



Australian
Human Rights
Commission

Whistleblower Protection Authority Bill 2025 (No. 2)

Australian Human Rights Commission

Submission to the Senate Legal and Constitutional Affairs
Legislation Committee

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Contents

1	Introduction	3
2	Summary	3
3	Recommendations.....	5
4	Relevant human rights	6
5	Overview of the Bill	7
6	Disclosures of wrongdoing.....	8
6.1	<i>Clearinghouse for disclosures of wrongdoing</i>	8
6.2	<i>No wrong doors approach</i>	10
6.3	<i>Monitoring investigations of wrongdoing to ensure whistleblowers are protected</i>	11
7	Whistleblower protection issues	13
7.1	<i>Referral and oversight</i>	13
7.2	<i>Investigation</i>	15
8	Other remedial functions and powers	18
8.1	<i>Rewards?.....</i>	21
9	Administrative provisions	22
10	Drafting issues	25
	Endnotes	28

1 Introduction

1. The Australian Human Rights Commission (AHRC) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in relation to its inquiry into the Whistleblower Protection Authority Bill 2025 (No. 2) (Cth) (the Bill).
2. The AHRC has made recent submissions as part of the Australian Government's proposed reforms of public sector whistleblower protection laws, including:
 - (a) a submission to the Senate Legal and Constitutional Affairs Legislation Committee in January 2023 in relation to the Public Interest Disclosure Amendment (Review) Bill 2022 (Cth) (AHRC Stage 1 submission)¹
 - (b) a submission to the Attorney-General's Department (AGD) in December 2023 in relation to the *Public sector whistleblowing stage 2 reforms* (AHRC Stage 2 submission).²

2 Summary

3. At the end of 2023, in response to consultation by AGD about public sector whistleblower reforms, the AHRC said that there is merit in the establishment of an independent public sector whistleblower protection authority in a form that could be expanded to cover the private sector in the future. There is a good case for such a body to be given at least the following functions:
 - acting as a clearinghouse for whistleblowers bringing forward public interest disclosures
 - providing advice and assistance to whistleblowers
 - investigating allegations of reprisals against whistleblowers.
4. Since that round of consultation in 2023, there has been no further public consultations by the AGD about the stage 2 reforms, including the potential for a whistleblower protection authority.
5. The present Bill, introduced on 11 February 2025, is a useful and timely contribution to the public debate on this issue. It provides an outline of what a whistleblower protection authority could look like and proposes a broad range of functions that a potential authority could have. For reasons described in more detail in this submission, the AHRC does not consider that this Bill is in a form that is currently able

to be passed, however, a review of the provisions of this Bill is a useful exercise and will hopefully inform government legislation directed to the same issue.

6. The AHRC supports the aspects of the Bill that provide more detail about the functions identified in [3] above, namely:
 - acting as a clearinghouse by receiving and referring for investigation both disclosures of wrongdoing (see section 6.1 below) and whistleblower protection issues (see section 7.1 below) across both the public and private sectors
 - providing advice and assistance to whistleblowers (s 20 of the Bill)
 - investigating whistleblower protection issues (although, while the AHRC supports such investigations by the whistleblower protection authority, more work needs to be done on provisions dealing with how investigations would occur in practice, see section 7.1 below).
7. In addition, the AHRC considers that any future Bill should ensure that if a disclosure of wrongdoing is made to a whistleblower protection authority, that the whistleblower has the same protections as if they had made the disclosure directly to a specialist body under relevant Commonwealth whistleblowing legislation. This ‘no wrong doors’ approach is dealt with in section 6.2 below and Recommendation 3.
8. The AHRC has three main concerns with the Bill.
9. First, some of the functions given to the Whistleblower Protection Commissioner duplicate the work of other regulators. The Bill provides that the Commissioner would be able to substantively monitor the way that specialist investigatory agencies conduct inquiries into disclosures of wrongdoing, or monitor the way that agencies conduct internal reviews about disclosures of wrongdoing when there is another specialist investigatory agency available to play that role. Sections 6.3 and 7.1 below deal with a number of issues that arise in this context.
10. Secondly, the Bill borrows heavily from the *National Anti-Corruption Commission Act 2022* (Cth) (NACC Act) for its administrative structure and proposed investigatory powers. However, the AHRC considers that far more consideration would need to be given to whether the suite of very intrusive investigatory powers available to the National Anti-Corruption Commission (NACC) was appropriate for a whistleblower protection authority primarily focused on issues of reprisals and victimisation directed to whistleblowers. Section 7.2 below identifies a range of significant human rights issues that are not addressed in the

extrinsic material for this Bill but would need to be considered before such investigatory powers were replicated in this new context.

11. Thirdly, the broad range of functions proposed in the Bill in addition to those identified in [3] above raises the potential for conflicts of interest to arise between the functions. This was an issue noted in the recent review of whistleblower protections in Queensland which also considered calls for a single authority with a wide range of functions.³ Section 8 below identifies three categories of functions (regulatory functions, impartial dispute resolution functions, and adversarial functions) and describes some issues that may arise in trying to reconcile them in the one body.

3 Recommendations

12. The AHRC makes the following recommendations:

Recommendation 1

The AHRC recommends that the Bill not be passed in its current form.

Recommendation 2

The AHRC recommends that the Australian Government carefully review the issues raised by this Bill, in the submissions to this Committee, and in the report of this Committee, and introduce its own legislation to establish a Whistleblower Protection Authority, with at least the following functions:

- acting as a clearinghouse for whistleblowers bringing forward public interest disclosures
- providing advice and assistance to whistleblowers
- investigating allegations of reprisals against whistleblowers.

Recommendation 3

The AHRC recommends that in order to give better effect to the 'no wrong doors' approach, a future Government's Bill provide that if a person makes a disclosure to the Whistleblower Protection Authority, they obtain the same benefits as if they had made a disclosure under applicable Commonwealth whistleblowing laws.

4 Relevant human rights

13. Whistleblowers provide an invaluable public service in identifying issues of maladministration, corruption and other wrongdoing so that they can be addressed and remedied. The way that they do this is by exercising their right to freedom of expression, recognised in article 19 of the *International Covenant on Civil and Political Rights* (ICCPR). This kind of speech promotes the rule of law and the democratic accountability that underpins the protection and fulfilment of a range of other important rights.
14. Article 19(3) of the ICCPR provides that the right to freedom of expression carries with it special duties and responsibilities. As a result, it may be subject to certain restrictions that are provided for by law, and are necessary in order to respect the rights and reputations of others, or to protect national security, public order, or public health or morals.
15. For example, the free speech of public servants needs to accommodate their common law duty of trust and fidelity to the government of the day, as well as obligations contained in the APS Code of Conduct. This means that some restrictions on political speech are permissible.⁴ Further, some work by public servants is properly regulated by secrecy provisions. The Australian Law Reform Commission published a report in 2009, *Secrecy Laws and Open Government in Australia* (ALRC Secrecy Report), which provided a comprehensive review of Commonwealth secrecy laws.⁵ The ALRC noted that while secrecy was necessary in some circumstances, it needed to be properly circumscribed in order to achieve the aim of open and accountable government.
16. Whistleblowing legislation is designed to facilitate speech (including, in some instances, public speech), particularly by people who are subject to secrecy provisions that would otherwise limit their speech, by providing them with legal protections for disclosing serious misconduct.
17. Whistleblowing can come at great personal cost to individuals who are prepared to disclose wrongdoing. As a result, it is important that the privacy of whistleblowers is protected, reflecting the general right to privacy outlined in article 17 of the ICCPR. Similarly, it is important that whistleblowers are protected from reprisals and victimisation for doing the right thing. Protection against reprisals assists in fulfilling the right to work and the right to just and favourable conditions of work in

articles 6(1) and 7 of the *International Covenant on Economic, Social and Cultural Rights*.

18. Australia has ratified the United Nations Convention against Corruption.⁶ Article 33 of that instrument provides:

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.
19. A Whistleblower Protection Authority would assist in fulfilling the rights identified above, by making it easy for whistleblowers to know where to go to make a report about wrongdoing, by assisting them with appropriate advice, and by taking steps to protect them from reprisals and victimisation.

5 Overview of the Bill

20. The simplified outline of the Bill provides that the Whistleblower Protection Commissioner (the Commissioner) has three primary functions:
 - (a) receiving and facilitating the investigation of disclosures of wrongdoing
 - (b) providing advice and assistance, guidance and support to persons and agencies relating to the making of disclosures of wrongdoing
 - (c) investigating the mistreatment of whistleblowers and undertaking enforcement activities, as appropriate.
21. The functions of the Commissioner are set out in more detail in s 10.
22. There are two kinds of conduct that are important to distinguish when considering these functions. The first is a 'disclosure of wrongdoing' and the second is a 'whistleblower protection issue'. In broad terms, a disclosure of wrongdoing covers a disclosure by a whistleblower under any Commonwealth scheme that provides for the making and investigation of such disclosures. A whistleblower protection issue relates to acts of reprisal or victimisation against a whistleblower or a failure to comply with obligations to protect a whistleblower.
23. The Commissioner's obligations in relation to 'disclosures of wrongdoing' are primarily focused on receipt, advice and referral with

some monitoring of investigations by agencies to ensure that they fulfil their obligations to protect whistleblowers. The Commissioner's obligations in relation to 'whistleblower protection issues' can involve either referral (potentially with management or oversight of the investigation by agencies) or substantive investigation by the Commissioner and potential subsequent enforcement action.

6 Disclosures of wrongdoing

6.1 Clearinghouse for disclosures of wrongdoing

24. Every review of whistleblower protections at the federal level in Australia has noted how complex and confusing the system is for a whistleblower to navigate.⁷
25. The establishment of a 'one-stop shop' whistleblower protection authority to cover both the public and private sectors was a key recommendation of the 2017 report by the Parliamentary Joint Committee on Corporations and Financial Services.⁸ This recommendation was endorsed by a Senate Committee report on the *Performance of the Inspector-General of Taxation*, which observed:

Given the complexity, confusion, and the potentially poor outcomes for individuals who make disclosures, the committee sees merit in having a single, centralised, agency responsible for the oversight of enforcing whistleblower protections. The committee supports the examination of the establishment of such an authority, and suggests that this be considered as part of a review of the PID Act.⁹
26. When the AGD was conducting its Stage 2 consultation about public sector whistleblower reforms in 2023, the AHRC said that there would be a significant benefit in establishing an independent public sector whistleblower protection authority in a form that could be expanded to cover the private sector in the future.¹⁰
27. A centralised and high-profile whistleblower protection authority would be likely to improve the allocation of disclosures for investigation by the appropriate agency. This was one of the key functions that the PJCCFS Whistleblower Report identified as being performed by a whistleblower protection authority: acting as a clearinghouse for disclosures.¹¹ It is the primary function played by the Protected Disclosures Commissioner in Ireland, for example.¹²
28. The current Bill adopts that clearinghouse model across all public and private whistleblower regimes. The AHRC supports this proposed

clearinghouse role for a whistleblower protection authority. Section 16(1) of the Bill provides that any person (including a public official, an agency or any other person) may:

- make a disclosure of wrongdoing to the Commissioner
- provide information about a disclosure of wrongdoing to the Commissioner
- request information, advice, guidance or assistance in relation to a disclosure of wrongdoing from the Commissioner.

29. A 'disclosure of wrongdoing' is defined broadly and includes:

- public interest disclosures under the *Public Interest Disclosure Act 2013* (Cth) (PID Act) – that is, public sector whistleblowing
- conduct that falls within the whistleblowing regime in the *Corporations Act 2001* (Cth) (Corporations Act)
- corruption issues under the NACC Act, where the referral is made by a current or former employee, volunteer or contractor of the entity to which the corruption issue relates
- alleged breaches of a code of conduct for parliamentarians, where the allegation is made by a current or former employee, volunteer or contractor of an organisation to whom the contravention also relates
- a disclosure of wrongdoing 'in accordance with' any other Commonwealth law, including the laws outlined in s 4(1)(b), where made by a current or former employee, volunteer or contractor of the entity to which the alleged wrongdoing relates.

30. Section 4(1)(b) lists nine Acts (including the PID Act, the Corporations Act and the NACC Act) that provide schemes for the receiving and investigating disclosures of wrongdoing. The last dot point above appears to extend the scope of disclosures of wrongdoing to disclosures any current or future Commonwealth whistleblower scheme. The Bill also provides for the extension of the definition of disclosures of wrongdoing by the rules.

31. If a person makes a disclosure to the Commissioner, the Commissioner may provide general information, advice, guidance and assistance to the person.¹³

32. The Commissioner may also either:

- refer the disclosure to a Commonwealth agency, if the disclosure relates to that agency¹⁴

- refer the disclosure to an agency that has functions and powers to investigate it,¹⁵ or
 - decide to take no further action.¹⁶
33. In making a decision about how to deal with the disclosure, the Commissioner must have regard to a list of factors set out in s 23(2).

6.2 No wrong doors approach

34. A centralised and high-profile whistleblower protection authority would be likely to improve the allocation of disclosures for investigation by the appropriate agency. In addition to being a central point for referral of disclosures of wrongdoing, it is important that whistleblowers are able to obtain the same protections by approaching the whistleblower protection authority as they would if they had approached the body that is primarily responsible for the whistleblower scheme that their disclosure relates to.
35. For example, the PID Act is highly prescriptive in relation to the way in which disclosures may be made. An internal disclosure may only be made to the person's supervisor or an 'authorised internal recipient'. An authorised internal recipient is an authorised officer of the discloser's agency, the agency to which the disclosure relates, the Ombudsman, or (if the disclosure relates to an intelligence agency) the IGIS.¹⁷
36. Once a disclosure is validly made under the PID Act, the discloser obtains a range of protections including immunity from civil, criminal or administrative liability for making the disclosure (s 10), protection from reprisals (ss 13–17), and protection of their identity (ss 20–21).
37. There is a real risk that a person who genuinely intends to make a public interest disclosure is denied the protections of the PID Act because the disclosure is made to the wrong agency, or the wrong person within an agency.
38. The AHRC consider that legislation governing any Commonwealth whistleblower protection authority should adopt the approach in the *Public Interest Disclosures Act 2012* (Vic) which provides protection to whistleblowers if:
- they make a disclosure to an agency that can receive public interest disclosures, and
 - the person honestly believed that the agency was an appropriate entity to which to make the disclosure.¹⁸

39. The 'honest belief' criterion is consistent with Australia's obligations under article 33 of the United Nations Convention against Corruption, to consider legislative protections where a person reports corruption issues in good faith to competent authorities.

6.3 Monitoring investigations of wrongdoing to ensure whistleblowers are protected

40. In addition to the clearinghouse or referral function identified above, the Bill also proposes that the Commissioner have an active role in monitoring the way in which a 'government agency' investigates or deals with the disclosure.¹⁹ There is some limit to this monitoring function: it must be 'for the purpose of ensuring that whistleblower protection responsibilities are fulfilled'. However, provided that purpose is fulfilled, it would permit the Commissioner to monitor any aspect of a substantive inquiry into wrongdoing beyond just whistleblower protection issues. This gives rise to questions about whether the Commissioner would be duplicating the functions of other specialist investigatory agencies.
41. In this context, 'government agency' is defined broadly,²⁰ and seems to give the Commissioner not only the power to monitor agencies conducting internal inquiries into conduct that relates to them, but also the power to monitor other investigatory agencies including the NACC, the Ombudsman, the Australian Taxation Office, the Australian Securities and Investment Commission or the Inspector-General of Intelligence and Security who may be conducting an inquiry as part of their own functions.
42. In addition, the Commissioner would be given the function of providing 'advice, guidance or assistance' to *both* the whistleblower and the agency (or specialist investigatory agency) dealing with the disclosure.
43. In support of this function, the Commissioner would have the power to require the production of information by the agency.²¹
44. The AHRC has some concerns about the breadth of the monitoring powers proposed to be granted to the Commissioner.
45. First, there are questions about whether all of these functions are compatible. There is already a power in s 20(1) of the Bill to provide 'general' information, advice and assistance to whistleblowers and government agencies, including when disclosures are first received. However the functions in s 21(2) seem to be more specific in that they empower the Commissioner to provide advice to both whistleblowers

and government agencies about how investigations into particular disclosures are dealt with once they are referred (provided that this is for the purpose of ensuring that whistleblower protection responsibilities are fulfilled). If there is a dispute about whether whistleblower protection responsibilities are being fulfilled, the AHRC would query whether it is appropriate for the Commissioner to be providing specific advice to both the whistleblower and the agency, as well as ‘monitoring’ the agency.

46. Secondly, there is a question about whether an additional regulator is required to monitor the investigation of wrongdoing by specialist regulators. As noted in [54] below, this is inconsistent with the way in which the NACC deals with referrals to specialist regulatory agencies.
47. Thirdly, the monitoring function given to the Commissioner is much broader than an inquiry into a whistleblower protection issue (discussed in section 7 below). It appears that the Commissioner is given the power of monitoring any aspect of the way that the agency investigates or deals with a disclosure of wrongdoing, provided it is for the purpose of ensuring that whistleblower protection responsibilities are fulfilled. Even if the Commissioner were limited to monitoring the way that internal investigations were conducted, there may be questions about the extent to which this function overlaps with the functions of other agencies, for example:
 - oversight by the Ombudsman of the handling of public interest disclosures in relation to Commonwealth agencies under ss 7A and 55 of the PID Act
 - oversight by the IGIS of the handling of public interest disclosures in relation to the intelligence community under ss 7B and 55 of the PID Act
 - oversight by the Inspector of the NACC of the NACC under Part 10, Div 2 of the NACC Act
 - oversight by the Inspector-General of Taxation under the *Inspector-General of Taxation Act 2003* (Cth).
48. Fourthly, very extensive powers are given to the Commissioner to support those monitoring functions. The Commissioner can require the mandatory production of any information.²² Usually, powers of this nature require a notice to produce to be issued and set out some minimum content requirements for such a notice so that its validity can be tested.

49. Fifthly, there are no specific provisions about the extent to which the Commissioner would have the power to compulsorily require information to be provided by National Intelligence Community agencies. Ordinarily, this would be dealt with specifically in legislation.
50. Proactive monitoring of any investigations into disclosures of wrongdoing is also likely to be a highly resource intensive task for any agency. The AHRC suggests that the need for this function be reconsidered in any future Bill for a whistleblower protection authority to ensure that it is filling a regulatory gap. The way that these issues appears to be dealt with by the Dutch whistleblower authority, Huis voor Klokkenluiders, is to limit investigations into substantive wrongdoing to situations where there is no other specialist agency investigating the conduct (see [74] below).

7 Whistleblower protection issues

51. As noted above, a whistleblower protection issue relates to acts of reprisal or victimisation against a whistleblower or a failure to comply with obligations to protect a whistleblower. The Commissioner would have broad powers to deal with whistleblower protection issues. They could either be referred to agencies to deal with, or the Commissioner may decide to conduct a substantive investigation themselves. If the issue is referred, the Commissioner would also have the power to manage or oversee the investigation by the agency.

7.1 Referral and oversight

52. One way that the Commissioner may deal with an alleged whistleblower protection issue is to refer it for investigation. The referral could either be to the agency to which the issue relates,²³ or to a specialist investigative agency.²⁴ This referral power is useful and appropriate. The AHRC supports this power and it is similar to the clearinghouse function in relation to substantive disclosures of wrongdoing described above.
53. Regardless of which kind of referral is made, the Commissioner would have the power to either 'manage' or 'oversee' the investigation. The EM does not provide any detail about what it means to manage or oversee the investigation,²⁵ and there is a range of practical issues that would need to be considered. As noted in section 9 below, it appears that many parts of this Bill are based on the NACC Act. The NACC can refer a corruption issue to an agency for investigation and has the

power to 'oversee' the investigation.²⁶ The EM to the NACC Bill provided the following explanation of this function:

This is intended to allow the Commissioner to provide investigative support to agencies that are investigating a corruption issue following a referral but do not have the same level of investigative expertise or capability as the NACC. This would assist the Commissioner to appropriately manage the NACC's resources and allow the Commissioner to focus on the most serious or systemic corruption issues, while providing support to agencies to investigate minor or lower-level corruption issue[s].²⁷

54. Significantly, this 'oversight' function is not available if the NACC refers the corruption issue to another specialist agency for investigation. The EM to the NACC Bill explained:

The Commissioner's ability to oversee investigations conducted by Commonwealth agencies is limited to a corruption issue that the Commissioner decides to deal with under clause 41 by referring the issue back to the agency to which the issue relates for investigation. Where the Commissioner has decided to deal with a corruption issue under clause 41 by referring it to another Commonwealth, State or Territory body for consideration, the Commissioner would not be able to oversee any investigation that the other agency then decided to undertake. This ensures that other independent investigative or oversight bodies (such as the AFP or the Commonwealth Ombudsman) cannot be the subject of direction by the Commissioner when performing their own investigative functions in relation to other Commonwealth agencies.²⁸

55. The NACC also has the power to:

- give directions to an agency about the planning and conduct of the investigation
- require reports from the agency head
- comment on the report and provide additional recommendations
- require responses from the agency to proposed recommendations.²⁹

56. Issues in the present Bill that would need to be resolved include the following:

- whether 'overseeing' an investigation has the same meaning in this Bill as it does in the NACC Act (see [53] above)
- if so, whether such oversight is necessary if a referral is made to an agency with specialist investigatory functions (see the

difference between s 22(1)(c) of the Bill and the NACC Act as described in [54] above)

- what ‘managing’ an investigation means, and whether it involves something similar to, or more extensive than, the powers of the NACC referred to in [55] above
 - again, whether management of an investigation by an agency with specialist investigatory functions is appropriate
 - how these functions would be used in relation to agencies that are members of the National Intelligence Community.
57. The AHRC considers that further thought would need to be given to these issues prior to these functions being settled.

7.2 Investigation

58. Instead of referring a whistleblower protection issue to another agency, the Commissioner may decide to investigate the issue themselves.³⁰ In deciding whether to conduct their own investigation into a whistleblower protection issue, the Commissioner must consider a range of factors including the need to ensure a balance between:
- the Commissioner’s role in dealing with whistleblower protection issues (particularly in dealing with significant whistleblower protection issues); and
 - ensuring that heads of Commonwealth agencies take responsibility for managing their agencies, or for investigating and dealing with whistleblower protection issues.³¹
59. This mandatory consideration recognises a potential tension between the responsibilities of agencies and the Commissioner, but neither the Bill nor the EM provides guidance on how to resolve it.
60. If a whistleblower protection issue relates to an agency, and the Commissioner decides to either refer, investigate, manage or oversee a whistleblower protection issue in one of the ways described in s 22(1), then the Commissioner may also direct the agency not to investigate the whistleblower protection issue.³² This direction about further action appears to be based on s 43 of the NACC Act, however the Bill is less clear and does not contain the same safeguards. The safeguards under the NACC Act are:
- a requirement for consultation with the agency head

- a requirement that the direction is necessary to ensure the effectiveness of any action the NACC may take in relation to the corruption issue
 - a requirement to consider requests by the agency to take particular action and to give reasons for the resulting decision.³³
61. The lack of clarity arises because, as noted above, the direction can only be given under the NACC Act to ensure the effectiveness of any action that the NACC may take in relation to the corruption issue, but the direction given by the Commissioner can be given in circumstances where the Commissioner refers the whistleblower protection issue for investigation and decides to neither manage nor oversee the investigation.³⁴
62. The most significant gap in the Bill relates to investigations conducted by the Commissioner. This is purportedly dealt with in s 34 of the Bill, however, that section merely picks up and applies all of Parts 7, 8 and 9 of the NACC Act. The sections of the NACC Act adopted are ss 51-171. The sections incorporated by reference here are longer than the entire Bill.
63. The Bill suggests that the only changes required to those parts are to:
- treat references to the 'Commissioner' (of the NACC) as references to the 'Whistleblower Protection Commissioner'; and
 - treat references to a 'corruption issue' as references to a 'whistleblower protection issue'.
64. It is clear that there are other terms in the NACC Act that would also need to be amended for these Parts to make sense as parts of the current Bill. This includes references in the NACC Act to:
- 'corrupt conduct' (for example, s 55(a) of the NACC Act)
 - 'corruption investigation' (for example, s 57(1) of the NACC Act)
 - 'staff member of the NACC' (for example, s 57(2) of the NACC Act)
 - 'NACC Act process' (for example, s 64(2) of the NACC Act)
 - 'authorised officer' (for example, s 85(1) of the NACC Act).
65. There are also sections in Parts 7, 8 and 9 of the NACC Act that do not make sense when transferred to this Bill such as:
- cross-references to other parts of the NACC Act that are not adopted by reference (for example, the notes to ss 58(2), 60(1), 63(1) and 152 of the NACC Act)

- the requirement to give the NACC Inspector certain documents (s 63(8), NACC Act)
 - the references in ss 74, 77, 100, 151, 154, 158, 159, 160, 164, 165, 167 and 171 of the NACC Act to certificates given under s 235 of the NACC Act, which is not incorporated into the Bill.
66. More substantively, the lack of any discussion in the EM suggests little if any consideration has been given as to whether all of these sections of the NACC Act are appropriate to investigations conducted by the Whistleblower Protection Commissioner. Some sections raise significant human rights issues that are not discussed in the Bill's Statement of Compatibility with Human Rights, such as:
- the incorporation by reference of criminal offences, for example for failing to comply with compulsory notices (ss 60 and 61 of the NACC Act), and offences relating to hearings (ss 68–72 and 81 of the NACC Act) – there is nothing in the Bill or the EM that indicates that it involves criminal penalties, and similar powers in the Bill to compel the production of information do not result in criminal sanctions if there is non-compliance³⁵
 - the non-incorporation into the Bill of defences to certain offences under the NACC Act – for example the protections for journalists' informants (s 31 of the NACC Act) and for international relations certificates (s 236 of the NACC Act) are not incorporated into the Bill
 - whether the Commissioner should be given the power to summons people to give evidence that may be relevant to criminal proceedings or confiscation applications (see ss 63 and 129–139 of the NACC Act) – these powers have the ability to interfere with the conduct of criminal or quasi-criminal proceedings and deserve specific consideration before being incorporated into a new context; they raise significant constitutional issues (see ss 140–148) and human rights issues about the right to a fair trial that that should properly be contained in a Statement of Compatibility with Human Rights
 - the conduct of private hearings by the NACC and whether this is appropriate for the Whistleblower Protection Commissioner (s 73 of the NACC Act)
 - whether there should be an offence of 'contempt of the Whistleblower Protection Authority' (compare s 82 of the NACC Act) and whether the Commissioner should have the ability to

direct that people be detained pending the determination of a contempt charge (compare s 85 of the NACC Act) – this raises very significant human rights issues dealing with the right to liberty that should properly be contained in a Statement of Compatibility with Human Rights

- whether the Whistleblower Protection Authority should have the ability to apply to a court for orders that a person deliver travel documents so that they cannot travel outside Australia in certain circumstances (compare s 88 of the NACC Act) – this raises significant human rights issues dealing with the right to freedom of movement that should properly be contained in a Statement of Compatibility with Human Rights
- whether the extensive powers to obtain, use and disclose investigation material are appropriate for the Whistleblower Protection Authority
- whether the Whistleblower Protection Authority should have the power to enter premises without a warrant (compare s 117 of the NACC Act) – this raises significant human rights issues about the right to privacy and the importance of safeguards like judicial oversight; it requires more consideration about the justification for such powers and whether they are proportionate to a legitimate aim
- whether there would be staff members of the Whistleblower Protection Authority who are also police officers (see the definition of ‘authorised officer’ in s 267 of the NACC Act which is not incorporated into the Bill) and whether they would be given specific search powers under the Crimes Act (see ss 121–128 of the NACC Act which are incorporated into the Bill).

67. On the basis of the extrinsic material to the Bill, the AHRC is not convinced that these issues have been given proper consideration. Further work is required in order to properly circumscribe an appropriate investigation regime.

8 Other remedial functions and powers

68. The Bill provides a wide range of remedial functions and powers to the Commissioner, but it is not clear whether they are all compatible and appropriate to be given to a single body. There seems to be a real potential for conflicts of interest to arise.

69. The Issues Paper published by the AGD in relation to Stage 2 of the public sector whistleblowing reforms provided a list of functions for a potential whistleblower authority that had been raised by stakeholders or that were part of models in other jurisdictions.³⁶ It appears that the Bill is an attempt to include all of those functions in a single body.
70. In broad terms, the kinds of remedial functions and powers proposed to be given to the Commissioner are:
- (a) regulatory functions in relation to whistleblower protection issues, including:
 - (i) the making of recommendations following an investigation (s 35)
 - (ii) accepting enforceable undertakings (s 38)
 - (iii) bringing enforcement proceedings for breach of whistleblower protection responsibilities (s 36(2))
 - (b) impartial dispute resolution functions, including voluntary mediation and arbitration (s 37)
 - (c) adversarial functions, including:
 - (i) direct representation of whistleblowers in legal proceedings (s 36(3))
 - (ii) legal advice or representation to any party engaged in mediation or arbitration for which the Commissioner is also responsible (s 37(3)).
71. In the view of the AHRC, there are good reasons for the Commissioner to have the kinds of regulatory functions and powers described in (a) above. A review by the Human Rights Law Centre of reported cases up to April 2023 under Australian whistleblowing laws found that there have been few cases dealing with whistleblower protection issues and very few where a whistleblower had been substantively successful. There was only one case where a whistleblower had been awarded damages for victimisation. Four cases were successful in preventing the release of documents or information that might reveal a whistleblower's identity. Two cases were successful in obtaining injunctive relief to prevent reprisal action against whistleblowers.³⁷ Empowering a regulator to investigate whistleblower protection issues, make recommendations following those investigations, accept enforceable undertakings in relation to potential breaches and, if necessary, commence legal proceedings, would significantly strengthen

existing protections by providing better pathways for whistleblower protection obligations to be enforced in practice.

72. It is not clear whether this regulatory posture is also consistent with the Commissioner acting as an impartial mediator or arbitrator as envisaged by the functions and powers described in (b) above. The equivalent Dutch regulator (described below) has noted that it was necessary for it to put in place fixed information barriers between staff responsible for providing general advice to whistleblowers (cf s 20 of the Bill) and staff responsible for regulatory functions.³⁸ An impartial mediation or arbitration function is likely to require (at least) further internal structural separation. There are also a number of issues with the model proposed in the Bill, including:
- as the Bill recognises, any arbitration would only be possible with the consent of all parties, given the constitutional limits on conferring an adjudicative power on the Commissioner who is not a Ch III court – this is likely to significantly limit any practical take up of such a function
 - there is nothing in the Bill that describes how arbitrated outcomes could be reviewed
 - there is a direct conflict between what would be required of an impartial mediator or arbitrator under s 37(2) and the function of providing legal advice or representation to one of the parties to such a mediation or arbitration under s 37(3).
73. There are also real practical obstacles to the Commissioner directly representing whistleblowers in legal proceedings (as seems to be anticipated by s 36(3)) as opposed to seeking to enforce whistleblower protection obligations as an independent regulator in the public interest. If the Commissioner became the legal representative for whistleblowers, there may be circumstances in which the instructions from the whistleblower may be inconsistent with the position that the Commissioner may have otherwise taken as an independent regulator.
74. There is only a handful of similar authorities in the world that have specialised whistleblower functions. In the Netherlands, the Huis voor Klokkenluiders has arguably the broadest range of functions, comprising:
- provision of confidential advice to whistleblowers (but not legal representation)
 - investigation of possible reprisals against whistleblowers

- investigation into substantive wrongdoing reported by a whistleblower if no supervisory authority or competent authority has been designated, or if no proper investigation has yet been carried out by a specialised supervisory authority, and the making of recommendations
 - research and education.³⁹
75. In 2018, the Huis voor Klokkenluiders published a report that compared its functions to the functions of other similar regulators in Europe and the G20.⁴⁰ In 2023, Transparency International reported⁴¹ on how well European Countries had implemented changes to their legislation to comply with the 2019 European Union Whistleblower Protection Directive.⁴²
76. In the US, the Office of Special Counsel is responsible for the Whistleblower Protection Act. Its functions include:
- acceptance of reports of wrongdoing from federal employees
 - referral of reports of wrongdoing for investigation
 - protection of federal employees and applicants from reprisal for whistleblowing.⁴³
77. The AHRC has not sought to duplicate the comparative research referred to above or to conduct a comprehensive comparative analysis of regulators. However, it does not appear that any other regulator has been given the broad range of functions proposed by this Bill.

8.1 Rewards?

78. One issue raised in the AGD issues paper was whether there should be a reward system for whistleblowers.⁴⁴ This had been previously recommended by the Parliamentary Joint Committee on Corporations and Financial Services in its 2017 report on *Whistleblower Protections*,⁴⁵ which canvassed schemes then in operation in the US, Canada and South Korea, along with reasons why UK regulators had opposed the introduction of such schemes.
79. The Bill refers to rewards in two ways. First, it is something that could be recommended by the Commissioner, following an investigation or public inquiry by the Commissioner or a 'special report' made by the Commissioner. The references to investigations and public inquiries appear to relate only to whistleblower protection issues (see s 34 of the Bill) and not to any disclosure of wrongdoing. It is not clear from the Bill what is meant by a 'special report' but it could relate to the kinds of

reports referred to in s 10(1)(i) of the Bill. Secondly, the Bill envisages that the Commissioner could provide 'practical support' to a person who has experienced a whistleblower protection issue,⁴⁶ including the payment of a reward.⁴⁷ Again, this proposal does not extend to providing rewards to whistleblowers generally; only to those who have experienced some form of retaliation for coming forward. Assuming the above analysis is correct, it is unclear why a rewards system, if it were to be introduced, would only be available to whistleblowers who were the victims of reprisals.

80. In the AHRC Stage 2 submission, the AHRC noted that it would be important to carefully consider the incentives created by a reward system before introducing one in Australia. The AHRC suggested that this could be the subject of a review by the Productivity Commission.⁴⁸ Recently, there has been some more empirical analysis of the impact of introducing monetary incentives for corporate whistleblowers, which concluded there was a reasonable basis to consider that reward programs could contribute positively to corporate regulation in Australia.⁴⁹ It will be important for any legislative proposals for rewards to clearly identify relevant regulatory impacts.

9 Administrative provisions

81. Most of the administrative provisions dealing with the structure, governance and oversight of the Whistleblower Protection Authority are based on similar provisions in the NACC Act. This has some advantages in that there is a precedent to draw from. Parliament has agreed that these kinds of administrative provisions were appropriate for the NACC. The AHRC does not have a view on whether the same structure is appropriate for the Whistleblower Protection Authority.
82. The recent review of the *Public Interest Disclosure Act 2010* (Qld) suggested that the range of functions provided to any such authority, and presumably also the extent of the administrative machinery that surrounds it, should be proportionate to the expected demand for its services.⁵⁰
83. This submission does not deal in detail with the administrative provisions. The table below notes where similar provisions can be found in the NACC Act.

Issue	Bill provision	NACC Act
The Commissioner	s 9	s 182
The Deputy Commissioners	ss 11-12	ss 18-19
Establishment of the Whistleblower Protection Authority	ss 13-15	ss 20-22
Appointment of Commissioners	ss 39-48	ss 185-193
The CEO	ss 49-59	ss 251-261
Staff and consultants	ss 60-63	ss 262-266
Immunities of staff members of the Authority	ss 64-65	ss 269-270
Annual report	ss 66-67	ss 271-272
Whistleblower Protection Advisory Council	ss 68-79	These provisions appear to be new.
Parliamentary Joint Committee on the Whistleblower Protection Authority	ss 80-85	ss 172-177

84. The first thing to note is that s 9 of the Bill, dealing with the appointment of the Whistleblower Protection Commissioner, is based on the appointment of the Inspector of the NACC and not on the appointment of NACC Commissioners. It is proposed that the Whistleblower Protection Commissioner be ‘an independent officer of the Parliament’. This is an unusual status, and in other Commonwealth legislation the status appears to be limited to:
- the Inspector of the NACC⁵¹
 - the Auditor-General.⁵²
85. In the case of the Auditor-General, the legislation specifies that they are to have ‘complete discretion in the performance or exercise of

[their] functions or powers' and are 'not subject to direction from anyone in relation to ... whether or not a particular audit is to be conducted ... the way in which a particular audit is to be conducted ... or ... the priority to be given to any particular matter'. The Auditor-General is to have regard to the audit priorities of the Parliament, as determined by the Joint Committee of Public Accounts and Audit.⁵³

86. In the case of the Inspector of the NACC the extrinsic material for the NACC Bill recognised that the Inspector (but not the NACC Commissioners) would be an independent officer of the Parliament in recognition of the role of the Inspector in complementing the oversight of the NACC provided by the Joint Parliamentary Committee on the NACC, and the Inspector's independence from the NACC Commissioner and the government of the day.⁵⁴
87. In addition to adopting an equivalent set of administrative machinery to that of the NACC (that is, Commissioners, a CEO, staff of the Authority, and a Parliamentary Joint Committee), the Bill proposes that there be a Whistleblower Protection Advisory Council consisting of a Chair and 6-10 members appointed on a part time basis and remunerated in a way determined by the Remuneration Tribunal. The functions of the Council are solely strategic. While not part of the NACC Act, there is precedent for the establishment of advisory councils of this nature in other areas.⁵⁵ The additional value of this further layer of governance and its cost is something that would need to be considered.
88. The Explanatory Memorandum says that the Bill will have no financial impact.⁵⁶ This seems unlikely for the establishment of a new agency. The AHRC recognises that the lack of costings may be because this Bill is a private Senators Bill with the resourcing limitations that this entails. The AHRC considers that a Whistleblower Protection Authority is an agency that justifies investment from government. Any new Bill will need to be accompanied by appropriate costings.
89. Some issues that should be considered as part of the administrative provisions are:
 - The incorporation into the selection process for Commissioners of an explicit requirement that there be public advertising and a merits based selection process (see amendments made by the *Australian Human Rights Commission Legislation Amendment (Selection and Appointment) Act 2022* (Cth)).

- Section 65 dealing with immunities from certain State and Territory laws provides that staff of the authority are not required to ‘register any vehicle, vessel, animal or article belonging to the Commonwealth’. This is taken from s 270 of the NACC Act, in a context where some authorised officers are also police officers, but it is not clear why this is a necessary immunity for staff of the Whistleblower Protection Authority.
- Section 67 refers to ‘sensitive information’. The language of that section is based on s 272 of the NACC Act. The meaning of ‘sensitive information’ is defined in s 227(3) of the NACC Act but not in the Bill. It may be that this is dealt with because s 86 of the Bill picks up Divs 1 and 2 of Part 11 of the NACC Act which include s 227, but this is not clear to a reader of the Bill, particularly without any interpretive notes.

10 Drafting issues

90. As noted above, the AHRC does not consider that the Bill is currently in a form that is able to be passed. It also appears to have been prepared in some haste as there are several minor drafting errors throughout. If, contrary to the AHRC’s position, the Committee considers that the Bill should be passed, these errors would need to be corrected at a minimum. The following table sets out those that the AHRC was able to identify.

Section	Content	Amendment required
s 18(3)	‘Action taken under subsection (3)’	‘Action taken under subsection (1)’
s 20(2)(i)	‘any other person that the deems fit’	‘any other person that the <u>Commissioner</u> deems fit’
s 21(5)	This subparagraph should be numbered s 21(4).	

Section	Content	Amendment required
s 25(7)	'The Commissioner may decide under subsection (1) to take no further action in relation to the whistleblower protection issue only if the is satisfied that'	'The Commissioner may decide under subsection (1) to take no further action in relation to the whistleblower protection issue only if the <u>Commissioner</u> is satisfied that'
s 30	'the Commissioner may advise the person'	Need to clarify whether this is the person referred to in s 29(1)(b).
s 38(5)	'If the Commissioner considers that the person who gave the undertaking has contravened any of its terms, the may apply to the Federal Court ...'	'If the Commissioner considers that the person who gave the undertaking has contravened any of its terms, the <u>Commissioner</u> may apply to the Federal Court ...'
s 38(6)	There is a stray paragraph (b) at the end of this section that does not appear to be part of the section.	
s 39(3)	'A person must not be appointed as the Commissioner unless the person the Minister must be satisfied that the person:'	'A person must not be appointed as the Commissioner unless the Minister is satisfied that the person:'

Section	Content	Amendment required
Part 4 Div 2	The heading is: 'The CEO, staff etc. and authorised officers'	This is taken from the heading to Part 12, Div 2 of the NACC Act, however, the Bill does not make provision for 'authorised officers' so the heading should be: 'The CEO, staff etc.'
s 59(2)(c)	'(see section 258)'	This appears to be a reference to s 258 of the NACC Act. The correct cross-reference in the Bill is to s 56.
s 69(1)(b)	'on its own initiative, to provide advice to the Commissioner in relation to the Authority's <u>function</u> '	'on its own initiative, to provide advice to the Commissioner in relation to the Authority's <u>functions</u> '

91. In addition, a number of sections refer to 'a Commissioner' in a way that suggests it is supposed to mean either the Commissioner or a Deputy Commissioner, but this is not separately defined.⁵⁷ More confusingly, some sections refer to 'the Commissioner' in a way that suggests it is supposed to mean either the Commissioner or a Deputy Commissioner.⁵⁸

Endnotes

- ¹ Australian Human Rights Commission, *Public Interest Disclosure Amendment (Review) Bill 2022*, submission to the Senate Legal and Constitutional Affairs Legislation Committee, 20 January 2023, at <https://www.aph.gov.au/DocumentStore.ashx?id=7b966ce8-3a78-4107-8f9d-fcee9f33d830&subId=732198>.
- ² Australian Human Rights Commission, Public sector whistleblowing reforms – stage 2, submission to the Attorney-General's Department, 22 December 2023, at https://consultations.ag.gov.au/integrity/pswr-stage2/consultation/download_public_attachment?sqlId=pasted-question-1700018847.04-18679-1700018847.24-56819&uuld=727427050.
- ³ The Hon Alan Wilson KC, *Review of the Public Interest Disclosure Act 2010*, June 2023, p 148 at <https://www.publications.qld.gov.au/dataset/review-public-interest-disclosure-act-2010/resource/163329e9-3aa2-4601-9ff8-725458170b6b>.
- ⁴ *Comcare v Banerji* (2019) 267 CLR 373 at [34].
- ⁵ Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009).
- ⁶ *United Nations Convention against Corruption*, opened for signature 31 October 2003, UN Doc A/RES/58/4 (entered into force 14 December 2005).
- ⁷ For example: Mr Philip Moss AM, *Review of the Public Interest Disclosure Act 2013* (15 July 2016) (Moss Review), p 6; Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into Whistleblower protections in the corporate, public and not-for-profit sectors* (PJCCFS Whistleblower Report), pp 27–31; Senate Economics Legislation Committee, *Performance of the Inspector-General of Taxation*, June 2020, at [4.72].
- ⁸ PJCCFS Whistleblower Report, chapter 12.
- ⁹ Senate Economics Legislation Committee, *Performance of the Inspector-General of Taxation*, June 2020, at [4.74].
- ¹⁰ AHRC Stage 2 submission, [135] https://consultations.ag.gov.au/integrity/pswr-stage2/consultation/download_public_attachment?sqlId=pasted-question-1700018847.04-18679-1700018847.24-56819&uuld=727427050.
- ¹¹ PJCCFS Whistleblower Report at [12.79].
- ¹² Protected Disclosures Commissioner, *What we do*, at <https://www.opdc.ie/en/organisation-information/20538-what-we-do/>.
- ¹³ Bill, s 20(1).
- ¹⁴ Bill, s 21(1)(a).
- ¹⁵ Bill, s 21(1)(b).
- ¹⁶ Bill, s 23(1)(b).
- ¹⁷ PID Act, s 34.
- ¹⁸ *Public Interest Disclosures Act 2012* (Vic), ss 18 and 38(1)(b).
- ¹⁹ Bill, s 21(2).
- ²⁰ Bill, s 8(1). Note the difference between 'Commonwealth agency' and 'government agency', and the reference in s 21(1)(b) to government agencies that have functions or powers of investigating wrongdoing.
- ²¹ Bill, ss 21(3) and (5).
- ²² Bill, ss 21(3) and (5).
- ²³ Bill, s 22(1)(b).
- ²⁴ Bill, s 22(1)(b).

- ²⁵ EM at [44].
- ²⁶ NACC Act, s 50.
- ²⁷ Revised Explanatory Memorandum for the National Anti-Corruption Commission Bill 2022 (Cth), at [6.76].
- ²⁸ Revised Explanatory Memorandum for the National Anti-Corruption Commission Bill 2022 (Cth), at [6.77].
- ²⁹ NACC Act, ss 51–54.
- ³⁰ Bill, s 22(1)(a).
- ³¹ Bill, s 23(2)(f).
- ³² Bill, ss 25(5) and 28(6).
- ³³ NACC Act, s 43(2)–(5).
- ³⁴ Bill, ss 21(1)(b)(iii) and (c)(iii).
- ³⁵ Bill, ss 21(3)–(5), 25(2)–(3), 28(3)–(4), 33(2)–(3).
- ³⁶ Attorney-General's Department, *Public sector whistleblowing reforms Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, November 2023, pp 21–22, at https://consultations.ag.gov.au/integrity/pswr-stage2/user_uploads/consultation-paper-public-sector-whistleblowing-reforms-stage-2.pdf.
- ³⁷ Human Rights Law Centre, *The Cost of Courage: Fixing Australia's Whistleblower Protections*, pp 6–7, at <https://www.hrlc.org.au/app/uploads/2025/04/2308-Cost-of-Courage-Whistleblower-Report.pdf>.
- ³⁸ Huis voor Klokkenuiders, *The Dutch Whistleblowers Authority in an international perspective: a comparative study*, September 2018, p 22, at <https://www.huisvoorklokkenuiders.nl/Publicaties/publicaties/2018/10/19/usbo-report-the-dutch-whistleblowers-authority-in-a-international-perspective>.
- ³⁹ Huis voor Klokkenuiders, *English*, <https://www.huisvoorklokkenuiders.nl/english>.
- ⁴⁰ Huis voor Klokkenuiders, *The Dutch Whistleblowers Authority in an international perspective: a comparative study*, September 2018, pp 38–47, at <https://www.huisvoorklokkenuiders.nl/Publicaties/publicaties/2018/10/19/usbo-report-the-dutch-whistleblowers-authority-in-a-international-perspective>.
- ⁴¹ Transparency International, *How well do EU countries protect whistleblowers? Assessing the transposition of the EU Whistleblower Protection Directive*, 2023, at https://images.transparencycdn.org/images/2023_How-well-do-EU-countries-protect-whistleblowers_EN.pdf.
- ⁴² Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, at <https://eur-lex.europa.eu/eli/dir/2019/1937/oj/eng>.
- ⁴³ US Office of Special Counsel, *About OSC*, at <https://osc.gov/Agency>.
- ⁴⁴ Attorney-General's Department, *Public sector whistleblowing reforms Stage 2 – reducing complexity and improving the effectiveness and accessibility of protections for whistleblowers*, November 2023, pp 18–19, at https://consultations.ag.gov.au/integrity/pswr-stage2/user_uploads/consultation-paper-public-sector-whistleblowing-reforms-stage-2.pdf.
- ⁴⁵ PJCCFS Whistleblower Report, pp 123–140.
- ⁴⁶ Bill, s 36(3).
- ⁴⁷ Bill, s 36(5).
- ⁴⁸ AHRC Stage 2 submission, at [126]–[128].
- ⁴⁹ Tutton J and Brand V, 'Corporate Whistleblowers and Financial Incentives' (2024) 47(4) *UNSWLJ* 1219.
- ⁵⁰ The Hon Alan Wilson KC, *Review of the Public Interest Disclosure Act 2010*, June 2023, p 148 at <https://www.publications.qld.gov.au/dataset/review-public-interest-disclosure-act-2010/resource/163329e9-3aa2-4601-9ff8-725458170b6b>.

⁵¹ NACC Act, s 182.

⁵² *Auditor-General Act 1997* (Cth), s 8.

⁵³ *Auditor-General Act 1997* (Cth), s 10.

⁵⁴ Revised Explanatory Memorandum for the National Anti-Corruption Commission Bill 2022 (Cth), at [10.57].

⁵⁵ See, for example, the Independent Advisory Council described in Part 3 of the *National Disability Insurance Scheme Act 2013* (Cth) and the Sport Integrity Australia Advisory Council described in Part 4 of the *Sport Integrity Australia Act 2020* (Cth).

⁵⁶ EM, p 2.

⁵⁷ Bill, ss 41–48.

⁵⁸ Bill, ss 44 and 48.