who has experienced detriment as a result of making a PID to seek a civil remedy under a common law cause of action, such as the general law of negligence.
151. While a compensable duty of care to support a discloser may help to enforce adoption of a pro-disclosure culture, the Review has instead recommended amending the PID Act to create an obligation on Principal Officers and supervisors to support public officials who wish to report a concern.¹⁵² We consider that this approach will also support the intended pro-disclosure culture, without affecting the ability of managers to make routine management decisions.
152. The Review considered a call to clarify when the **onus of proof in civil remedies** should revert to the respondent or defendant to show that their act or omission was reasonable or justified.¹⁵³ The current drafting of this provision is consistent with similar provisions on the Commonwealth statute book. The Review considers that this issue should be examined again when more evidence about the application of these offence provisions is available through litigation.
153. The Review was not persuaded of the need to specify that **damages** under the PID Act were uncapped or that they included exemplary damages.¹⁵⁴ Within the PID Act, there are presently no caps on damages and no limits on the kinds of remedies that can be awarded by the Federal Court of Australia or the Federal Circuit Court of Australia. The Review considers that those courts' existing discretionary powers to determine remedies in a particular case should be preserved.
154. Disclosers also have a choice about whether to seek a remedy for any harm they have suffered as a result of making a PID under either the PID Act, or the Fair Work Act.¹⁵⁵ In exercising this choice, potential plaintiffs will consider a range of jurisdiction factors as part of their wider litigation strategy, such as the ability to seek a remedy through the Fair Work Commission,¹⁵⁶ time limits on

a substantial reason for the discriminatory conduct (section 112(4)). This test is stronger than the test for a reprisal under the PID Act, in which a belief or suspicion that a person has, or intends, to make a PID is only a 'part of the reason' for the act or omission causing detriment (PID Act, section 13(1)(c)).

¹⁵² Refer **Recommendations 20 and 21**.

¹⁵³ Submission by Professor AJ Brown, page 5

¹⁵⁴ Submission of Professor AJ Brown, pages 3-4.

¹⁵⁵ PID Act, section 22 and 22A.

¹⁵⁶ Fair Work Act, section 576.

applications for civil remedies,¹⁵⁷ different treatment of costs,¹⁵⁸ and limits on the value of pecuniary penalty orders.¹⁵⁹ The Review considers that it is beyond its scope to assess whether caps on damages available under the Fair Work Act to compensate for adverse action taken against the plaintiff because they exercised a workplace right are appropriate. The Review also considers that this issue should be examined again at a future date when more evidence may be available.

¹⁵⁷ Fair Work Act, section 544.

¹⁵⁸ Fair Work Act, section 570.

¹⁵⁹ Fair Work Act, section 546.

PART 6: CLARIFY THE COVERAGE OF THE LEGISLATION

155. The Review heard arguments that the scope of the current legislation be expanded to also include the private sector or members of the public, as well concerns that the application of the current provisions to particular agencies is often difficult to interpret. These issues are discussed below.

RETAIN THE CURRENT FOCUS ON PUBLIC SECTOR WHISTLEBLOWING

156. The Review considers that the PID Act is an appropriate mechanism for protecting disclosures within the Commonwealth public sector. It is ill-adapted to private sector whistleblowing as the accountability processes and mechanisms are different. Private sector whistleblowing is already the subject of whistleblower protections regimes managed by the Australian Securities and Investments Commission and the Australian Prudential Regulatory Authority.¹⁶⁰ The kinds of disclosable conduct that should be subject to the legislation are also different as they may relate to breaches against the kinds of regulation that protects a free market (like competition law and financial transparency) or that protects the relationship between a company and its shareholders (like conflicts of interest and fiduciary duties), rather than abuse of public office. While adequate protections for private sector whistleblowing are important, the Review considers that this matter is better addressed by the Parliament and is outside its scope.¹⁶¹
157. At present, the PID Act only protects disclosures by and about public officials, but it defines the term broadly to include employees, contracted service providers and their staff members, as well as agency heads, directors of Commonwealth companies, members of the Australian Defence Force and the Australian Federal Police, statutory officeholders, and individuals exercising statutory powers.¹⁶² Other jurisdictions protect disclosures made by a broader range of people than the Commonwealth legislation.¹⁶³ The Review does not consider it necessary to extend the protections available to disclosers to members of the public. People working in close proximity to those whose behaviour they have reported under the PID Act are particularly vulnerable to

¹⁶⁰ There are protections for whistleblowing in the private sector within the *Corporations Act 2001*, *Banking Act 1959*, *Insurance Act 1973*, *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993*.

¹⁶¹ The Senate Standing Committee on Economics considered options to strengthen investigation and prosecution of foreign bribery, including by improving whistleblower protection within the private sector. Unfortunately, the Committee had not released a discussion paper or interim report before ceasing to exist when Parliament was dissolved before the 2016 election.

¹⁶² PID Act, sections 26(1)(a) and 69. The Act also permits a member of the public to be deemed to be a 'public official' if the individual has information that concerns 'disclosable conduct' (section 70).

¹⁶³ For example: in VIC, WA, NT and the ACT anyone can make a PID; in QLD, anyone can make a public interest disclosure about specific topics of concern, but only public officials can make a disclosure about corrupt conduct, maladministration or misuse of public resources. The Commonwealth approach is most similar to that taken in NSW and TAS, although members of Parliament and their staff are also included in NSW and TAS. The approach taken in SA extends protections to anyone, although a review in 2014 by the Independent Commissioner Against Corruption recommended that these protections be available to public officials in relation to public sector wrongdoing, similar to the Commonwealth, NSW and TAS approach.

reprisal and detrimental conduct. In rare situations where the protections of the PID Act may be appropriate for a person who is not a public official, the Authorised Officer has a power to 'deem' that person to be a public official.¹⁶⁴ In general, if members of the public face risks when reporting concerns about public administration, the Review considers that they are better dealt with by police and the general criminal laws concerning intimidation or assault. There are also effective existing administrative channels to report wrongdoing or make complaints in the Commonwealth public sector, such as procedures within agencies or within the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security.

CLARIFY THE CONTINUED EXCLUSION OF THE JUDICIARY, SENATORS, MEMBERS OF PARLIAMENT AND THEIR STAFF MEMBERS

158. The PID Act is not intended to capture allegations of wrongdoing by or about members of Parliament or their staff members.¹⁶⁵ The Review considers that this kind of wrongdoing should be scrutinised by the Parliament itself,¹⁶⁶ not agencies within the Executive. Despite this clear policy intention, the Review has received two submissions which cast doubt upon whether the legislation has achieved this intention as Ministers exercising statutory powers may be public officials, and people employed under the *Members of Parliament (Staff) Act 1984* could be contracted service providers. While the actions of Ministers 'with which a person disagrees' are explicitly excluded from the meaning of disclosable conduct (s.31(b)(i)), this provision is too narrowly drafted to exclude Ministers or staff members from the operation of the PID Act entirely.¹⁶⁷
159. The Review took this uncertainty as an opportunity to reconsider the policy intent of the legislation. The Commonwealth is the only jurisdiction in Australia which intends to exclude scrutiny of members of Parliament and/or their staff members from similar legislation.¹⁶⁸

¹⁶⁴ PID Act, section 70.

¹⁶⁵ PID Act, section 69(1), item 17.

¹⁶⁶ Such as through the House Standing Committee of Privileges and Members' Interests and the Senate Standing Committee of Privileges.

¹⁶⁷ For example, allegations that the Minister had acted *ultra vires* in exercising a statutory power do not require an individual to disagree with the Minister's decision. Further, Ministers may still be able to make disclosures about other public officials.

¹⁶⁸ Other jurisdictions take diverse approaches. In NSW staff members can make disclosures, and disclosures to a member of Parliament are protected, but not disclosures made by members of Parliament. In the ACT, a Minister can receive a disclosure from anyone (section 15), while a disclosure can be made about a member of the Legislative Assembly or their staff to the Clerk of the Assembly, the Auditor-General, the Ombudsman or a nominated disclosure officer (section 11(1)(a)). In QLD, a Member of the Legislative Assembly can receive disclosures unless the disclosure is about a judicial officer (section 14) although they have no statutory role in investigating the disclosure (section 34). Ministers and their staff are defined as public officials and able to make PIDs (section 7(2)), while other members of Parliament would be able to make PIDs on specific topics as a member of the general public.

Part 6: Clarify the coverage of the legislation

Submissions from the Accountability Round Table, Professor Brown and Mr Andrew Wilkie MP all suggest that members of Parliament and their staff are a significant gap in the PID Act's jurisdiction.

160. The Review considers that members of Parliament and their staff members require robust scrutiny. Their role within the Parliament and Australia's system of government relies upon their integrity and accountability to the people of Australia for the decisions they make. While the existing institutions to scrutinise wrongdoing by members of Parliament and their staff have extensive powers, they are also inherently politicised and rarely used without sustained public media coverage. For Ministerial staff, the political nature of their role is reflected within the Code of Conduct for Ministerial Staff which explicitly notes that any sanctions will only be imposed after consultation with the relevant Minister by the Prime Minister's Chief of Staff. The employment of other staff members relies upon the satisfaction of the parliamentarian they serve for their continued tenure. The rigour or otherwise of these arrangements is ultimately a matter for the Parliament.
161. The PID Act has relied upon linking together existing oversight regimes to provide protection for individuals who seek to report concerns about wrongdoing through the appropriate channels. As neither the conduct of members of Parliament nor their staff can be subject to scrutiny and sanction by an independent body outside or within the Parliament, this approach is ill-adapted to extending the protections of the PID Act to Senators, Members and their staff, as it would not be clear upon whom the obligation to investigate disclosures would be bestowed, and it would impose a bureaucratic process upon political roles.
162. If an independent body is created with the power to scrutinise alleged wrongdoing by members of Parliament or their staff, such as a comprehensive federal integrity body, the Review recommends that consideration be given to extending the application of the PID Act to these groups. Without such as an independent body, the PID Act should be amended to exclude possible application to members of Parliament and their staff.

Recommendation 26: 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.

Recommendation 27: 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.

163. Some submissions called for the judiciary to be subject to the PID Act.¹⁶⁹ The PID Act enables disclosures of alleged wrongdoing by statutory office holders, including members of the judiciary

¹⁶⁹ Submissions of the Law Council of Australia, page 6, and Joint Media Organisations, page 6.

when they exercise administrative powers.¹⁷⁰ The exercise of judicial powers or functions by judges or tribunal members is not disclosable conduct under the PID Act. While the integrity of all officeholders should be subject to scrutiny, the independence of the judiciary from government and the Executive is fundamental to the Separation of Powers and the checks and balances in Australia's constitution. If an individual considers that judicial powers have been wrongly exercised they can seek to appeal the decision to a superior court, or make a complaint to the Chief Justice of the court. The Review considers the PID Act is not suited to enabling scrutiny of the use of judicial powers.

CLARIFY APPLICATION TO WITNESSES, SOME AGENCIES AND GRANT RECIPIENTS

164. The Review has considered a number of adjustments to the way the legislation's coverage is described. These changes are intended to provide greater clarity and fairness to those who are already subject to the PID Act.
165. The PID Act currently offers protections from civil and criminal liability only for **witnesses** who give information to someone conducting a disclosure investigation.¹⁷¹ The Review considers that these protections should be expanded to include protections from reprisal and protections for people assisting in preliminary enquiries about a PID. Offering inducements like these protections could help agencies to investigate concerns more effectively, rather than relying upon the PID Act's obligation on public officials to use their best endeavours to assist in the conduct of a disclosure investigation. The witness' liability for their own conduct should not be affected by these provisions.

Recommendation 28: 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.

166. The PID Act was drafted before the PGPA Act simplified the governance of Commonwealth entities.¹⁷² Using the **PGPA term 'entity'**¹⁷³ instead of the Public Service Act term 'agency' within the PID Act will provide organisations with greater clarity about whether they are subject to the PID Act. The PID legislation could then be simplified by removing many of the 'prescribed authorities' listed, within section 72, such as the Australian Federal Police, the Australian

¹⁷⁰ Section 32.

¹⁷¹ Section 57.

¹⁷² The PID Act currently refers to categories of entities listed under the Public Service Act which requires detailed lists of prescribed authorities be named within section 72. This situation arises because some agencies subject to the PID Act are not also subject to the Public Service Act.

¹⁷³ The PGPA Act's term of Commonwealth 'entity' includes corporate and non-corporate bodies, as well as Commonwealth companies and Parliamentary departments.

Part 6: Clarify the coverage of the legislation

Prudential Regulatory Authority, the Office of the Official Secretary to the Governor-General, the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman.¹⁷⁴

167. If this change is adopted, it may also be appropriate to replace the role of Principal Officer with the PGPA's equivalent concept of Accountable Entity. While this would help to simplify section 73 of the PID Act which currently lists Principal Officers for particular agencies or types of agencies, it would also broaden the group of people covered as Accountable Entity covers the person or people responsible for governing the entity and may include several people.
168. If the PID Act applied to all PGPA 'entities', the status of intelligence and security agencies would still need to be clarified as only the Office of National Assessments is an entity in its own right, rather than falling within their portfolio department.¹⁷⁵

Recommendation 29: That the definition of 'agency' in the PID Act be replaced with the *Public Governance, Performance and Accountability Act 2013* term 'entity' while retaining treatment of intelligence and security agencies as entities separate from their portfolio department.

169. The PID Act includes contractors, contracted service providers and their staff members within the definition of public officials. Contrary to the policy intention of the legislation, there have been situations in which the contracted service provider definition has also captured **grant recipients** who received their funding through a contract.¹⁷⁶ The Review considers that grant recipients usually have an arms-length relationship to government and the Commonwealth public sector, in which they provide reporting on their delivery and outcomes, rather than working in close on-going collaboration like contractors and contracted service providers often do. The Review recommends amending the PID Act to ensure that grant recipients are not public officials.

Recommendation 30: That the definition of 'contracted service provider' be amended to ensure that grant recipients are not subject to the PID Act.

¹⁷⁴ The Review has not identified any organisations that are currently subject to the PID Act who would be excluded any this approach. In contrast, there would be a minor expansion of coverage to include Geoscience Australia, IP Australia and the Commonwealth Grants Commission who appear not to have already been subject to the PID Act.

¹⁷⁵ At present, this status as separate 'agencies' is linked to the definition of 'intelligence agency' and the meaning of 'intelligence information', although there may be other ways to preserve the existing effect of the legislation by referring to section 3 of the *Inspector-General of Intelligence and Security Act 1986* within these definitions.

¹⁷⁶ Submission by the Commonwealth Ombudsman, page 48.

PART 7: SIMPLER INTERACTIONS WITH OTHER INVESTIGATORY REGIMES

170. A Principal Officer is required to investigate a disclosure allocated to his or her agency. The PID Act is not intended to displace established procedures under other laws for investigating specific types of conduct, but rather to link these different regimes together and provide consistent protections for disclosers who bring forward information about wrongdoing. For this reason, the PID Act does not confer specific investigative powers in its own right, nor does it detract from obligations imposed by another law of the Commonwealth.¹⁷⁷
171. There are a range of situations in which it would be more appropriate to investigate a disclosure under another legislative or administrative regime. The PID Act recognises these situations as a ground on which a Principal Officer can decide not to investigate, so long as the information concerns disclosable conduct that has been, or is currently being, investigated under that alternative regime.¹⁷⁸ The Review supports a suggestion made by the Commonwealth Ombudsman that these discretions be expanded to include instances when the alleged disclosable conduct would be more appropriately investigated under another regime. Similar discretions exist in section 48(1)(f-g) for conduct that has been, or is being investigated under another legislative or administrative regime. This approach would also be consistent with the existing ability to consider whether an investigation should be conducted under another law of the Commonwealth.¹⁷⁹
172. Agencies' use of this discretion would be subject to scrutiny by the Commonwealth Ombudsman and the IGIS through information collected about agency's responses to PIDs in the annual report as well as in response to complaints about the mishandling of PIDs.

Recommendation 31: 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.

173. The review considered a call that the discretions not to investigate be amended to omit the discretion not to investigate if the disclosure does not concern 'serious' disclosable conduct.¹⁸⁰ The Review found no evidence that this power has been misused by agencies. Despite the Review's recommendations to focus the scope of disclosure to fraud, serious misconduct and corrupt conduct, the Review anticipates that minor matters will continue to be disclosed that do not warrant investigation under the PID Act. The Review considers that the operation of this discretion should be considered in future reviews.

¹⁷⁷ Refer PID Act, section 82(2).

¹⁷⁸ PID Act, section 48(1)(f-g).

¹⁷⁹ PID Act, section 47(3).

¹⁸⁰ PID Act, section 48(1)(c). Submission by Professor AJ Brown, page 2-3

Part 7: Simpler interactions with other investigatory regimes

174. For agencies investigating a potential breach of the public or parliamentary service

Code of Conduct, there are two provisions of the legislation that appear to be in conflict. In applying section 47(3), if there is sufficient information to support an investigation under other legislation, such as a Code of Conduct investigation, the PID investigator will recommend that action in the report of the investigation.¹⁸¹ The subsequent investigation under the Public Service Act would be performed according to the requirements of that legislation. Section 53(5) of the PID Act appears to impose a contradictory requirement, specifying that if an alleged breach of the Code of Conduct is investigated under the PID Act, the Principal Officer must comply with procedures under s15(3) of the Public Service Act and the Parliamentary Service Act. The Belcher *Red Tape Review* identified the interaction between PID and the Code of Conduct as particularly challenging.¹⁸²

175. If **Recommendations 5 and 31** are adopted, the Review recommends repealing section 53(5). The narrower scope of disclosable conduct and the simplified discretion to refer a matter to another legislative process, such as Code of Conduct, would make it likely that few parallel investigations under both frameworks will be conducted in the future.¹⁸³ This amendment is consistent with the approach publicised in the Commonwealth Ombudsman's guidance which promotes conducting any Code of Conduct investigations separately following the completion of a PID Act investigation to avoid the complexities of trying to conduct a combined investigation that fulfils the requirements of both legislation.¹⁸⁴ In the unlikely event that a combined investigation is required, the Review considers that section 82(2) will operate to ensure that statutory requirements necessary to find a breach of the Code of Conduct under the Public Service Act or Parliamentary Service Act continue to apply.

Recommendation 32: If Recommendations 5 and 31 are adopted, that section 53(5) of the PID Act be repealed since it will be redundant.

176. The Review also considered the specific requirement to investigate a PID that relates to **fraud** in accordance with the Commonwealth Fraud Control Framework.¹⁸⁵ This interaction was identified as problematic by the Belcher Review. Unlike section 53(5), this provision includes explicit advice on how to manage any inconsistency between the PID Act's requirements and the fraud compliance requirements, which has made it simpler to implement for agencies. The Review does not recommend changes.

¹⁸¹ This approach is consistent with the example noted under section 51 and the power in section 47(3).

¹⁸² Barbara Belcher AM recommended that the responsible departments 'work together to better manage the apparent overlap'. Recommendation 19.5 and 22.15. *Independent Review of Whole of Government Internal Regulation* (2015).

¹⁸³ If the need does arise, the Review considers that section 82(2) will operate to ensure that statutory requirements necessary to find a breach of the Code of Conduct under the Public Service or Parliamentary Service Acts continue to apply.

¹⁸⁴ Commonwealth Ombudsman, Agency Guide to the PID Act, version 2, page 53.

¹⁸⁵ PID Act, section 53(4).

177. Heads of law enforcement agencies within the Commonwealth already have an **obligation to notify corruption issues** to the Integrity Commissioner.¹⁸⁶ Yet under the PID Act, investigators are required to report evidence of an offence punishable by imprisonment for at least two years to the AFP.¹⁸⁷ These reporting obligations are duplicative and may be inappropriate as allegations of corruption need sensitive handling and investigative secrecy.¹⁸⁸ To resolve this challenge, the Review recommends the mandatory obligation to notify police be amended to include an exclusion for when a matter relates to a corruption issue which has already been notified to the Integrity Commissioner.

Recommendation 33: 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 *Law Enforcement Integrity Commissioner Act 2006*.

¹⁸⁶ Law Enforcement Integrity Commissioner Act, section 19.

¹⁸⁷ PID Act, section 56(2).

¹⁸⁸ Submissions from the Department of Immigration and Border Protection, page 23, and the Australian Federal Police, page 8.

CONCLUSION

178. The PID Act is intended to bring forth and investigate disclosures of serious wrongdoing within agencies, to ensure they are investigated, to enable agencies to fathom the nature of this wrongdoing, and to address it. Disclosures made under the PID Act shine a light on wrongdoing: these disclosures help agencies understand and tackle pockets of wrongdoing and the culture enabling it. Only those agencies that are actively looking for serious wrongdoing can be confident in their integrity.
179. The Review notes the considerable effort which agencies have made since January 2013 to implement the PID Act. The Review commends the significant work of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security in supporting agencies and individuals within their jurisdictions in the implementation and use of the PID Act. The Review also commends the cooperative relationship the Commonwealth Ombudsman and the IGIS have established as oversight agencies of the PID Act. These statutory office holders have been of tremendous assistance to both agencies and disclosers in their implementation of the PID Act. Without the dedication of both these lead PID Act agencies, the operation of the PID Act would have been less effective.
180. Commensurate with the PID Act aims, the Review's recommendations are intended to encourage and instil a pro-disclosure culture. When disclosures are made, a strong capacity for investigation is needed. The proposed additional investigative agencies will use their specialist expertise and suite of powers to scrutinise issues within their remit based on PID information, and to support better practice by those agencies. Focussing away from personal employment-related grievances towards serious wrongdoing will help to restore the reputation of the PID Act in the Commonwealth public sector and encourage agencies to regard the PID Act framework in the integrity and anti-corruption context. Simpler legislative procedures, coupled with scrutiny by the Commonwealth Ombudsman, the Inspector-General of Intelligence and Security, and the proposed additional investigative agencies, will improve the PID Act framework and assist the Commonwealth public sector to achieve the purposes of the legislation.
181. If the Review's recommendations are adopted, there will be significant amendments to the legislation and changes to the PID landscape and its implementation by agencies. Evaluation is required to understand whether the Review's recommendations are achieving their purpose, particularly:
- the effectiveness of amendments proposed to focus the scope of disclosable conduct; and
 - the effectiveness of a principles-based approach at encouraging a pro-disclosure culture, including whether the balance between clear rules and principle-based obligations are appropriate.
182. As more evidence about the operation of the PID Act is collected by the Commonwealth Ombudsman and the IGIS in their strengthened roles as oversight agencies, future reviews should also consider:
- whether the requirement that an external disclosure be not 'contrary the public interest' should be omitted or redefined to provide greater clarity for a potential discloser;

- whether the reprisal offence provisions provide adequate protections for disclosers;
- whether the circumstances within which an external or emergency disclosure may be made are well adapted to the purposes of the PID Act;
- whether health and safety matters should remain a kind of disclosable conduct; and,
- whether the entitlements to civil remedies are sufficient.

183. During the Review, there was extensive public debate about the need for an independent body to investigate corruption in the Commonwealth public sector, including among elected officials. Any future reform along these lines is a matter for the Parliament to consider.

184. The Review is mindful of the need to ensure that Australia's existing integrity framework, including the PID Act, is working as well as possible. To achieve that aim, the Review's recommendations seek to enhance the Commonwealth's integrity and accountability framework by: enhancing protections for individuals who seek to report fraud, serious misconduct and corrupt conduct; assisting agencies to administer the PID Act by providing them with additional support through the proposed additional investigative agencies; and, advancing a pro-disclosure culture.

185. The Review thanks those whose contributions have helped the Review understand the challenges of the PID Act, and how it might be improved. The Review is grateful for the ongoing support and expertise of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security, as well as their staff members and all those agencies and individuals who took the time to share their experience of the PID Act with the Review through submissions, online survey responses and meetings.