



Whistleblower Protection Authority Bill 2025 (No.2)

Senate Standing Committees on Legal and Constitutional Affairs

Submission by the Commonwealth Ombudsman, Iain Anderson

June 2025

Introduction and summary

I welcome the opportunity to comment on the *Whistleblower Protection Authority Bill 2025 (No.2)* (the Bill). The Bill would establish a Whistleblower Protection Authority (Authority) and Commissioner whose functions include receiving and allocating disclosures of wrongdoing, providing assistance, advice, guidance and support to whistleblowers and investigating reprisals against whistleblowers. The proposed Authority would have responsibilities that extend across legislative regimes and sectors. However, in considering the Bill, I have focused on the Bill's interaction with my role in overseeing the operation of the Public Interest Disclosure (PID) Scheme which provides a whistleblowing framework for the Commonwealth public sector. The main issue which I draw to the Committee's attention is that the Bill does not address how it would interact with that existing framework.

Background

The purpose of the Office of the Commonwealth Ombudsman (the Office) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly; and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independent and impartial consideration of complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive, and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

Analysis of the Bill

Providing advice, assistance and guidance for disclosers and agencies

As I stated in my Public Interest Disclosure Scheme Annual Report 2023–24, the *Public Interest Disclosure Act 2013* (PID Act) is still not well understood within the Commonwealth public sector despite its enactment in 2013. This places a premium on



my role to assist public officials and disclosers with information and advice about the PID Act and conduct educational and awareness programs relating to that Act (s 62).

The information and advice my Office provides to whistleblowers and agencies under the PID Act is varied. It includes information and advice on the kinds of information that can be disclosed, the mechanics of making or investigating a disclosure, or information on protections which may apply. Demand for this information and advice is increasing: my Office received and responded to 374 enquiries from agencies and disclosers in 2023–24, compared with 192 in 2022–23 and 174 in 2021–22. My Office also publishes information and advice for agencies and disclosers online.

The Bill would empower the Commissioner with a similar function to provide advice, assistance, guidance and support to any public official, Commonwealth agency or other person on rights, obligations and processes relating to the making of disclosures of wrongdoing (cl 10(1)(a)). Insofar as this function supports public officials to make disclosures under the PID Act, the Commissioner's function would overlap with mine under that Act. Such overlap would need to be carefully managed to mitigate risks such as whistleblower confusion about which body they should disclose to or seek advice from, the potential for the provision of inconsistent advice to whistleblowers or agencies, and the potential for forum shopping.

Ensure protections are provided

The Bill provides the Commissioner with a function to ensure a discloser is provided with "appropriate" support and protection (cl 10(1)(g)). I note clause 10(1)(c), 10(1)(g) and cl 23 work together so the Commissioner is required to safeguard the identity and confidentiality of disclosers seeking the Commissioner's support.

However, it is not clear how the Bill is intended to operate with the protections that exist under the PID Act. For example, under the PID Act, it is an offence for a person to disclose a whistleblower's identifying information. The PID Act also provides a discloser with protections from civil, criminal or administrative liability for making the public interest disclosure, although there is some ambiguity about when a discloser's immunities would apply such that a whistleblower may not be sure they are immune from prosecution until a court determines they are. The Bill provides another avenue for disclosures but does not appear to offer whistleblowers protections from liability. Whistleblowers may not be comfortable disclosing to the Authority without being sure they have immunity from any liability that may flow from making a disclosure.



Reprisals against whistleblowers

The Bill appears to focus on ‘whistleblower protection issues’, which are defined as reprisals against whistleblowers and failures by responsible persons to fulfil their obligations to prevent or mitigate reprisals (cl 8). This is highlighted in the Explanatory Memorandum which states, ‘[p]eople should not be punished for telling the truth, or for exposing misconduct or wrongdoing.’

Whistleblowers who are experiencing reprisal in relation to a disclosure currently have the option of making a new disclosure under the PID Act to my Office. A public official may also make a complaint to my Office if they are dissatisfied with the way the agency handles their reprisal claim. My Office may investigate a disclosure of a reprisal or a reprisal complaint. My Office is also empowered to undertake own motion investigations into PID agencies’ handling of reprisals but is limited in resources to be able to do this. However, the decentralised nature of the PID Scheme means by design the Scheme primarily relies on agencies to investigate reprisals.

For completeness, the table at **Appendix A** shows where my Office provides comparable reprisal-related functions to those proposed for the Commissioner.

Legal advice and other supports for disclosers

The Bill would empower the Commissioner to provide “appropriate” support (cl 10(1)(g)), legal advice, representation, or other “practical support” to disclosers if they are or may be party to a proceeding of a court or tribunal (cl 10(1)(n)). For the purposes of the Bill, it may be prudent for the Committee to consider what “appropriate” support and other “practical support” would involve. Similarly, it may be prudent for the Committee to consider which courts and tribunals the Commissioner should be authorised to support whistleblowers in relation to.

In my experience, whistleblowers tend to need upfront support, primarily information about the operation of the PID Act and their options. Other useful supports that could be provided by bodies such as specialist Community Legal Centres, subject to funding, could include support in preparing or drafting disclosures, legal advice about making an external disclosure, and legal advocacy, advice or personal representation in cases where they are concerned about reprisals.

There are various precedents where the types of supports that public officials may be able to access are specified in the framework. For example, Appendix E of the

Commonwealth's *Legal Services Directions 2017* provides the framework for providing financial assistance to Commonwealth officials in relation to legal proceedings. This framework limits Commonwealth financial support to certain types of employees and proceedings. Consideration could be given to whether the Commissioner's support be similarly limited. For example, it might not be appropriate for the Commissioner to use public money to support a whistleblower to commence defamation proceedings but it may be appropriate to support a whistleblower in relation to a proceeding before the Fair Work Commission.

Avoid conflicts of interest

Further to clause 10(1)(n), in my view, legal advice and personalised legal advocacy and support would be best delivered by an entity separate to the responsible oversight body. This separation of functions would mitigate risks of perceived or actual conflicts of interest.

As currently drafted, the Commissioner could provide legal advice to a whistleblower directly;¹ while investigating an agency's handling of reprisal action.² It would be critical to ensure each of these functions could be delivered by Authority staff in practice without conflict. It would also potentially still create the risk that disclosers could lose faith in the Authority, even if potential conflicts of interest are well managed, because the disclosers may nonetheless be dismayed if one part of the Authority considers but does not ultimately agree with their allegations of reprisal despite another part of the Authority supporting them to make those allegations.

¹ paragraph 10(1)(n), *Whistleblower Protection Authority Bill 2025 (No.2)*.

² paragraph 10(1)(j), *Whistleblower Protection Authority Bill 2025 (No.2)*.

Appendix A

The table below shows where my Office provides comparable reprisal-related functions to those proposed for the Commissioner.

Whistleblower Protection Authority functions in relation to reprisals	Commonwealth Ombudsman functions in relation to reprisals
10(1)(d) to assess and where appropriate refer disclosures of wrongdoing to appropriate Commonwealth agencies etc	The Ombudsman can assess disclosures about reprisal/protection issues—see sections 29(2A) and 34(1)(c) of PID Act. The Ombudsman can also refer such matters to the applicable agency for investigation and monitor the investigation, or allocate such matters to itself and investigate them (s43(5)(a)(ii) of the PID Act).
10(1)(e) to monitor and, where appropriate, provide advice or assistance to agencies or bodies to whom disclosures of wrongdoing have been referred, in respect of whistleblower protection issues	<p>The Ombudsman has a general education and advice function for agencies which may include education and advice on reprisals.</p> <p>The Ombudsman also publishes the Agency Guide to the PID Act, which addresses reprisals. It has also published a Guide to Assessing and Managing the Risk of Reprisal.</p> <p>The Ombudsman is notified of agency decisions not to allocate a disclosure, not to investigate a PID, and is provided with a copy of all completed PID investigations. A PID investigation may include a reprisal investigation. The Ombudsman has power to review and make recommendations in response to these notifications.</p> <p>This allows the Ombudsman to monitor the operation of the PID Scheme, although this is a new function which did not come with additional funding or resources.</p>
10(1)(f) to manage, oversee or review, in appropriate circumstances, the manner in which Commonwealth agencies investigate or deal with disclosures of wrongdoing, in respect of whistleblower protection issues	The Ombudsman can consider complaints about agencies' handling of PID investigations (including reprisals) to assess whether their actions are reasonable and comply with the PID Act and their own PID procedures.

Whistleblower Protection Authority functions in relation to reprisals	Commonwealth Ombudsman functions in relation to reprisals
<p>10(1)(l) to manage, oversee or review, in appropriate circumstances, the investigation by Commonwealth agencies of issues of reprisal, detrimental action, or failures to prevent detrimental action, arising or resulting from disclosures of wrongdoing;</p>	<p>Such complaints may be investigated by the Ombudsman, who may make formal comments, suggestions or recommendations.</p> <p>As noted above, the Ombudsman may review agencies' handling of PID investigations in response to notifications it receives.</p>
<p>10(1)(m) to communicate to appropriate authorities and to the public the results of investigations, including reports or recommendations on actions that should be or have been taken, or are being taken, in relation to whistleblower protection—including criminal prosecution, disciplinary action, civil penalty enforcement, or the seeking or provisions of remedies or rewards in favour of persons who make disclosures of wrongdoing;</p>	<p>The Ombudsman is required to report biannually on the operation of the PID Act.</p>
<p>10(1)(o) to commence proceedings in a court, or to make applications to an industrial, civil or administrative body, to enforce this Act or any Commonwealth law containing whistleblower protection responsibilities</p>	<p>While the PID Act does not explicitly provide the Ombudsman with a function to commence proceedings or make applications, in practice the Ombudsman would recommend the applicable agency refer suspected breaches of the offence provisions of the Act, or suspected illegality generally, to the Australian Federal Police (or make the referral themselves).</p>
<p>10(1)(j) to investigate and conduct public inquiries into issues of reprisal, detrimental action, or failures to prevent detrimental action, arising or resulting from disclosures of wrongdoing</p>	<p>The <i>Ombudsman Act 1976</i> provides that the Ombudsman has a function to investigate complaints relating to the handling of disclosures under the PID Act, including reprisals. Disclosures about reprisal can, when appropriate, be investigated by the Ombudsman rather than the subject agency. The <i>Ombudsman Act 1976</i>, however, requires investigations of complaints to be conducted in private—although the Ombudsman has the power to publish information</p>

Whistleblower Protection Authority functions in relation to reprisals	Commonwealth Ombudsman functions in relation to reprisals
	about an investigation if in the opinion of the Ombudsman it is in the public interest to do so.