

‘THE LACK OF PROTECTION IS UNACCEPTABLE’: PROTECTING WHISTLEBLOWERS IN ROYAL COMMISSIONS AND INQUIRIES

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To effectively consider their subject matter, royal commissions and other statutory inquiries require information. While coercive powers enable commissions and inquiries to seek out information, past experience has also underscored the importance of individuals coming forward with insider insight. Do these whistleblowers enjoy sufficient protection and support? This article considers protections for inquiry participants, with a focus on federal and Victorian laws, and recent trends in participant support. It explores the findings of two recent federal reviews into protections in the Royal Commissions Act 1902 (Cth) and the impact of secrecy provisions on engagement with royal commissions. The article argues that federal law insufficiently protects whistleblowers engaging with royal commissions, and that while these reviews’ recommendations are commendable, they do not go far enough. The article explores options for reform, including the integration of royal commissions into whistleblowing frameworks.

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I INTRODUCTION

In August 2022, the Royal Commission into Defence and Veteran Suicide (‘Veteran Suicide Royal Commission’) published its interim report.¹ In a chapter on ‘[p]rocedural matters’,² the Veteran Suicide Royal Commission raised several issues that ‘have concerned us deeply’.³ Foremost among these was the adequacy of protections for potential participants in the inquiry.⁴ The report was scathing. ‘These ... matters are not new’, it said.⁵ ‘The Australian Government has known about and had the opportunity to address [them] ... We are troubled that there has not been conclusive action to resolve these matters.’⁶ The Veteran Suicide Royal Commission proceeded to make recommendations for reform and stressed ‘that these changes are urgent’.⁷

¹ *Royal Commission into Defence and Veteran Suicide* (Interim Report, 2022) ix <<https://defenceveteransuicide.royalcommission.gov.au/system/files/2023-05/interim-report-dvsrc-may-2023.pdf>>, archived at <<https://perma.cc/3E2H-QQCP>> (‘*Veteran Suicide Royal Commission Interim Report*’).

² *Ibid* 259 [1].

³ *Ibid*.

⁴ *Ibid* 259 [3], 260–1 [8]–[13], 262–4 [18]–[32].

⁵ *Ibid* 259 [3].

⁶ *Ibid* 259 [3]–[4].

⁷ *Ibid* 259 [5].

Royal commissions and other ad hoc statutory inquiries are a distinct form of executive government investigation.⁸ Whatever the subject matter, an investigation requires information. Accordingly, the laws that underpin these investigations — such as the *Royal Commissions Act 1902* (Cth) (*Royal Commissions Act*) and the *Inquiries Act 2014* (Vic) (*Inquiries Act*) — provide a range of tools for seeking out information, including coercive powers.⁹ Sometimes, however, the best information comes forward freely, volunteered by people on the inside of agencies and organisations with first-hand perspectives on the issues subject to investigation.¹⁰ Are such individuals — whistleblowers, in contemporary parlance¹¹ — adequately protected in their engagement with royal commissions and inquiries?

The Veteran Suicide Royal Commission did not think so. '[W]e are aware that some people are concerned that there are legal restrictions which prevent them from disclosing information', it continued.¹² It further noted that:

It is important that it be made clear — by legislation and executive action — that all persons can provide relevant information to the Royal Commission. There are some existing protections, but they are not adequate in all circumstances.¹³

The Veteran Suicide Royal Commission explained that a clear concern about the adequacy of protections had emerged from its consultation. 'We agree that the lack of protection is unacceptable', it said.¹⁴ This inadequacy took at least two forms, the report explained. First, for serving personnel, there were concerns that participation could impact 'their career or their subsequent experience in service'.¹⁵ Second, many potential participants were subject

⁸ Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework* (Report No 111, October 2009) 41 [1.9] <<https://www.alrc.gov.au/publication/making-inquiries-a-new-statutory-framework-alrc-report-111/>>, archived at <<https://perma.cc/YGZ6-BQ6Y>> (*Making Inquiries*).

⁹ See, eg, *Royal Commissions Act 1902* (Cth) ss 2(1), s 3(1) (*Royal Commissions Act*); *Inquiries Act 2014* (Vic) ss 17(1), 23(1), 64(1), 70(1) (*Inquiries Act*).

¹⁰ Marcia Parmerlee Miceli and Janet P Near, 'The Relationships among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis' (1984) 27(4) *Academy of Management Journal* 687, 689; William De Maria, 'Quarantining Dissent: The Queensland Public Sector Ethics Movement' (1995) 54(4) *Australian Journal of Public Administration* 442, 447.

¹¹ Miceli and Near (n 10) 689; De Maria (n 10) 447; *Macquarie Dictionary* (online at 27 December 2025) 'whistleblower'.

¹² *Veteran Suicide Royal Commission Interim Report* (n 1) 260 [8].

¹³ *Ibid.*

¹⁴ *Ibid* 260 [10].

¹⁵ *Ibid* 260 [12].

to secrecy obligations; some feared that participation may contravene these obligations.¹⁶

The inadequacy of protections troubled the Veteran Suicide Royal Commission.¹⁷ However, these issues are not limited to a single royal commission; they go to the heart of royal commissions' (and other inquiries') capacity to effectively fulfil their functions. Accordingly, analysis of the legislative landscape, including its shortcomings and solutions, is timely. Following the interim report, changes were made to the *Royal Commissions Act* to provide greater protection for participants giving certain information to the Veteran Suicide Royal Commission. However, these amendments were narrow and limited solely to that inquiry.¹⁸ The tenor of the Veteran Suicide Royal Commission concerns was not so limited: 'we also urge the Australian Government to find a long-term solution, so that future commissions of inquiry do not have to waste valuable time dealing with these same problems'.¹⁹

The article will consider the federal *Royal Commissions Act*, with comparative reference to Victoria's *Inquiries Act*, a modern iteration of a commissions and inquiries law enacted in 2014. However, many of the issues discussed here have salience in other state and territory contexts. In recent years, there has been increased academic focus on how royal commissions engage with, protect and support victims and vulnerable witnesses; this followed royal commissions which centred victim and vulnerable witness participation, including the Royal Commission into Institutional Responses to Child Abuse ('Child Abuse Royal Commission').²⁰ While this article seeks to build on that growing field of literature, it adopts a distinct focus: the risks faced

¹⁶ See *ibid* 261 [13].

¹⁷ See above nn 6, 14–16 and accompanying text.

¹⁸ See especially, eg, *Royal Commissions Act* (n 9) s 60Q, as inserted by *Royal Commissions Amendment (Enhancing Engagement) Act 2023* (Cth) sch 1 item 4.

¹⁹ *Veteran Suicide Royal Commission Interim Report* (n 1) 261 [16].

²⁰ See, eg, Taylah Cramp and Anita Mackay, 'Protecting Victims and Vulnerable Witnesses Participating in Royal Commissions: Lessons from the 2016–2017 Royal Commission into the Protection and Detention of Children in the Northern Territory' (2019) 29(1) *Journal of Judicial Administration* 3, 3–5; Anita Mackay and Jacob McCahon, 'Comparing Commissions, Inquests and Inquiries: Lessons from Processes Concerning Family Violence and Child Protection in Victoria' (2019) 45(3) *Monash University Law Review* 531, 571, 578–9; Anita Mackay and Jacqueline Giuffrida, 'Implications of the Royal Commission into Institutional Responses to Child Abuse for the Protection of Vulnerable Witnesses: Royal Commission Procedures and Introduction of Intermediaries and Ground Rules Hearings around Australia' (2020) 29(3) *Journal of Judicial Administration* 136, 136–7; Dave McDonald, Jenae Carpenter and Natalia Hanley, 'Allowing for Participants in Royal Commissions: A Scoping Review' (2020) 30(1) *Journal of Judicial Administration* 37, 38–9.

by participants who may wish to engage with a royal commission by virtue of their current or former workplace role. This aspect of participant protection has, to date, received limited academic attention.²¹

Consider the three of the most recent federal royal commissions: Veteran Suicide Royal Commission, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Disability Royal Commission') and the Royal Commission into the Robodebt Scheme ('Robodebt Royal Commission').²² All three utilised the evidence of participants who, as a consequence of their employment, had witnessed wrongdoing relevant to the inquiry.²³ As the risks involved in participation for this cohort are distinct from the challenges faced by victims and vulnerable witnesses, this article seeks to make a new contribution to the field. Throughout, the article will use the label 'whistleblower' as a shorthand for participants to commissions or inquiries sharing information relating to their current or former workplace. It is a convenient shorthand, given the risks faced as a consequence of such information sharing. However, it is important to note that these individuals would not necessarily be eligible whistleblowers under the relevant laws governing their disclosures to a commission or inquiry (whereas they may engage protections if they took that same information to an eligible recipient under the relevant whistleblowing scheme).²⁴ Accordingly, the label is used in its common, rather than legal technical, meaning.

²¹ For example, it is not canvassed in one of the leading texts on the powers of royal commissions: Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry* (Butterworths, 2001).

²² 'Recent Royal Commissions', *Royal Commissions* (Web Page) <<https://www.royalcommission.gov.au/recent>>, archived at <<https://perma.cc/6BT2-YUSH>>.

²³ See, eg, *Royal Commission into the Robodebt Scheme* (Report, 2023) vol 1, 306 <https://robodebt.royalcommission.gov.au/system/files/2023-07/robodebt_report_volume_1.pdf>, archived at <<https://perma.cc/6PGU-UHSQ>>; *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 3, 233 <<https://disability.royalcommission.gov.au/publications/final-report-volume-3-nature-and-extent-violence-abuse-neglect-and-exploitation>>, archived at <<https://perma.cc/8P7J-NUFN>>; *Veteran Suicide Royal Commission Interim Report* (n 1) 39–41 [41]–[53]; *Royal Commission into Defence and Veteran Suicide Royal Commission* (Final Report, 2024) vol 3, 9–13 [19]–[32], 144–5 [23]–[29], 146 [40], 147 [44]–[45], 148 [47], [50] <<https://defenceveteransuicide.royalcommission.gov.au/system/files/2024-09/final-report-volume-3.pdf>>, archived at <<https://perma.cc/6834-SVNL>>.

²⁴ For example, a federal public servant who raised concerns about certain forms of workplace wrongdoing is protected under s 26 of the *Public Interest Disclosure Act 2013* (Cth) ('PID Act') if those concerns are raised to a supervisor or authorised internal recipients. In certain narrow circumstances, a whistleblower is also protected in raising concerns externally: at s 26. Only upon satisfying these criteria would a disclosure to a royal commission be protected: at 26(1) item 2.

The article will commence at Part II by outlining the nature of the risks faced by whistleblowers participating in commissions or inquiries. This Part will detail existing legal and policy responses including: (i) protections against reprisal; (ii) confidentiality regimes; (iii) provisions which override secrecy or non-disclosure obligations; and (iv) legal support. Part III will consider two recent reviews undertaken by the federal Attorney-General's Department into the adequacy of whistleblower protections. Part IV will summarise and synthesise the preceding discussion to highlight key shortcomings in the existing whistleblower protection framework, after which Part V will consider options for reform.

For the author, these are not abstract concerns. As a founder of the Whistleblower Project — Australia's first specialist legal service for whistleblowers²⁵ — at the Human Rights Law Centre ('HRLC'), the author has advised whistleblowers on their participation in commissions and inquiries on numerous occasions in recent years. This has informed an appreciation of the value that first-hand participant information can provide to these investigations. But it has also underscored the risk that participants face; the author has represented several participants in inquiries who have suffered workplace detriment as a consequence of their participation.²⁶ As the Veteran Suicide Royal Commission's interim report emphasised, reform is vital to ensuring the ongoing effectiveness of royal commissions.²⁷ An investigation is only as good as the information it can access. Given that the lack of adequate whistleblower protections for participants are the subject of ongoing consideration, the author hopes that this article provides useful insight for future reform.

The timeliness of these issues was underscored when, on the eve of this article's publication, the Royal Commissions Legislation Amendment (Protections for Providing Information) Bill 2026 ('Protections Bill') was

²⁵ Kieran Pender, *The Cost of Courage: Fixing Australia's Whistleblower Protections* (Report) 4 <<https://www.hrlc.org.au/app/uploads/2025/04/2308-Cost-of-Courage-Whistleblower-Report.pdf>>, archived at <<https://perma.cc/36QX-7W5G>> ('*Cost of Courage*'); Madeleine Howle and Kieran Pender, 'After Speaking to Hundreds of Whistleblowers, It's Clear Our Laws Are Failing Them', *The Point* (Blog Post, 12 Feb 2026) <<https://thepoint.com.au/opinions/260212-after-speaking-to-hundreds-of-whistleblowers-its-clear-our-laws-are-failing-them>>, archived at <<https://perma.cc/M572-HASD>>.

²⁶ Howle and Pender (n 25).

²⁷ *Veteran Suicide Royal Commission Interim Report* (n 1) 261 [16].

rushed through federal Parliament.²⁸ The Protections Bill was intended to ensure the Royal Commission on Antisemitism and Social Cohesion ('Antisemitism Royal Commission') could hear from national security whistleblowers.²⁹ Its passage was a necessary and important step, which will be considered further below.³⁰ But the Protections Bill's narrow operation³¹ only serves to highlight the need for more comprehensive reform to deliver enduring solutions which benefit all future royal commissions.

II CONTEXT

A Significance

Before considering the legal framework, it is helpful to say something about the peculiar democratic and institutional status of royal commissions and equivalent inquiries.³² Royal commissions are 'one of the oldest institutions of government' in the common law world,³³ dating back to the compilation of the *Domesday Book* in the late 11th century.³⁴ Royal commissions have become a distinctive aspect of Westminster governmental machinery: an executive function in a constitutional sense, yet in substance positioned between the executive, legislative and judicial branches, with an independence and public-

²⁸ See Commonwealth, *Gazette: Government Notices*, Acts of Parliament Assented to: Act Nos 5 to 11 of 2026; Dan Jervis-Bardy and Josh Butler, 'Rules around Sensitive Information "Impeding" Interim Report into Bondi Terror Attack, Head of Antisemitism Royal Commission Warns', *The Guardian* (online, 12 March 2026) <<https://www.theguardian.com/australia-news/2026/mar/12/bondi-terror-attack-commission-rules-virginia-bell-report-ntwnfb>>, archived at <<https://perma.cc/GL8H-4Q88>>.

²⁹ See Explanatory Memorandum, Royal Commissions Legislation Amendment (Protections for Providing Information) Bill 2026 (Cth) 13 [34], 21 [88]–[89], 24 [104]–[105] ('Protections Bill Explanatory Memorandum'); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 March 2026, 32–3 (Michelle Rowland, Attorney-General) ('*Parliamentary Debates* (2 March 2026)').

³⁰ See below Part VI.

³¹ Human Rights Law Centre, Submission No 3 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Royal Commissions Legislation Amendment (Protections for Providing Information) Bill 2026* (5 March 2026) 2 [5] <<https://www.aph.gov.au/DocumentStore.ashx?id=13eeb6b2-9baa-47ce-9bff-8fdb719146fe&subId=787103>>, archived at <<https://perma.cc/8383-2JP2>> ('HRLC Submission').

³² I am grateful to one of the reviewers for suggestions that prompted this subsection.

³³ Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry: Some Legal and Procedural Aspects* (Law Book, 1982) 16.

³⁴ *Ibid* 16–17.

facing role that set royal commissions aside from other executive functions.³⁵ Royal commissions are, in effect, the state's most powerful ad hoc investigative body.³⁶ In Australia, since Federation, royal commissions have had a significant social and policy impact.³⁷ 'Any assessment of law reform in Australia must take account of the role of Royal Commissions as policy makers', once argued Ronald Sackville, a former Justice of the Federal Court of Australia.³⁸ 'This is because virtually all governments in Australia appoint Royal Commissions or similar bodies, such as boards of inquiry, with what seems to be surprising regularity.'³⁹ The cultural significance of royal commissions has been strengthened in recent decades by the impact of particular inquiries; they are increasingly perceived as a solution to major social ills.⁴⁰ Commonly, the response to any major scandal is to call for a royal commission.⁴¹ As much was underscored when, midway through the publication process for this article, the Antisemitism Royal Commission was called following concerted community pressure.⁴²

³⁵ See Hugh McDowall Clokie and J William Robinson, *Royal Commissions of Inquiry: The Significance of Investigations in British Politics* (Stanford University Press, 1937) 24–6; Hallett (n 33) 17, discussing Clokie and Robinson (n 35) 34–6; 'About Royal Commissions', *Royal Commissions* (Web Page) <<https://www.royalcommission.gov.au/about-royal-commissions>>, archived at <<https://perma.cc/LYM5-5QX2>>.

³⁶ Scott Prasser, 'Royal Commissions in Australia: When Should Governments Appoint Them?' (2006) 65(3) *Australian Journal of Public Administration* 28, 33.

³⁷ See McDonald, Carpenter and Hanley (n 20) 37–8; Prasser (n 36) 30–1.

³⁸ Ronald Sackville, 'Law Reform Agencies and Royal Commissions: Toiling in the Same Field?' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 274, 277.

³⁹ Ibid.

⁴⁰ See McDonald, Carpenter and Hanley (n 20) 37–8; Prasser (n 36) 30–1.

⁴¹ For example, in response to recent concerns about the childcare sector, '[a] royal commission or independent inquiry' has been described as 'the only way to truly expose how deep the problems go': Adele Ferguson, 'Childcare Horrors Are Shocking, but They're No Surprise to Me', *The Sydney Morning Herald* (online, 4 July 2025) <<https://www.smh.com.au/national/childcare-horrors-are-shocking-but-they-re-no-surprise-to-me-20250704-p5mci2.html>>, archived at <<https://perma.cc/ASA7-3TGZ>>.

⁴² See, eg, Executive Council of Australian Jewry, 'Jewish Community Leadership Calls for a Royal Commission' (Statement, 30 December 2025) <<https://www.ecaj.org.au/jewish-community-leadership-calls-for-a-royal-commission/>>, archived at <<https://perma.cc/29RJ-N4Y2>>; Shannon Corvo, Andi Yu and Paulina Vidal, 'Sports Stars Call for Federal Royal Commission into Antisemitism and Bondi Attack', *ABC News* (online, 4 January 2026) <<https://www.abc.net.au/news/2026-01-04/sport-stars-call-for-federal-royal-commission/106197406>>, archived at <<https://perma.cc/4LEE-53T9>>; Law Council of Australia, 'Law Council Supports Establishment of a Royal Commission into Antisemitism' (Media Release, 6

This unique institutional status underscores the normative significance of the shortcomings outlined in the sections to follow. Failing to adequately protect those who risk considerable personal and professional consequences to assist the state's pre-eminent ad hoc investigative body has critical democratic implications. These shortcomings not only limit the effectiveness of individual inquiries — as the Veteran Suicide Royal Commission was at pains to point out⁴³ — but also undermine the institution's wider legitimacy as a tool of democratic accountability.⁴⁴ Reform to address the issues outlined below is therefore not merely procedurally desirable as a matter of good policy, but a constitutional imperative in light of the unique role of royal commissions in Australia. It is to these shortcomings, and possible reform to fix them, that this article now turns.

B *Legal Framework*

The conduct of federal royal commissions is governed by the *Royal Commissions Act*.⁴⁵ The Victorian *Inquiries Act*, meanwhile, provides for the conduct of royal commissions, boards of inquiry and formal reviews.⁴⁶ Both regimes create a suite of powers to assist the commission or inquiry to undertake its work; the *Royal Commissions Act* empowers a commissioner to summon a person to appear to give evidence or produce documents or other things,⁴⁷ or issue a written notice requiring the production of a document or thing.⁴⁸ Failure to attend when subject to a summons, or failure to comply with a notice, is an offence with a penalty of two years' imprisonment.⁴⁹ Federal royal commissions are also empowered to apply for search warrants.⁵⁰ The *Inquiries Act* provides for similar coercive powers.⁵¹ Royal commission hearings often combine inquisitorial and adversarial features, with the commission itself

January 2026) <<https://lawcouncil.au/media/media-releases/lca-supports-establishment-of-a-royal-commission-into-antisemitism>>, archived at <<https://perma.cc/VR9Q-BNCG>>.

⁴³ *Veteran Suicide Royal Commission Interim Report* (n 1) 260 [8].

⁴⁴ See Sackville (n 38) 275, 280–1; McDonald, Carpenter and Hanley (n 20) 37–8, 45.

⁴⁵ See generally *Royal Commissions Act* (n 9) s 1A, pts 2, 4–5; *Making Inquiries* (n 1) 66 [3.3]–[3.5].

⁴⁶ *Inquiries Act* (n 9) pt 2 div 3, pt 3 div 3, pt 4 div 3.

⁴⁷ *Royal Commissions Act* (n 9) s 2(1).

⁴⁸ *Ibid* s 2(3A).

⁴⁹ *Ibid* s 3.

⁵⁰ *Ibid* s 4.

⁵¹ See, eg, *Inquiries Act* (n 9) ss 17, 19, 21, 23, 28.

asking questions of witnesses, together with examination by counsel assisting the commission and cross-examination by counsel for relevant parties.⁵² Otherwise, subject to the obligation to provide procedural fairness,⁵³ royal commissions have latitude to inform themselves as they see fit.⁵⁴

C Risk

It is helpful to set out the potential risks faced by a workplace-related participant to a royal commission. There are three categories of risk: criminal-, civil- and employment-related. First, public servants are subject to a range of secrecy obligations.⁵⁵ At a federal level, there are over 800 different secrecy offences.⁵⁶ As will be explored, there is considerable uncertainty around the application of many secrecy offences to the provision of information to a royal commission.⁵⁷ Similarly, most states and territories have their own regimes for protecting government information in their criminal legislation.⁵⁸ In principle, participation in a commission or inquiry could give rise to liability for the unauthorised disclosure of information.

Second, all employees, across both public and private sectors, owe a range of employment-related duties in relation to the confidentiality of information. These duties have contractual and equitable foundations;⁵⁹ employees of *Corporations Act 2001* (Cth) (*'Corporations Act'*) entities also have statutory

⁵² Mackay and Giuffrida (n 20) 138.

⁵³ See generally *Mahon v Air New Zealand* [1984] 1 AC 808, 820 (Lord Diplock for Lords Diplock, Keith, Scarman, Bridge and Templeman); Donaghue (n 21) 146–53.

⁵⁴ Mackay and McCahon (n 20) 538.

⁵⁵ See, eg, *Criminal Code Act 1995* (Cth) sch 1 pt 5.6 (*'Criminal Code'*); *Public Service Act 1999* (Cth) s 13(6).

⁵⁶ Attorney-General's Department (Cth), *Review of Secrecy Provisions* (Final Report, 2023) 4 [3] <<https://www.ag.gov.au/sites/default/files/2023-11/secrecy-provisions-review-final-report.pdf>>, archived at <<https://perma.cc/M3RR-GGKL>> (*'Secrecy Review'*). Note that the nature and number of secrecy offences under federal law will change significantly if the Secrecy Provisions Amendment (Repealing Offences) Bill 2026 (Cth), which was introduced into Parliament in April 2026, is enacted: Commonwealth, *Parliamentary Debates*, House of Representatives, 1 April 2026, 12–14 (Michelle Rowland, Attorney-General).

⁵⁷ See below Part IV(A).

⁵⁸ *Crimes Act 1900* (ACT) s 153; *Criminal Code Act 1983* (NT) s 76; *Criminal Code Act 1899* (Qld) s 85; *Criminal Code Act 1924* (Tas) s 110; *Criminal Code Act Compilation Act 1913* (WA) s 81.

⁵⁹ Mark Irving KC observed that '[t]he law governing the obligations of employees relating to the use of confidential information is "an unhappy mixture" of equity, contract and statute': Mark Irving, *The Contract of Employment* (LexisNexis Butterworths, 2nd ed, 2019) 599.

confidentiality obligations.⁶⁰ Disclosing employer information without consent could, in principle, expose an employee to civil liability. Finally, and perhaps most practically significant, employees who participate in a royal commission without employer approval could face workplace-related retaliation, ranging from dismissal or demotion to lesser forms of reprisal, such as bullying.⁶¹ The legality of such conduct raises complex issues, considered below; even where such mistreatment is unlawful, the barriers to redress may discourage an employee from speaking up.

D Protections

The *Royal Commissions Act* has two primary provisions to address the mistreatment of participants. First, any person who ‘uses, causes or inflicts, any violence, punishment, damage, loss or disadvantage on account of another person’s participation in a royal commission, whether as a witness, giving evidence, or producing documents or information pursuant to a notice or requirement, commits an indictable offence.’⁶² Second, an employer who dismisses an employee or otherwise prejudices them ‘for or on account of the employee having’ participated in a royal commission by appearing as a witness, giving evidence, or producing documents or information pursuant to a summons or notice, commits an indictable offence.⁶³ It is a defence if the employee is dismissed or prejudiced ‘for some reason other than’ their participation,⁶⁴ with the employer bearing the evidential burden.⁶⁵ The penalty for both provisions is 10 penalty units (\$3,300 total) or one year’s imprisonment.⁶⁶ The original version of the *Royal Commissions Act* provided witnesses with the same protection as a witness in the High Court;⁶⁷ ss 6M and 6N were added by the *Royal Commissions Act 1912* (Cth), in similar terms to their current form.⁶⁸ The insertion of these offences received little

⁶⁰ *Corporations Act 2001* (Cth) s 183(1) (*‘Corporations Act’*).

⁶¹ Examples of whistleblowers’ experiences are captured in *Cost of Courage* (n 25) 5–8.

⁶² *Royal Commissions Act* (n 9) s 6M.

⁶³ *Ibid* s 6N(1).

⁶⁴ *Ibid* s 6N(2).

⁶⁵ *Ibid*; *Criminal Code* (n 55) s 13.3(3).

⁶⁶ See *Royal Commissions Act* (n 9) ss 6M–6N; *Crimes Act 1914* (Cth) s 4AA(1) (*‘Crimes Act’*).

⁶⁷ *Royal Commissions Act* (n 9) s 7(2), as enacted.

⁶⁸ *Royal Commissions Act 1912* (Cth) s 7, amending *ibid*.

attention in parliamentary debates.⁶⁹ Equivalent provisions can be found in the *Crimes Act 1914* (Cth), which also apply to royal commissions.⁷⁰

In *X v Australian Prudential Regulation Authority*, the High Court adopted a limited approach to the breadth of these anti-reprisal provisions.⁷¹ In that case, the regulator sought to disqualify parties from being senior managers of regulated insurers on the basis of evidence given to the Royal Commission into HIH Insurance.⁷² The joint judgment held that the regulator's discharge of its regulatory functions was not undertaken 'for or on account of the individuals participating in the royal commission and found that those words in s 6M involved 'notions of purpose, motive, object and intention'.⁷³ Such intention was deemed absent even where evidence from a royal commission 'may provide some, or even all, of the material which the Australian Prudential Regulation Authority may consider, and upon which it may rely, in giving effect [to the regulatory scheme]'.⁷⁴

The *Inquiries Act*, meanwhile, has a similar offence provision against a person who conducts a business or other undertaking or threatening to take 'detrimental action against a worker' because the worker gave, or will give, information to a royal commission.⁷⁵ There are several defences: first, if participation in a royal commission was not 'a substantial reason' for the detrimental action;⁷⁶ second, if 'the worker unlawfully gave information to a Royal Commission';⁷⁷ or third, if the worker had contravened offences against giving misleading evidence to a commission or perjured themselves.⁷⁸ An equivalent provision exists in relation to boards of inquiry⁷⁹ and formal

⁶⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1912, 1186 (William Hughes, Attorney-General); Commonwealth, *Parliamentary Debates*, Senate, 15 August 1912, 2196 (Gregor McGregor, Vice-President of the Executive Council), 2209; Commonwealth, *Parliamentary Debates*, House of Representatives, 15 August 1912, 2269 (William Hughes, Attorney-General).

⁷⁰ *Crimes Act* (n 66) ss 35–40. See also *Making Inquiries* (n 8) 510–12 [19.115]–[19.119].

⁷¹ (2007) 226 CLR 630, 645–6 [52], 646–7 [54]–[56] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ), 665–6 [121]–[122] (Kirby J).

⁷² *Ibid* 634 [5]–[7] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

⁷³ *Ibid* 648 [59] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

⁷⁴ *Ibid*.

⁷⁵ *Inquiries Act* (n 9) s 51(1).

⁷⁶ *Ibid* s 51(2).

⁷⁷ *Ibid* s 51(3)(a).

⁷⁸ The relevant offences are contained in *Inquiries Act* (n 9) s 50 and *Crimes Act* (n 66) s 314: *Inquiries Act* (n 9) s 51(3)(b).

⁷⁹ *Inquiries Act* (n 9) s 91.

reviews.⁸⁰ Before the *Inquiries Act* was enacted, Victorian legislation provided commission participants with equivalent privileges and immunities to Supreme Court witnesses.⁸¹

E Confidentiality

One way to protect participants is by requiring confidentiality around their participation and evidence. Section 6D of the *Royal Commissions Act* provides for confidentiality protections to be applied to witnesses before commissions in certain circumstances. The provision has three key parts. Its first two subsections are somewhat dated, and provide that a witness will not be required to disclose ‘any secret process of manufacture’,⁸² and that on request, the royal commission will take evidence in private if ‘the evidence relates to the profits or financial position of any person’ and it ‘would be unfairly prejudicial’ for the evidence to be taken publicly.⁸³ Subsection (3) has greater contemporary application; it empowers the royal commission to direct that any evidence or documents given to the royal commission ‘must not be published, or must not be published except in such manner, and to such persons, as the Commission specifies’.⁸⁴ Contravention of such a direction is an offence.⁸⁵ The royal commission may have inherent power to order that evidence be taken in private, and that the section is to ‘be read as in aid of and not as in derogation of that general power.’⁸⁶ The *Inquiries Act* grants wide-ranging powers for Victorian commissions to control access to proceedings and restrict the publication of evidence.⁸⁷ These provisions are necessary because, in *Herald and Weekly Times Ltd v Woodward*, the Victorian Court of Appeal held that Victorian royal commissions had no coercive powers other than those conferred, and that the *Inquiries Act*’s predecessor provisions did not confer powers to restrict publication of evidence.⁸⁸

Notwithstanding these measures, there has been growing recognition that the often adversarial process of a commission or inquiry is unsuitable for some

⁸⁰ *Ibid* s 121.

⁸¹ *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 21A(1), as at 27 August 2014.

⁸² *Royal Commissions Act* (n 9) s 6D(1).

⁸³ *Ibid* s 6D(2).

⁸⁴ *Ibid* s 6D(3).

⁸⁵ *Ibid* s 6D(4).

⁸⁶ *Ibid* s 6D(5).

⁸⁷ See *Inquiries Act* (n 9) pt 2 div 5.

⁸⁸ [1995] 1 VR 156, 159, 161 (Brooking J, Ormiston J agreeing at 162, Vincent J agreeing at 162).

types of participants. For example, Victoria's Bushfires Royal Commission adopted 'a "novel" approach' of holding community consultation sessions in fire-affected areas.⁸⁹ Similarly, following the establishment of the Child Abuse Royal Commission, the *Royal Commissions Act* was amended to allow for private sessions, so that information could be gathered in a less formal, private setting.⁹⁰ Ultimately, the Child Abuse Royal Commission held over 8,000 private sessions; it has been commended for its victim-centred and trauma-informed approach to information gathering,⁹¹ '[g]iving victims a voice' which 'legitimised the[ir] trauma ... in a way that seeking redress through the court system has not been able to accomplish'.⁹²

The private session regime was established with the addition of pt 4 to the *Royal Commissions Act*.⁹³ It applies to the Child Abuse Royal Commission and other royal commissions as prescribed by regulation⁹⁴ — comprising, to date, the Disability Royal Commission, the Veteran Suicide Royal Commission and the Royal Commission into Aged Care Quality and Safety.⁹⁵ Royal commissions are empowered to hold private sessions 'to obtain information in relation to matters into which the Commission is inquiring';⁹⁶ there is flexibility in how these sessions are constituted.⁹⁷ A private session participant is not considered a commission witness and the session does not constitute a hearing; however, ordinary protections still apply.⁹⁸ Critically, it is an offence for information given at a private session to be recorded, used or disclosed, other than for the narrow purposes of the commission;⁹⁹ commissions can only use information obtained during private session in reports if the information is de-identified, or subsequently given to the commission otherwise than in private session.¹⁰⁰

⁸⁹ Mackay and Giuffrida (n 20) 138, quoting *2009 Victorian Bushfires Royal Commission* (Final Report, July 2010) vol 3, 3 [1.1.1] <<http://royalcommission.vic.gov.au/Commission-Reports/Final-Report/Volume-3.html>>, archived at <<https://perma.cc/35AU-CZZW>>.

⁹⁰ Mackay and Giuffrida (n 20) 139, citing *Royal Commissions Act* (n 9) pt 4, as inserted by *Royal Commissions Amendment Act* 2013 (Cth) sch 1 item 30.

⁹¹ Mackay and Giuffrida (n 20) 139.

⁹² *Ibid* 140.

⁹³ See above n 90.

⁹⁴ *Royal Commissions Act* (n 9) s 6OAB.

⁹⁵ *Royal Commissions Regulations 2019* (Cth) s 7, as at 29 February 2024 ('*Royal Commissions Regulations*').

⁹⁶ *Royal Commissions Act* (n 9) ss 6OB(1)–(2).

⁹⁷ See *ibid* s 6OB.

⁹⁸ *Ibid* ss 6OC(5), 6OE–6OF.

⁹⁹ *Ibid* s 6OH.

¹⁰⁰ *Ibid* s 6OJ.

Provisions in pt 4 also clarify that the *Royal Commissions Act* overrides other laws that might authorise the disclosure of private session information¹⁰¹ and extends the no-access period for relevant records for the purposes of the *Archives Act 1983* (Cth) to 99 years.¹⁰²

Finally, information given to relevant royal commissions ‘other than for the purposes of a private session,’¹⁰³ which contains certain information — for the Child Abuse Royal Commission, for example, information relating to the participant’s ‘experiences of child sexual abuse in an institutional context’¹⁰⁴ — is treated as if it were given in private session, with all of the equivalent protections.¹⁰⁵ The importance of this extended regime was described in the Disability Royal Commission’s interim report, which had requested its application (the change was later enacted).¹⁰⁶ The interim report said:

We are aware that if people with disability, their families, supporters, or people who identify as whistleblowers do not feel confident that the information they provide to the Royal Commission can remain confidential after the Royal Commission ends, our inquiry may be limited in its reach. This is particularly so because while we will make every effort to do so, we may not be able to offer a private session to every person who requests one.¹⁰⁷

Accordingly, the pt 4 regime and its exclusion of potential subsequent lawful access — for example via subpoena,¹⁰⁸ freedom of information or archive request — has been important in providing certainty of ongoing confidentiality. This extensive private session regime is unique to federal law; state and territory

¹⁰¹ Ibid s 6OL.

¹⁰² Ibid ss 6OM(1)–(2).

¹⁰³ Ibid ss 6ON(1)(a), 6OP(1)(a), 6OQ(1)(a).

¹⁰⁴ Ibid s 6ON(1)(b)(i).

¹⁰⁵ See especially ibid ss 6ON(2)–(4), 6OP(2)–(4), 6OQ(2)–(5).

¹⁰⁶ See *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) 107 <<https://disability.royalcommission.gov.au/system/files/2020-10/Interim%20Report.pdf>>, archived at <<https://perma.cc/48CA-QTKE>> (*‘Disability Royal Commission Interim Report’*); *Royal Commissions Amendment (Protection of Information) Act 2021* (Cth) sch 1 item 6, inserting *Royal Commissions Act* (n 9) s 6OP.

¹⁰⁷ *Disability Royal Commission Interim Report* (n 106) 107.

¹⁰⁸ See especially *Royal Commissions Act* (n 9) ss 6ON–6OQ; Attorney-General’s Department (Cth), *Review of Confidentiality Protections in the Royal Commissions Act 1902* (Report, March 2022) 15 <<https://consultations.ag.gov.au/rights-and-protections/royal-commissions-protections-review/results/report-on-confidentiality-protections-in-the-royal-commissions-act.pdf>>, archived at <<https://perma.cc/FG3W-5N5K>> (*‘Confidentiality Review’*). For a recent example where access by way of discovery to inquiry documents was sought and in part granted: *Madafferi v The King* [2025] VSCA 114, [4], [25] (McCann JR).

laws do not contain equivalents,¹⁰⁹ while only Tasmanian law empowers a commission to hold a private session (without the surrounding statutory infrastructure).¹¹⁰

F *Override Provisions*

Another way to address risk is through an override provision. Until the recent passage of the Protections Bill (considered further below),¹¹¹ the *Royal Commissions Act* did not make any provision for clarifying how external confidentiality provisions impact participants' ability to give information to royal commissions.¹¹² Conversely, the *Inquiries Act* provides that it is not a reasonable excuse to refuse to comply with a requirement under the Act to give or produce information because 'another enactment prohibits the person from giving the information ... or imposes a duty of confidentiality on the person in relation to the information.'¹¹³ Section 34(2) then provides: 'The person is not subject to any criminal, civil, administrative or disciplinary proceedings or action only because the person complies with the requirement.' An equivalent provision provides similarly for boards of inquiry, but only if the board requires the information, not by default.¹¹⁴ There is no equivalent provision for formal reviews.

G *Other Protections*

There are several additional protections found in federal and Victorian legislation. The *Royal Commissions Act* provides that statements made in evidence, or materials produced in response to a notice 'are not admissible in evidence against a natural person in any civil or criminal proceedings' in a federal, state or territory court.¹¹⁵ Witnesses are also entitled to recover

¹⁰⁹ Attorney General's Department (Cth), *Appendices to Report on Confidentiality Protections in the Royal Commissions Act* (Web Document, 2022) app C, 17 <<https://consultations.ag.gov.au/rights-and-protections/royal-commissions-protections-review/>>, archived at <<https://perma.cc/DB6T-NFBP>>.

¹¹⁰ *Commissions of Inquiry Act 1995* (Tas) s 19A(1).

¹¹¹ See below Part VI.

¹¹² See *Confidentiality Review* (n 108) 28–9; *Secrecy Review* (n 56) 83.

¹¹³ *Inquiries Act* (n 9) s 34(1).

¹¹⁴ *Ibid* ss 74(1)–(2).

¹¹⁵ *Royal Commissions Act* (n 9) s 6DD(1).

reasonable expenses for their attendance.¹¹⁶ It is an indictable offence to act fraudulently or deceptively ‘with intent to affect’ a participant’s testimony¹¹⁷ and to intentionally prevent a witness from attending or producing evidence.¹¹⁸ It is notable that these protections all limit their application to formal participation — ie, giving evidence or complying with a notice. Finally, it is an offence to commit ‘any intentional contempt of a Royal Commission’, which may include interfering with a participant.¹¹⁹

In addition to its specific protections, the *Inquiries Act* provides that formal participants have the same privileges and immunities as Supreme Court witnesses.¹²⁰ This includes absolute privilege for statements made under oath.¹²¹ The Victorian law also contains a broadly worded provision in relation to subsequent inadmissibility, providing that:

Any answer, information, document or other thing given or produced to a Royal Commission by a person and the fact that an answer, information, document or other thing was given or produced, is not admissible in evidence, or otherwise able to be used, against the person in any other proceedings ...¹²²

Unlike its federal equivalent, the provision is not limited to evidence given formally.¹²³ Victorian law also provides for the recovery of witness expenses ‘in accordance with [a] prescribed scale’.¹²⁴

H *Support Services*

Finally, recent commissions and inquiries have seen the provision of free, independent legal support for participants. Given the complexity of the protections and risks canvassed above, this has been an important step towards ensuring adequate support. Typically, these support services have been accompanied by protocols for non-legal support, including counselling. In 2013, following the establishment of the Child Abuse Royal Commission, Knowmore Legal Service was established with federal funding to support

¹¹⁶ *Ibid* s 6G(1).

¹¹⁷ *Ibid* s 6J(1).

¹¹⁸ *Ibid* s 6L.

¹¹⁹ See *ibid* s 6O(1).

¹²⁰ *Inquiries Act* (n 9) s 39(4).

¹²¹ See, eg, *Defamation Act 2005* (Vic) ss 27(1)–(2).

¹²² *Inquiries Act* (n 9) s 40(1).

¹²³ *Ibid* ss 40(1)–(2). Cf *Royal Commissions Act* (n 9) ss 6DD, 6OE.

¹²⁴ *Inquiries Act* (n 9) s 42.

participants engaging with the Royal Commission.¹²⁵ Your Story Disability Legal Support was similarly established, in collaboration with legal aid organisations and First Nations legal services, to support people in ‘safely sharing their story with the Disability Royal Commission’.¹²⁶ For the Veteran Suicide Royal Commission, the federal government — in partnership with National Legal Aid and Legal Aid NSW — established the Defence and Veterans Legal Service.¹²⁷ Additionally, individuals and entities formally engaging with the commission, such as witnesses or those required to comply with a notice, could seek financial assistance for reasonably incurred costs of accessing independent legal representation.¹²⁸ Where royal commissions have a narrower focus, such as the Robodebt Royal Commission, specific legal services have not been established, but participants may still be eligible for funded legal support.¹²⁹

In Victoria, Victoria Legal Aid (‘VLA’) facilitated, through private lawyers, a legal support scheme for participants engaging with the Royal Commission

¹²⁵ ‘History’, *Knowmore* (Web Page) <<https://knowmore.org.au/about-us/history/>>, archived at <<https://perma.cc/P75T-AH2Y>>; Clare Keating, *Evaluation of Knowmore Legal Service* (Final Evaluation Report, February 2016) v <<https://knowmore.org.au/wp-content/uploads/2018/07/Final-knowmore-Evaluation-Report-4.-v-6-April-2016.pdf>>, archived at <<https://perma.cc/6XG6-Y683>>.

¹²⁶ ‘About Us’, *Your Story Disability Legal Support* (Web Page) <<https://web.archive.org/web/20250120191239/https://www.yourstorydisabilitylegal.org.au/about-us>>, archived at <<https://perma.cc/3JT9-8LUN>>.

¹²⁷ ‘Legal Assistance for People Engaging with the Royal Commission into Defence and Veteran Suicide’, *Attorney-General’s Department (Cth)* (Web Page) <<https://web.archive.org/web/20251115074919/https://www.ag.gov.au/legal-system/legal-assistance-services/commonwealth-legal-financial-assistance/legal-assistance-people-engaging-royal-commission-defence-and-veteran-suicide>>, archived at <<https://perma.cc/D6TX-BTNG>>.

¹²⁸ *Ibid.*

¹²⁹ See ‘National Legal Aid Welcomes Government’s Decision To Wipe Some Welfare Debts’, *National Legal Aid* (Web Page, 28 August 2025) <<https://nationallegalaid.org.au/news/wipe-welfare-debts>>, archived at <<https://perma.cc/L2PW-PMQ7>>; Legal Aid ACT, *Applying for a Grant of Legal Assistance (GOA)* (Web Document) <<https://www.legalaidact.org.au/sites/default/files/files/publications/202502%20-%20LAACT%20-%20Applying%20for%20a%20Grant%20of%20Aid.pdf>>, archived at <<https://perma.cc/48DA-RYYU>>; Legal Aid NSW, *What Can Legal Aid NSW Provide Advice about?* (Web Document, November 2024) <<https://www.legalaid.nsw.gov.au/content/dam/legalaidnsw/documents/pdf/ways-to-get-help/legal-advice/what-can-legal-aid-nsw-provide-advice-about.pdf.coredownload.pdf>>, archived at <<https://perma.cc/MKC5-GXQB>>; ‘Legal Problems We Can Help with’, *Legal Aid Queensland* (Web Page, 23 December 2025) <<https://www.legalaid.qld.gov.au/Get-legal-help/Legal-problems-we-can-help-with>>, archived at <<https://perma.cc/Y4BY-8TRM>>; ‘Help at Court’, *Victoria Legal Aid* (Web Page, 17 February 2026) <<https://www.legalaid.vic.gov.au/help-court>>, archived at <<https://perma.cc/D4VC-CZQN>>.

into Management of Police Informants.¹³⁰ The scheme was not means-tested.¹³¹ Likewise, the Victorian Aboriginal Legal Service and VLA established the Lotjpa Independent Legal Service (‘Lotjpa’) to provide free and independent legal support to First Peoples wishing to participate in the Yoorrook Justice Commission.¹³² Where whistleblower-style issues arose for Lotjpa clients, the HRLC worked in collaboration with Lotjpa to provide legal support.¹³³

III REVIEWS

In recent years, federal governments have twice considered these issues through reviews undertaken by the Attorney-General’s Department (‘Department’) in relation to confidentiality protections and the impact of secrecy provisions respectively.

A Confidentiality Review

In response to concerns raised by the Disability Royal Commission,¹³⁴ the *Royal Commissions Amendment (Protection of Information) Act 2021* (Cth) improved confidentiality protections for Disability Royal Commission participants. As part of the parliamentary debate, including concerns raised by the crossbench,¹³⁵ the Morrison government agreed to undertake a departmental review on the ‘protection provisions in the ... Act to examine any

¹³⁰ ‘Legal Assistance for the Royal Commission into the Management of Police Informants’, *Victoria Legal Aid* (Web Page, 4 August 2025) <<https://www.legalaid.vic.gov.au/legal-assistance-royal-commission-management-police-informants>>, archived at <<https://perma.cc/N52Z-A7AV>>.

¹³¹ *Ibid.*

¹³² Victorian Aboriginal Legal Service, *Victorian Aboriginal Legal Service Annual Report 2022–23: 50 Years Staunch* (Report, 2023) 21 <<https://www.vals.org.au/wp-content/uploads/2024/02/VALS-Annual-Report-2022-23-1.pdf>>, archived at <<https://perma.cc/G8XX-4HUH>>; ‘Service Critically Important in Supporting Yoorrook and Truth-Telling’, *Victoria Legal Aid* (Web Page, 29 May 2025) <<https://www.legalaid.vic.gov.au/lotjpa-service-critically-important-supporting-yoorrook-and-truth-telling>>, archived at <<https://perma.cc/TXG7-AP7K>>.

¹³³ Victorian Aboriginal Legal Service – VALS (Facebook, 1 September 2023) <<https://www.facebook.com/photo.php?fbid=674655278032032&id=100064626974302&set=a.442046024626293>>, archived at <<https://perma.cc/FTU3-2K8S>>.

¹³⁴ *Disability Royal Commission Interim Report* (n 106) 107.

¹³⁵ See, eg, Commonwealth, *Parliamentary Debates*, Senate, 25 August 2021, 5175 (Jordan Steele-John); Commonwealth, *Parliamentary Debates*, House of Representatives, 30 August 2021, 8879 (Adam Bandt).

impediments to people coming forward and sharing information.¹³⁶ Following consultation, in March 2022 the Department published its *Review of Confidentiality Protections in the Royal Commissions Act 1902* ('*Confidentiality Review*').¹³⁷ After canvassing the protections available,¹³⁸ and their intersection with common law remedies,¹³⁹ the *Confidentiality Review* considered the effectiveness of existing protections. It found that the private session regime had been broadly effective,¹⁴⁰ and that — in its role as custodian of royal commission records¹⁴¹ — the Department had not identified 'any gaps'¹⁴² preventing it from adequately protecting private session information.¹⁴³ The *Confidentiality Review* noted concerns that the extension of private session protections to other information was statutorily limited to certain royal commissions, which might inhibit future inquiries.¹⁴⁴ However, the Department noted the desirability of commissions inquiring on a public basis, and that the need for confidentiality protections may be subject-matter specific.¹⁴⁵ Accordingly, it recommended further consideration be given to expanding the relevant provisions — ss 6ON and 6OP — 'to have more general application, while also ensuring they can accommodate circumstances or requirements of particular Royal Commissions'.¹⁴⁶

The *Confidentiality Review* also considered the existing non-publication direction regime, noting that at present, it requires each piece of information to be considered individually, which may be unnecessarily burdensome.¹⁴⁷ The Department noted that any confidentiality directions, once issued, operate in perpetuity;¹⁴⁸ it suggested that this may impact transparency at a subsequent

¹³⁶ *Confidentiality Review* (n 108) 3.

¹³⁷ *Ibid* 1, 4–5.

¹³⁸ *Ibid* 7–11.

¹³⁹ *Ibid* 11–12.

¹⁴⁰ *Confidentiality Review* (n 108) 14.

¹⁴¹ The Department's Secretary has been the custodian of royal commission records for all Royal Commissions 'that concluded from 2017 onwards': *Confidentiality Review* (n 108) 17–18. See also *Royal Commission Regulations* (n 95) s 11.

¹⁴² *Confidentiality Review* (n 108) 14.

¹⁴³ *Ibid*.

¹⁴⁴ *Ibid* 15.

¹⁴⁵ *Ibid* 15–16.

¹⁴⁶ *Ibid*.

¹⁴⁷ See *ibid*.

¹⁴⁸ *Ibid*.

time when confidentiality was no longer necessary.¹⁴⁹ Accordingly, the report recommended further consideration of reform to the non-publication direction regime.¹⁵⁰ The *Confidentiality Review* noted that, as a consequence of the decision in *Belan v National Union of Workers (NSW Branch)* ('*Belan*'),¹⁵¹ protection against subsequent admissibility does not extend to tribunals, only courts.¹⁵² In contrast, the equivalent *Inquiries Act* provision extends to tribunals.¹⁵³ The report accepted that there was merit in considering reform to the inadmissibility protection.¹⁵⁴

The *Confidentiality Review* also considered a range of other matters, including amending several offence provisions to improve their effectiveness,¹⁵⁵ and expanding the scope of the detriment-related offences.¹⁵⁶ The report considered retaliation by way of litigation against a participant who, in giving evidence, might contravene contractual non-disclosure obligations.¹⁵⁷ It cited the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry ('*Banking Royal Commission*'), whose chair had expressed the view that such agreements could not prevent a person complying with a notice, and that retaliation by an employer (including litigation) would constitute an offence.¹⁵⁸ Furthermore, the conduct said to be contrary to confidentiality obligations would not be admissible, potentially inhibiting any such claims against participants.¹⁵⁹ In any event, the Department recommended further consideration of amendments to clarify that such obligations 'would not be enforceable against a party in circumstances where

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ (2018) 267 FCR 6 ('*Belan*').

¹⁵² *Confidentiality Review* (n 108) 18, discussing *ibid.* See also at 9 [17] (Rares, Perry and Charlesworth JJ).

¹⁵³ *Inquiries Act* (n 9) ss 40(1), (3).

¹⁵⁴ *Confidentiality Review* (n 108) 19.

¹⁵⁵ Ibid 20.

¹⁵⁶ Ibid 21.

¹⁵⁷ Ibid 19–20, discussing Explanatory Memorandum, Royal Commissions Amendment Bill 2013 (Cth) 10. See also at 20–2.

¹⁵⁸ Ibid 19, citing Transcript of Proceedings, *In the Matter of a Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Royal Commission, Commissioner Hayne, 12 February 2018) <<https://webarchive.nla.gov.au/awa/20190808034444/https://financialservices.royalcommission.gov.au/public-hearings/Pages/transcripts.aspx>>, archived at <<https://perma.cc/3WFK-FW73>> ('*Banking Royal Commission Transcript*').

¹⁵⁹ *Confidentiality Review* (n 108) 20.

information has been shared with a Royal Commission (whether in evidence or otherwise)¹⁶⁰.

Last, the *Confidentiality Review* considered the adequacy of remedies for participants who experience subsequent detriment relating to their participation.¹⁶¹ It considered that common law remedies, such as breach of contract and tort claims,¹⁶² were insufficient for several reasons. First, they were only available after loss had materialised, which was undesirable — failing to reassure participants of their protections.¹⁶³ Second, requiring litigation to enforce common law rights meant that there were ‘substantial practical barriers to persons effectively accessing remedies.’¹⁶⁴ Accordingly, the Department considered three alternatives. First, it canvassed whether royal commissions could be integrated into existing whistleblower protection regimes.¹⁶⁵ It did not consider this a ‘viable solution’ (this will be explored below in Part V(B)).¹⁶⁶ Second, it considered adding civil penalty provisions but considered that this would result in enforcement complexities: ‘[t]here is no regulatory body for the Royal Commissions context generally, and it would seem difficult to establish a viable body of that kind.’¹⁶⁷ Finally, the report assessed the potential for civil remedy provisions, modelled off those found in whistleblowing laws, ‘including compensation, injunctions from taking certain actions, issuing of apologies, and reinstatement of employment’.¹⁶⁸ While the barriers to litigation would persist, the Department concluded there was merit in further considering this option.¹⁶⁹ The Morrison government did not formally respond to the *Confidentiality Review*; the status of these recommendations is unclear.

B *Secrecy Review*

In its interim report, the Veteran Suicide Royal Commission expressed concern about secrecy provisions inhibiting engagement by potential participants.¹⁷⁰

¹⁶⁰ Ibid 21–2.

¹⁶¹ Ibid 22, 27–8.

¹⁶² Ibid 11–12.

¹⁶³ Ibid 22.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid 24.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid 26.

¹⁶⁸ Ibid 27.

¹⁶⁹ Ibid.

¹⁷⁰ *Veteran Suicide Royal Commission Interim Report* (n 1) 261 [8], 262 [13].

Important information was anticipated to come from ‘serving and ex-serving members whose lived experience is intrinsically linked to classified or operationally sensitive information’.¹⁷¹ However, if members of that cohort ‘disclose[d] this information ... without the appropriate approvals, whether voluntarily or where compelled by coercive powers, they may be exposed to criminal liability’.¹⁷² The Veteran Suicide Royal Commission recommended the enactment of stronger protections in the *Royal Commissions Act* and a defence to secrecy offences.¹⁷³ In its response, the Albanese government agreed in principle to the recommendation, indicating its intention to consider reform.¹⁷⁴ Additionally, as part of a more wide-ranging review of secrecy offences, the Department was asked to consider the issue. In a January 2023 interim report titled *Review of Secrecy Provisions: Protections for Individuals Providing Information to Royal Commissions* (‘*Secrecy Review*’), the Department accepted that ‘there is room to improve’ existing arrangements.¹⁷⁵ Presently, the general secrecy offences in the *Criminal Code Act 1995* (Cth) (‘*Criminal Code*’) include a defence where relevant information is communicated to a court or tribunal (whether or not pursuant to an order).¹⁷⁶ This does not extend to royal commissions.¹⁷⁷ An area of particular concern highlighted was participants who engage voluntarily.¹⁷⁸ While many secrecy offences contain defences where disclosure is required by law,¹⁷⁹ these are not engaged where information is provided otherwise than pursuant to an obligation.¹⁸⁰

The *Secrecy Review* noted that while royal commissions ‘should have access to relevant information to inform their inquiry’, this access needed to be balanced against other public interests, such as ‘preventing harms caused by the

¹⁷¹ Ibid 262 [13].

¹⁷² Ibid.

¹⁷³ Ibid 264.

¹⁷⁴ See Department of Defence (Cth) and Department of Veterans’ Affairs (Cth), *Australian Government Response to the Interim Report of the Royal Commission into Defence and Veteran Suicide* (Response, September 2022) 10 <<https://defenceveteransuicide.royalcommission.gov.au/system/files/2022-10/the-government-response-to-the-royal-commission-into-defence-and-veteran-suicide-interim-report.pdf>>, archived at <<https://perma.cc/T2GZ-FMFN>>.

¹⁷⁵ *Secrecy Review* (n 56) 80.

¹⁷⁶ *Criminal Code* (n 55) s 122.5(5).

¹⁷⁷ *Secrecy Review* (n 56) 83.

¹⁷⁸ Ibid 80, 84.

¹⁷⁹ See, eg, *Racial Discrimination Act 1975* (Cth) s 27F(3)(c); *Disability Discrimination Act 1992* (Cth) s 127(3)(c) (‘*Disability Discrimination Act*’); *Age Discrimination Act 2004* (Cth) s 60(3)(c).

¹⁸⁰ *Secrecy Review* (n 56) 84.

disclosure of some secrecy-regulated information'.¹⁸¹ Intelligence agencies had raised concerns that any increase in access to 'secrecy-regulated information' would need to be accompanied by 'enhanced confidentiality measures'.¹⁸² Ultimately, the *Secrecy Review* recommended that the federal government consider amending the *Royal Commissions Act* to

(i) establish a framework that clarifies the application of secrecy offences to individuals providing information to Royal Commissions and (ii) establish appropriate protective security requirements for Royal Commissions.¹⁸³

The former recommendation, the *Secrecy Review* suggested, may include adding royal commissions alongside courts and tribunals to the *Criminal Code* defence.¹⁸⁴ In the Department's final report for the *Secrecy Review*, it noted that 'consideration of these proposed reforms by the [g]overnment is ongoing'.¹⁸⁵ In November 2023, the then Attorney-General, Mark Dreyfus KC, responded to the review, noting an acceptance of its recommendation of 'improved protections for ... individuals providing information to Royal Commissions'.¹⁸⁶ These changes were addressed, in limited part, by the Protections Bill, which is considered further below.¹⁸⁷

IV SHORTCOMINGS

Having set out the legal framework and these recent reviews, it is helpful to consider the *Royal Commissions Act's* shortcomings in respect of participant protections.

A Limited Scope

A major concern with the existing regime is that the vast majority of offence provisions hinge on formal participation in a royal commission — ie, appearing as a witness or otherwise giving evidence to a commission, or producing

¹⁸¹ Ibid 85.

¹⁸² Ibid.

¹⁸³ Ibid 88.

¹⁸⁴ Ibid, discussing *Criminal Code* (n 55) s 122.5.

¹⁸⁵ *Secrecy Review* (n 56) 45 [202].

¹⁸⁶ Mark Dreyfus, 'Reforms to Commonwealth Secrecy Offences' (Media Release, 21 November 2023) <<https://markdreyfus.com/media/media-releases/reforms-to-commonwealth-secrecy-offences-mark-dreyfus-kc-mp/>>, archived at <<https://perma.cc/67CJ-RG3B>>.

¹⁸⁷ See below Part VI.

documents or information pursuant to a summons, requirement or notice.¹⁸⁸ The *Royal Commissions Act's* protections against subsequent admissibility (s 6DD) and offences against bribery of a witness (s 6I), fraud on a witness (s 6J), preventing a witness from attending (s 6L), injury to a witness (s 6M) and employment-related prejudice (s 6N) all relate to *formal* participation.

Consider some contrasting examples. A well-advised whistleblower, appreciating the limits of this protection, may have their legal representatives write to a commission, explaining in broad terms (without contravening any confidentiality obligations) the nature of the information they wish to provide, and requesting the commission issue a notice requiring the participant to provide the foreshadowed information. In these circumstances, the prohibition in s 6N would clearly apply to any detrimental action taken by an employer upon learning of the employee's participation.¹⁸⁹ However, absent well-informed representation,¹⁹⁰ the whistleblower might write directly to the royal commission, providing the relevant information (which may be subject to confidentiality obligations).¹⁹¹ If their employer were to discover this correspondence, they may take steps to dismiss the employee or commence proceedings for breach of confidentiality.¹⁹² Furthermore, because the correspondence was not pursuant to a summons, requirement or notice, but provided voluntarily, the employee would not be able to rely on the protection against subsequent admissibility.¹⁹³ Or, as the *Secrecy Review* identified, if the disclosure were contrary to criminal law, the employee would not be entitled to rely upon a common statutory defence, namely that the disclosure was required by law.¹⁹⁴ In such circumstances, any retaliatory conduct would not be unlawful, and the whistleblower may face civil or criminal liability.¹⁹⁵

The practical impact of this difficulty is underscored by the extension of the private session regime to the Child Abuse Royal Commission, the Disability

¹⁸⁸ See above nn 63–4, 115–20 and accompanying text.

¹⁸⁹ See *Royal Commissions Act* (n 9) s 6N.

¹⁹⁰ As one commentator on this article, with considerable experience in commissions and inquiries, noted: 'Those with representation ask for notices, and those without, don't.'

¹⁹¹ See *Confidentiality Review* (n 108) 28–9; *Veteran Suicide Royal Commission Interim Report* (n 1) 261 [13], 263 [25].

¹⁹² See *Veteran Suicide Royal Commission Interim Report* (n 1) 260–1 [12]–[13], 263 [25]. But see *Confidentiality Review* (n 108) 19.

¹⁹³ See *Secrecy Review* (n 56) 80, 84.

¹⁹⁴ *Ibid* 83–4.

¹⁹⁵ See *Royal Commissions Act* (n 9) ss 6DD, 6M–6N.

Royal Commission and the Veteran Suicide Royal Commission.¹⁹⁶ A royal commission can only hold so many formal hearings, whether public or private. But information provided to a commission may nonetheless usefully inform a commission's investigation. Even where the information provided leads to a subsequent formal hearing, or issuance of a notice, requirement or summons, the initial communication would not benefit from the suite of protections.¹⁹⁷ The benefit of the extended private session regime is that it applies private session-style protections to a whole category of information, provided the relevant royal commission treated it as confidential.¹⁹⁸ For the Veteran Suicide Royal Commission, for example, the private session regime applied to information given to the Commission which

contains any of the following: ... an account of a person's experiences of suicide, suicidality or poor mental health as a defence member or veteran; ... an account of a person's experiences of systemic issues as a defence member or veteran; and the information ... identifies the ... person ... who gave [it] ...¹⁹⁹

The breadth of this category of communication with a royal commission subject to protection alleviates the issues identified above — there is no requirement that the information be communicated pursuant to a notice, or given at a hearing. However, unlike the regime relating to private sessions themselves, which can be granted to any royal commission by regulations,²⁰⁰ this extended regime is written into the *Royal Commissions Act* as explicitly applying to the Child Abuse Royal Commission, the Disability Royal Commission and the Veteran Suicide Royal Commission.²⁰¹ In the absence of reform, future royal commissions, and their participants, will not benefit from these protections.

Finally, and perhaps in part due to its antiquated drafting, the *Royal Commissions Act* does not express an intent to bind the Crown, whether in right of the Commonwealth or states and territories. Modern legislation typically evinces such intentions with express words; it can also be inferred by necessary

¹⁹⁶ See *ibid* ss 6ON–6OQ.

¹⁹⁷ See *Confidentiality Review* (n 108) 20–1.

¹⁹⁸ *Ibid* ss 6ON(1), 6OP(1), 6OQ(1).

¹⁹⁹ *Ibid* s 6OQ.

²⁰⁰ *Ibid* s 6OAB.

²⁰¹ *Ibid* ss 6ON–6OQ.

implication.²⁰² Often, federal legislation which seeks to bind the Crown nonetheless indicates that the Crown is not liable to be prosecuted for an offence.²⁰³ Accordingly, where a federal public servant suffered employment-related detriment in relation to their participation in a royal commission, it is unclear whether the offence provisions would render the Commonwealth liable. Even if an implied intention to bind the Crown in right of a state government were identified, the application of these provisions to state public servants would raise complex constitutional issues.²⁰⁴

B *Limited Immunities*

It is deeply ‘unsatisfactory’ that potential participants have little clarity around the application of civil and criminal law confidentiality obligations to possible communications with a royal commission.²⁰⁵ It may well be that contractual or equitable confidentiality obligations would be unenforceable for public policy reasons if used against a royal commission whistleblower.²⁰⁶ The statutory confidentiality obligation in the *Corporations Act*, meanwhile, applies to ‘improperly’ using information;²⁰⁷ a court may well hold that, even in the absence of a legal requirement (such as a notice), it was not improper to give information to a commission. Furthermore, as the Banking Royal Commission chair said, ‘any institution which sought any form of legal redress against ... a whistleblower seeking to volunteer information to the Commission’ may well be in contempt.²⁰⁸ However, notwithstanding all of the above, it should be straightforward whether or not communication with a royal commission is lawful as a matter of contract, equity or civil statutory obligations. The uncertainty is deleterious to participants’ confidence in bringing forward information.²⁰⁹

²⁰² See *Bropho v Western Australia* (1990) 171 CLR 1, 16 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ), quoting *British Broadcasting Corporation v Johns* [1965] Ch 32, 78–9 (Diplock LJ).

²⁰³ See, eg, *Privacy Act 1988* (Cth) ss 4(1)–(2); *PID Act* (n 24) s 3.

²⁰⁴ See generally Justice Kristen Walker, ‘The *Melbourne Corporation* Doctrine: Some Unresolved Questions’ in James Stellios and John Griffiths (eds), *Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2024) vol 2, 185, 197–206.

²⁰⁵ *Making Inquiries* (n 8) 476 [18.35].

²⁰⁶ See Irving (n 59) 619–21.

²⁰⁷ *Corporations Act* (n 60) s 183(1).

²⁰⁸ *Banking Royal Commission Transcript* (n 158) 12.

²⁰⁹ See above nn 12–16 and accompanying text.

The situation is even more problematic in the criminal context. Potential criminal liability has a considerable chilling effect on the willingness of participants to provide information.²¹⁰ While some secrecy offences expressly regulate the disclosure of information to royal commissions,²¹¹ many do not,²¹² leaving ambiguity around liability. In some cases, provisions permit disclosure where ‘required by law’, which would apply to information provided pursuant to a notice, but not information given voluntarily.²¹³ In other cases, provisions permit disclosure to a court or tribunal — depending on the wording of the relevant provisions, this may or may not extend to royal commissions.²¹⁴ This uncertainty is undesirable. As the Community and Public Sector Union submitted to the review of the *Royal Commissions Act* and related issues carried out by the Australian Law Reform Commission (‘ALRC’) — culminating in the *Making Inquiries: A New Statutory Framework* (‘*Making Inquiries*’) report — where a participant was compelled to provide information, they could find themselves in an invidious position: ‘To force a witness to disclose confidential information, without clear legislation that allows for it, would open the public servant up to disciplinary proceedings and potentially criminal prosecution.’²¹⁵

C Lack of Remedies

Even where a participant’s conduct falls within the relevant scope, the protection offered is limited to offence provisions: it is unlawful to mistreat the whistleblower in relation to their participation.²¹⁶ This approach has several limitations. First, at a federal level, an impacted participant is reliant on the Australian Federal Police deciding to investigate, and the Commonwealth Director of Public Prosecutions determining to prosecute.²¹⁷ Given the

²¹⁰ *Secrecy Review* (n 56) 46 [208], 80; *Veteran Suicide Royal Commission Interim Report* (n 1) 260 [8], 261 [13].

²¹¹ See, eg, *Australian Securities and Investments Commission Act 2001* (Cth) s 127(2B); *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth) ss 270(1)–(2)(a), 275.

²¹² *Secrecy Review* (n 56) 29, 45.

²¹³ *Ibid* 84.

²¹⁴ See *Making Inquiries* (n 8) 470–3 [18.13]–[18.23].

²¹⁵ *Ibid* 474–5 [18.30], quoting Community and Public Sector Union, Submission No RC 10 to Australian Law Reform Commission, *Review of the Royal Commissions Act 1902 and Related Issues* (22 May 2009).

²¹⁶ *Royal Commissions Act* (n 9) ss 6M–6N.

²¹⁷ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 452 [14.21] <<https://www.alrc.gov.au/wp-content/uploads/2019/08/>

criminal standard of proof of beyond reasonable doubt, it may be difficult to prosecute in many cases (it is common in employment-related civil law contexts, acknowledging the asymmetry of information and power, for the burden of proof to be reversed).²¹⁸ Such prosecutions are extremely rare; the Department, as part of the *Confidentiality Review*, admitted that it did ‘not have data to indicate the extent to which the offence provisions for taking retribution action against a person have been relied on in practice.’²¹⁹ Second, even if the prosecution is successful, there is no individual recourse for the whistleblower; a trial judge could not, for example, order that an unlawfully dismissed employee be reinstated.²²⁰ There is no federal victims of crime compensation regime²²¹ and many state and territory schemes only apply to violent crime.²²²

Second, as the *Confidentiality Review* acknowledged, common law remedies are likely to be insufficient — even putting aside the access to justice barriers.²²³ None of the potential common law claims, in contract or tort, ‘have arisen from or been adapted to the circumstances of an individual suffering detriment as a result of them having engaged with a Royal Commission’ — meaning there would be difficulty in meeting all elements of a claim.²²⁴ The availability of statutory claims, meanwhile, would be context-dependent.²²⁵ There may be circumstances where anti-discrimination law is applicable; for example, under the *Disability Discrimination Act 1992* (Cth), ‘harassment of a person with [a] disability because of their engagement with a Royal Commission may be unlawful.’²²⁶ In cases involving the employment-related mistreatment of federal public servants, ordinary administrative law remedies may be available — for

final_report_133_amended1.pdf>, archived at <<https://perma.cc/H6FC-92F9>>; *Director of Public Prosecutions Act 1983* (Cth) ss 9(4)–(5A).

²¹⁸ See, eg, *Fair Work Act 2009* (Cth) s 361 (‘*Fair Work Act*’); *Industrial Relations Act 2016* (Qld) s 306.

²¹⁹ *Confidentiality Review* (n 108) 19.

²²⁰ See *ibid* 25–6.

²²¹ Sam Garkawe and Michael O’Connell, ‘The Need for a Federal, Australia-Wide Approach to Issues Concerning Crime Victims’ (2007) 18(3) *Current Issues in Criminal Justice* 488, 490.

²²² *Victims of Crime (Financial Assistance) Act 2016* (ACT) ss 7, 11, 18–19; *Victims of Crime Assistance Act 2009* (Qld) ss 21(1), 25; *Victims of Crime Assistance Act 1976* (Tas) ss 2(1) (definition of ‘offence’), 4(1)(a); *Victims of Crime Assistance Act 1996* (Vic) ss 3(1) (definitions of ‘act of violence’ and ‘criminal act’), 7–8.

²²³ *Confidentiality Review* (n 108) 22.

²²⁴ *Ibid*.

²²⁵ *Ibid* 24–5.

²²⁶ See *ibid* 28; *Disability Discrimination Act* (n 179) s 35.

example, a decision to terminate a public servant's employment because they participated in a royal commission may be *ultra vires*.²²⁷

Where the information communicated to a royal commission related to workplace conditions or wrongdoing affecting workers, it might constitute a protected complaint or inquiry under the adverse action regime in the *Fair Work Act 2009* (Cth).²²⁸ Notably, to be engaged, these protections *do not* require that the complaint or inquiry was made to a body with a relevant jurisdiction. The explanatory memorandum uses the illustrative example of 'Freddy', a petrol station employee, who writes to the Australian Competition and Consumer Commission on the mistaken belief 'that it is able to investigate wage underpayments'.²²⁹ It might be that a disclosure to a royal commission could fall within this category; as the explanatory memorandum explains, 'it is not a pre-requisite for the protection to apply that the employee has "recourse to competent administrative authorit[ies]'.²³⁰ However, this protection would only be available in relation to certain categories of information and for employees and contractors covered by the adverse action regime²³¹ — which does not extend to state and local government employees in certain states, for example,²³² nor generally to employees of non-constitutional corporations.²³³

In sum, the absence of suitable remedies means that an unlawfully-mistreated participant may be left in an unfortunate position, unable to seek compensation or reinstatement. This may undermine the willingness of participants to come forward. The only caveat to the above is this: prior to recent amendments,²³⁴ federal anti-discrimination laws only prohibited

²²⁷ See *Confidentiality Review* (n 108) 11, 27–8; Australian Public Service Commission, 'Terminating Employment' (Web Page, 5 October 2023) <<https://www.apsc.gov.au/working-aps/hr-practitioners/ending-employment/terminating-employment>>, archived at <<https://perma.cc/4DDN-6BHZ>>.

²²⁸ See *Fair Work Act* (n 218) ss 340–1.

²²⁹ Explanatory Memorandum, *Fair Work Bill 2008* (Cth) 218.

²³⁰ *Ibid* 217–18 [1370], quoting *Workplace Relations Act 1996* (Cth) s 659(2)(e), as repealed by *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth) sch 1 item 2.

²³¹ See *Fair Work Act* (n 218) ss 340–2.

²³² See *ibid* ss 30B(1)–(2), 30G; 'Fair Work System', *Fair Work Ombudsman* (Web Page) <<https://www.fairwork.gov.au/about-us/workplace-laws/fair-work-systemwho-is-covered>>, archived at <<https://perma.cc/4N3W-PHRX>>.

²³³ See *Fair Work Act* (n 218) ss 13 (definition of 'national system employee'), 388.

²³⁴ See, eg, *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth) sch 1 item 77; *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 7 item 12. See also Explanatory Memorandum, *Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021* (Cth) 52 [188]–[192] ('Sex Discrimination Bill

victimisation against someone who raised concerns about unlawful discrimination through offence provisions.²³⁵ In a line of authority, it was suggested that these offence provisions — read in conjunction with the *Australian Human Rights Commission Act 1986* (Cth) — may also ground actionable civil liability in relation to the same conduct.²³⁶ However, a divergent line of authority cast doubt on the existence of such a civil claim.²³⁷ This uncertainty prompted legislative amendments.²³⁸ However, it might be at least arguable that the authority supporting actionable civil claims in relation to a criminal offence provision in anti-discrimination law could equally support civil claims in relation to the offence provisions against witness mistreatment in the *Royal Commissions Act*. That possibility has not yet been tested in litigation.

D *Limited Confidentiality Regime*

Finally, several of the other matters identified by the *Confidentiality Review* underscore shortcomings across various regimes. The private session regime requires a royal commission to be prescribed by regulation,²³⁹ while the regime's extended application requires the royal commission to be written into the statute,²⁴⁰ limiting flexibility. The wider non-publication direction regime would be improved if a royal commission's direction could operate in relation to categories of information, rather than requiring item-by-item

Explanatory Memorandum'); Explanatory Memorandum, Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022 (Cth) 97–8 [378]–[383] ('Anti-Discrimination Bill Explanatory Memorandum').

²³⁵ See, eg, *Sex Discrimination Act 1984* (Cth) s 94, as at 9 December 2018; *Disability Discrimination Act* (n 179) s 42, as at 10 November 2022.

²³⁶ See *O'Connor v Ross (No 1)* [2002] FMCA 210, [11] (Driver FM) ('O'Connor'); *Penhall-Jones v New South Wales* [2007] FCA 925, [10] (Buchanan J) ('Penhall-Jones'); *Dye v Commonwealth Securities Ltd (No 2)* [2010] FCAFC 118, [71] (Marshall, Rares and Flick JJ); *Hanson v Burston* [2022] FCA 1234, [91] (Bromwich J). Two of these cases refer to provisions of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth), the former title of the *Australian Human Rights Commission Act 1986* (Cth); see *O'Connor* (n 236) [1] (Driver FM); *Penhall-Jones* (n 236) [3] (Buchanan J); *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (Cth) sch 3 item 1.

²³⁷ *Walker v Cormack* (2011) 196 FCR 574, 586–7 [41] (Gray J); *Walker v Victoria* [2012] FCAFC 38, [98]–[100] (Gray J, Reeves J agreeing at [167]); *Chen v Monash University* (2016) 244 FCR 424, 450 [121] (Barker, Davies and Markovic JJ).

²³⁸ Sex Discrimination Bill Explanatory Memorandum (n 234) 5 [18]; Anti-Discrimination Bill Explanatory Memorandum (n 234) 10 [41].

²³⁹ *Royal Commissions Act* (n 9) s 6OAB(b).

²⁴⁰ *Ibid* ss 6ON–6OQ.

confidentiality.²⁴¹ Finally, the ability for information given to a royal commission to be used in tribunal proceedings, following *Belan*, undermines the protection against subsequent admissibility.²⁴²

V REFORM

Some of the necessary amendments to improve participant protection are straightforward; addressing *Belan*, for example, would merely require mirroring the equivalent *Inquiries Act* provision.²⁴³ While there are some legitimate policy tensions around the importance of transparency in undertaking royal commissions, revising the private session scheme and its extended application to be used at a royal commission's discretion seems reasonable. There are two issues of greater complexity: clarifying the application of confidentiality provisions to communications with royal commissions, and providing for enforceable protections. These will be considered in turn, along with the need for participant legal support.

A Immunities

Reform to clarify the ability of participants to provide information to commissions, where participants are otherwise subject to confidentiality obligations, is essential. This reform is necessary, notwithstanding the enactment of the Protections Bill into law,²⁴⁴ considered further below,²⁴⁵ because of that Bill's very narrow scope of operation.²⁴⁶

The *Inquiries Act* offers a helpful starting point, providing at s 34 that statutory confidentiality obligations are *not* a reasonable excuse for failing to comply with a requirement to provide information or documents,²⁴⁷ and that a participant 'is not subject to any criminal, civil, administrative or disciplinary proceedings or action only because the person complies with the requirement'.²⁴⁸ There are two exceptions where another enactment:

²⁴¹ *Confidentiality Review* (n 108) 15.

²⁴² See *Belan* (n 151) 9 [16]–[18] (Rares, Perry and Charlesworth JJ).

²⁴³ *Inquiries Act* (n 9) s 40.

²⁴⁴ The *Royal Commissions Legislation Amendment (Protections for Providing Information Act) 2026* (Cth) was assented to on 12 March 2026: see above n 28 and accompanying text.

²⁴⁵ See below Part VI.

²⁴⁶ See HRLC Submission (n 31) 2 [5].

²⁴⁷ *Ibid* s 34(1).

²⁴⁸ *Ibid* s 34(2).

(i) specifically deals with the giving of information to a royal commission;²⁴⁹ or (ii) is prescribed by regulations for the purposes of s 34.²⁵⁰

A few things can be said about s 34. First, it only expressly applies to statutory confidentiality obligations.²⁵¹ It may be that contractual or equitable prohibitions on disclosure would be unenforceable,²⁵² but it would still be useful to provide for a more wide-ranging immunity. Section 10 of the *Public Interest Disclosure Act 2013* (Cth) ('PID Act'), the federal public sector whistleblowing law,²⁵³ provides that, when an individual makes a disclosure, 'the individual is not subject to any civil, criminal or administrative liability (including disciplinary action) for making the public interest disclosure.'²⁵⁴ The provision also clarifies that no contractual or other remedy can be enforced or exercised on the basis of the disclosure.²⁵⁵ An optimal federal provision, drawing on s 34, would explicitly extend to contractual and equitable obligations.

Second, by ceding to conflicting provisions which either (i) expressly regulate disclosure to a commission,²⁵⁶ or (ii) are prescribed by regulation,²⁵⁷ s 34 allows for circumstances where uninhibited disclosure to a commission is not in the public interest. In the ALRC's *Making Inquiries* report, concerns had been raised by intelligence agencies about the risk of a blanket override provision.²⁵⁸ Similarly, the *Secrecy Review* raised the prospect that systems and protocols would need to be implemented to protect the confidentiality of information provided to royal commissions²⁵⁹ — something pursued in part by the Protections Bill.²⁶⁰ However, the s 34 mechanism would allow the federal government to determine which secrecy regimes raise such acute public interest considerations that they should supersede the ability of a royal commission to receive information, while still providing greater certainty than the status quo — accepting that, in most circumstances, the public interest

²⁴⁹ Ibid s 34(3)(a).

²⁵⁰ Ibid s 34(3)(b).

²⁵¹ Ibid s 34(1).

²⁵² See Irving (n 59) 619–21.

²⁵³ *PID Act* (n 24) ss 6–7.

²⁵⁴ Ibid s 10(1)(a).

²⁵⁵ See *ibid* s 10(1)(b); *Confidentiality Review* (n 108) 10.

²⁵⁶ *Inquiries Act* (n 9) s 34(3)(a).

²⁵⁷ Ibid s 34(3)(b).

²⁵⁸ *Making Inquiries* (n 8) 475 [18.34].

²⁵⁹ *Secrecy Review* (n 56) 9, 45 [201].

²⁶⁰ Protections Bill Explanatory Memorandum (n 29) 3 [5], 22 [94]–[96].

aligns with uninhibited access.²⁶¹ This, ultimately, was the recommendation of the ALRC's *Making Inquiries* report: a general override provision, subject to these exceptions.²⁶² 'This would have the advantage of flexibility, while still providing certainty', it found.²⁶³

Third, a disadvantage of s 34 is it only applies where there is a requirement under the *Inquiries Act* to give the information or material — for example, because a notice has been issued.²⁶⁴ As the *Secrecy Review* noted, limiting protections to compelled information 'may have a chilling effect on individuals willing to come forward to engage with a [r]oyal [c]ommission'.²⁶⁵ Accordingly, it would be advantageous if a federal equivalent applied more broadly to all information given to a royal commission (whether or not pursuant to a legal requirement) — as has been done, in a narrow setting, by the Protections Bill.²⁶⁶ Such language is found elsewhere in the *Inquiries Act* in relation to subsequent admissibility.²⁶⁷ Some limits may be desirable — the immunity should not provide carte blanche for individuals to disclose confidential information which is otherwise irrelevant to a royal commission. The ALRC's *Making Inquiries* report recommended that an inquiry 'should be required to state clearly that it compels the information notwithstanding that secrecy provision' for the override power to be enlivened,²⁶⁸ but this would not address voluntary disclosures. One approach might be for the immunity to apply, provided that the participant has reasonable grounds to consider the information is relevant to the commission.²⁶⁹ Additionally, as part of an overhaul of the confidentiality regime, information provided pursuant to the immunity could be treated as confidential, unless otherwise determined by the commission.²⁷⁰ This would prevent malicious disclosures for the sole purpose of publicising information contrary to confidentiality obligations.

Last, it should be made clear that, where the immunity provision is overridden by an exception, a participant cannot be compelled to comply

²⁶¹ See *Making Inquiries* (n 8) 476 [18.37].

²⁶² *Making Inquiries* (n 8) 477 [18.41]–[18.43].

²⁶³ *Ibid* 477 [18.43].

²⁶⁴ See *Inquiries Act* (n 9) ss 17, 34(1).

²⁶⁵ *Secrecy Review* (n 56) 84.

²⁶⁶ HRLC Submission (n 31) 2 [5].

²⁶⁷ *Inquiries Act* (n 9) s 40(1).

²⁶⁸ *Making Inquiries* (n 8) 477 [18.41].

²⁶⁹ This approach could adopt language used by whistleblower protection laws: see, eg, *PID Act* (n 24) s 26 items 1–3.

²⁷⁰ See *Confidentiality Review* (n 108) 15–16.

with a requirement to provide information to the commission. Compelling compliance in these circumstances ‘clearly would be unfair.’²⁷¹

B *Protection and Remedies*

There is a need for enforceable statutory protections to ensure participants who suffer detriment as a consequence of their participation in a royal commission can seek redress. The *Confidentiality Review* considered two options: (i) incorporating disclosure to a royal commission into the primary federal whistleblowing laws, the *PID Act* and the *Corporations Act*; or (ii) creating equivalent remedy provisions in the *Royal Commissions Act*.²⁷² The Department recommended against pursuing the first option for two reasons. First, because in relation to the *PID Act*, the law ‘not only’ provides protections for individual disclosers, but also establishes ‘a prescriptive framework for the investigation of the alleged wrongdoing,’²⁷³ which would be inapplicable here. Second, unless the definitions of eligible whistleblowers and eligible wrongdoing were expanded, ‘it is not clear that the proposed amendments would significantly expand the scope for a general witness or person who engages with the Royal Commission.’²⁷⁴ Conversely, and notwithstanding the residual access to justice issues, the Department saw merit in equivalent civil remedies provisions; it recommended further consideration.²⁷⁵

The Department’s arguments against integrating protections for commission participants into whistleblower protection frameworks are, with respect, not persuasive. First, although the *PID Act* creates an investigative framework for internal whistleblowing,²⁷⁶ it also provides protections for other forms of disclosures — without attendant investigative requirements. For example, in certain circumstances, a federal public servant make a public interest disclosure to anyone other than a foreign public official.²⁷⁷ This can be done either following unaddressed internal whistleblowing,²⁷⁸ or, in emergency circumstances, immediately.²⁷⁹ The *PID Act* creates no investigative framework

²⁷¹ *Making Inquiries* (n 8) 478 [18.45].

²⁷² *Confidentiality Review* (n 108) 24–5.

²⁷³ *Ibid* 24. See also *PID Act* (n 24) pts 2–3.

²⁷⁴ *Confidentiality Review* (n 108) 25.

²⁷⁵ *Ibid* 27, discussing *PID Act* (n 24), *Corporations Act* (n 60).

²⁷⁶ *PID Act* (n 24) pt 3.

²⁷⁷ *Ibid* s 26(1) items 2–3.

²⁷⁸ *Ibid* item 1.

²⁷⁹ See *ibid* item 3.

around these external disclosures,²⁸⁰ but does provide protections — immunity from liability²⁸¹ and the ability to seek remedies in the event of retaliation, including compensation and reinstatement.²⁸² Similarly, the *Corporations Act* provides a protection regime for private sector whistleblowers,²⁸³ who disclose internally, to corporate regulators²⁸⁴ and, in certain circumstances, to politicians or journalists,²⁸⁵ but creates no investigative requirements. Accordingly, these regimes could comfortably integrate royal commissions into the protection framework without imposing requirements on commissions themselves.

Second, the Department raised concerns that limitations in the scope of these regimes — the individuals and types of wrongdoing covered — would undermine the protections.²⁸⁶ This objection is unconvincing. First, there are presently no enforceable civil protections for royal commission participants;²⁸⁷ any coverage, even if partial, would be an improvement. Second, the inclusion of royal commissions into existing whistleblowing frameworks would provide substantial protection to the majority of the federally-regulated Australian workforce. The *PID Act* covers federal public servants, government contractors, employees of contractors and some other categories of government-adjacent workers.²⁸⁸ The *Corporations Act* covers employees, officers, contractors and service providers of constitutional corporations and other financial services companies.²⁸⁹ Given constitutional limitations may constrain the application of federal protections to state government employees in any event,²⁹⁰ these two regimes cover the vast majority of workplace-related participants who could be subject to such regulation. While there are some gaps — employees of partnerships are not, for example, covered by the *Corporations Act*, as a

²⁸⁰ See *ibid* s 7; *Secrecy Review* (n 56) 43.

²⁸¹ *PID Act* (n 24) s 10.

²⁸² *Ibid* ss 13–16.

²⁸³ *Corporations Act* (n 60) pt 9.4AAA.

²⁸⁴ *Ibid* s 1317AA.

²⁸⁵ See especially *ibid* ss 1317AAD(1)(f)–(g).

²⁸⁶ *Confidentiality Review* (n 108) 24–5.

²⁸⁷ *Ibid* 25.

²⁸⁸ *PID Act* (n 24) ss 69–70.

²⁸⁹ *Corporations Act* (n 60) ss 1317AAA–1317AAB.

²⁹⁰ *Spence v Commonwealth* (2019) 268 CLR 355, 418 [99]–[100] (Kiefel CJ, Bell, Gageler and Keane JJ), discussing *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31. See also Walker (n 204) 186–8.

consequence of the head of power relied upon²⁹¹ — these gaps are separately under consideration for reform.²⁹² Even if those gaps persist, integrating royal commissions into the *PID Act* and *Corporations Act* frameworks would represent substantial coverage of potential workplace-related participants. Non-workplace-related participants, meanwhile, do not face the same risk context, meaning the need for protections is distinct (and diminished).

Although it is true that these two regimes demarcate the wrongdoing to which they apply, and whistleblowing on conduct outside this scope would not be protected, each regime is sufficiently broad to cover much of the misconduct that might conceivably be disclosed to a commission. The *PID Act* sets out 10 categories of wrongdoing;²⁹³ disclosures qualify for protection if a whistleblower ‘believes on reasonable grounds’ that their disclosure tends to show any such wrongdoing.²⁹⁴ Categories of ‘disclosable conduct’ include conduct by an agency or public official that is unlawful or corrupt, constitutes maladministration, an abuse of public trust, or a wastage of public money, or endangers health, safety or the environment.²⁹⁵ The *Corporations Act*, meanwhile, defines ‘disclosable matters’ to encompass any information where the whistleblower ‘has reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances, in relation to ... the regulated entity; or ... a related body corporate’.²⁹⁶ Both regimes are therefore sufficiently broad as to encompass most of the wrongdoing that might feasibly be brought to a royal commission’s attention, while excluding low-level misconduct that would only burden the commission (both regimes exclude personal work-related grievances).²⁹⁷

Accordingly, contrary to the position of the Department, there is reason to think that integrating royal commissions into whistleblower protection frameworks would be straightforward. Royal commissions could be added as an eligible recipient of disclosures by amending s 26 of the *PID Act* and s 1317AA of the *Corporations Act*, providing whistleblowers with the full suite of protections in each regime. There are significant benefits, including

²⁹¹ Treasury (Cth), *Regulation of Accounting, Auditing and Consulting Firms in Australia* (Consultation Paper, May 2024) 39 <<https://treasury.gov.au/sites/default/files/2024-05/c2024-509472-cp-regulation.pdf>>, archived at <<https://perma.cc/U6JE-HCZF>>. See also at 40 n 90.

²⁹² See *ibid* 39–40.

²⁹³ *PID Act* (n 24) s 29(1) items 1–10.

²⁹⁴ *Ibid* s 26(1) items 1–3.

²⁹⁵ *Ibid* s 29.

²⁹⁶ *Corporations Act* (n 60) s 1317AA(4).

²⁹⁷ See *ibid* s 1317AADA; *PID Act* (n 24) ss 29 (2A), 29A.

simplicity and efficacy, in integrating protections in this manner: it would avoid further duplication of protection provisions, and ensure ongoing improvement as whistleblowing regimes are enhanced in line with best practice.²⁹⁸ However, to the extent that integration is not desired, a readily available alternative exists: replicating the enforceable remedy infrastructure in the *PID Act* and *Corporations Act* into the *Royal Commissions Act*. By providing statutory remedies when a whistleblower to a royal commission suffers detriment as a result of their participation, this change would go some way towards addressing a major shortcoming in the existing framework. While it would not be a panacea — the *Confidentiality Review* noted access to justice barriers may limit uptake²⁹⁹ — the Department concluded that the idea had ‘merit’ because ‘it may help some people in some circumstances, if not all situations’.³⁰⁰ Whichever approach is adopted, enforceable remedy provisions are essential to ensuring adequate protection.

C Support

Finally, even if substantial reform is enacted, participants will continue to require access to specialised legal assistance. While there is no obligation for governments to fund representation for commission participants,³⁰¹ it has long been accepted that such government-funded support is not only appropriate, but typically improves the effectiveness of a commission.³⁰² One of the challenges in offering such support is the ad hoc nature of commissions and inquiries; hence the need to establish distinct legal services to assist participants in recent royal commissions (most recently, the Albanese government established a legal service to assist those making submissions to the

²⁹⁸ The *PID Act* (n 24) is presently under review by the Department, while a statutory review of the *Corporations Act* (n 60) protections was legislated to be commence by Treasury in late 2024 pursuant to *Corporations Act* (n 60) s 1317AK; see Michelle Rowland, ‘Consultation on Stage Two Public Sector Whistleblower Reforms’ (Media Release, 3 September 2025) <<https://ministers.ag.gov.au/media-centre/consultation-stage-two-public-sector-whistleblower-reforms-03-09-2025>>, archived at <<https://perma.cc/K4S4-3XDK>>; Treasury (Cth), *Government Response to PwC Tax Leaks Scandal* (Response, 19 September 2023) 11 <<https://treasury.gov.au/sites/default/files/2024-06/c2024-536402-fs.pdf>>, archived at <<https://perma.cc/MUT3-B8KL>>.

²⁹⁹ *Confidentiality Review* (n 108) 27.

³⁰⁰ *Ibid.*

³⁰¹ See the discussion in Donaghue (n 21) 192–3 [8.21].

³⁰² See *ibid* 193–4 [8.22].

Antisemitism Royal Commission).³⁰³ While the subject matter expertise of these distinct legal services is no doubt valuable, the loss of institutional knowledge about risk and participant support in engaging with commissions is suboptimal.

One solution might be in ongoing funding for whistleblowing legal services. In 2018, the Victorian government proposed a pilot scheme for whistleblowers to access legal support;³⁰⁴ more recently, in 2023, an independent review into Queensland's public sector whistleblowing law recommended that the Department of Justice and Attorney-General should 'should develop a pilot program to fund a legal assistance provider (for example, Legal Aid or a community legal centre) to provide legal advice'.³⁰⁵ Better access to support for whistleblowers was also raised in late 2023 by the Department in a consultation paper on *PID Act* reform.³⁰⁶ While such proposals remain nascent (the Victorian scheme did not proceed),³⁰⁷ if one or more specialist whistleblowing legal services were established and publicly funded, they might prove an appropriate home for ongoing expertise in assisting participants contributing to commissions and inquiries.

Additionally or alternatively, the *Royal Commissions Act* could be amended to specifically empower a commission to fund a participant's legal fees, with protocols developed to facilitate these schemes. While s 6G provides that '[a]ny witness appearing before a Royal Commission shall be paid a reasonable sum

³⁰³ See Michelle Rowland, 'Establishment of Royal Commission on Antisemitism and Social Cohesion' (Media Release, 8 January 2026) <<https://ministers.ag.gov.au/media-centre/establishment-royal-commission-antisemitism-and-social-cohesion-08-01-2026>>, archived at <<https://perma.cc/XS8G-63MH>>; 'National Legal Advice Service', *Royal Commission on Antisemitism and Social Cohesion* (Web Page) <<https://asc.royalcommission.gov.au/counselling-and-support-services/legal-assistance>>, archived at <<https://perma.cc/AFK5-M7C8>>.

³⁰⁴ Department of Premier and Cabinet (Vic), *Designing a Pilot for the Discloser Support Scheme* (Discussion Paper, October 2018) 3 <<https://nla.gov.au/nla.obj-3736979935/view>>, archived at <<https://perma.cc/6BT2-NB78>>.

³⁰⁵ Department of Justice and Attorney-General (Qld), *Review of the Public Interest Disclosure Act 2010* (Report, June 2023) 213 <<https://www.publications.qld.gov.au/dataset/review-public-interest-disclosure-act-2010/resource/163329e9-3aa2-4601-9ff8-725458170b6b>>, archived at <<https://perma.cc/F7A3-Q2GG>>.

³⁰⁶ Attorney-General's Department (Cth), *Public Sector Whistleblowing Reforms: Stage 2 — Reducing Complexity and Improving the Effectiveness and Accessibility of Protections for Whistleblowers* (Consultation Paper, November 2023) 16–19 <https://consultations.ag.gov.au/integrity/pswr-stage2/user_uploads/consultation-paper-public-sector-whistleblowing-reforms-stage-2.pdf>, archived at <<https://perma.cc/K2AM-BNJY>>.

³⁰⁷ *Cost of Courage* (n 25) 16.

for the expenses of his or her attendance,³⁰⁸ either in accordance with a prescribed scale or at the discretion of a commissioner, the equivalent provision in the *Inquiries Act 2005* (UK) in the United Kingdom is more prescriptive. It allows the chair of an inquiry to award reasonable amounts to a person by way of compensation for their time participating,³⁰⁹ or any expenses, ‘in attending, or otherwise in relation to, the inquiry’.³¹⁰ The provision then provides: ‘The power to make an award under this section includes [the] power, where the chairman considers it appropriate, to award amounts in respect of legal representation.’³¹¹ Detailed protocols have been developed to facilitate the exercise of this power,³¹² which have allowed relevant public interest groups, individual witnesses and affected members of the community to access legal support during recent high-profile British inquiries.³¹³

VI RECENT AMENDMENTS

A Reform

Following the establishment of the Antisemitism Royal Commission, concerns were raised by several stakeholders, including this author, about the extent to which possible participants might feel limited in engaging with this Royal Commission by secrecy obligations, given the national security context.³¹⁴ In

³⁰⁸ *Royal Commissions Act* (n 9) s 6G(1).

³⁰⁹ *Inquiries Act 2005* (UK) s 40(1)(a).

³¹⁰ *Ibid* s 40(1)(b).

³¹¹ *Ibid* s 40(2).

³¹² See, eg, Department for Business & Trade (UK) and Department for Business, Energy & Industrial Strategy (UK), *Costs Protocol Relating to Legal Representation at Public Expense* (Protocol, 22 September 2021) [1] <<https://www.gov.uk/government/publications/post-office-horizon-it-inquiry-2020/cost-protocol-relating-to-legal-representation-at-public-expense>>, archived at <<https://perma.cc/ETT2-DG5Y>>.

³¹³ See, eg, ‘Costs Protocol Relating to Legal Representation at Public Expense’, *Post Office Horizon IT Inquiry* (Protocol) <<https://www.postofficehorizoninquiry.org.uk/key-documents/costs-protocol-relating-legal-representation-public-expense>>, archived at <<https://perma.cc/FF9M-3ZR5>>; ‘Costs Protocol Relating to Legal Representation at Public Expense’, *The Nottingham Inquiry* (Protocol, 23 May 2025) <<https://cdn.websitebuilder.service.justice.gov.uk/uploads/sites/64/2025/05/Nottingham-Inquiry-Costs-protocol-relating-to-legal-representation-at-public-expense-2.pdf>>, archived at <<https://perma.cc/B3WR-83D7>>; ‘Protocol on Legal Costs’, *The Lampard Inquiry* (Protocol, August 2025) <<https://lampardinquiry.org.uk/key-documents/protocol-on-legal-costs/>>, archived at <<https://perma.cc/W2UY-PUS6>>.

³¹⁴ Ronald Mizen, ‘\$131m Royal Commission at Risk as Secrecy Loophole Threatens Evidence’, *The Australian Financial Review* (online, 9 February 2026) <<https://www.afr.com/politics/>>

early March 2026, the Albanese government introduced the Protections Bill;³¹⁵ it was briefly considered by the Parliamentary Joint Committee on Intelligence and Security ('Joint Committee'),³¹⁶ before being passed by the Senate a mere 10 days after its introduction into the House of Representatives.³¹⁷

The Protections Bill did three primary things. First, it amended the *Royal Commissions Act* to provide that it is 'not a reasonable excuse' to refuse to formally participate in a royal commission (such as by not producing a document or failing to answer a question) on the basis that to do so 'would contravene a secrecy provision'.³¹⁸ Second, it provided an override mechanism — for both formal and voluntary participation in a commission — under which such participation is not contrary to secrecy provisions.³¹⁹ It is important that this mechanism encompassed voluntary participation for the reasons outlined above;³²⁰ the provision merely requires that the person 'reasonably believes that the information or document is relevant to the matters into which the Commission is inquiring'.³²¹ The term 'secrecy provision' is also broadly defined.³²²

However, these two amendments, which together seek to prevent secrecy provisions undermining the ability of royal commissions to collect information, only apply to 'intelligence information' or 'operationally sensitive information', defined as encompassing material created by or in relation to Australia's intelligence agencies and law enforcement agencies respectively.³²³

federal/131m-royal-commission-at-risk-as-secrecy-loop-hole-threatens-evidence-20260209-p5o0qv>.

³¹⁵ *Parliamentary Debates* (2 March 2026) (n 29) 32.

³¹⁶ Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Royal Commissions Legislation Amendment (Protections for Providing Information) Bill 2026* (Report, March 2026) 2–3 <https://www.aph.gov.au/-/media/02_Parliamentary_Business/24_Committees/244_Joint_Committees/PJCIS/RCLA/PJCIS-RCLA_Bill_report_final.pdf>, archived at <<https://perma.cc/8MP6-VC9M>> ('*Protections Bill Advisory Report*').

³¹⁷ See *Parliamentary Debates* (2 March 2026) (n 29) 32; Commonwealth, *Journals*, Senate, 12 March 2026, 1396–7.

³¹⁸ Royal Commissions Legislation Amendment (Protections for Providing Information) Bill 2026 (Cth) sch 1 item 1 ('Protections Bill'), inserting *Royal Commissions Act* (n 9) s 6PC.

³¹⁹ Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PD.

³²⁰ See above Part IV(A).

³²¹ Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PD(1)(a)(i).

³²² Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PA (definition of 'secrecy provision').

³²³ See Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PA (definitions of 'intelligence information' and 'operationally sensitive information').

The override provision also only applies where an ‘arrangement’ in relation to intelligence information or operationally sensitive information has been published and the ‘giving, making or production of the information, document, statement or disclosure is consistent with procedures established in accordance’ with the arrangement.³²⁴ Such arrangements have been published by the Antisemitism Royal Commission, which set out practical protocols for communicating such information to the Royal Commission.³²⁵

These aspects of the Protections Bill also only apply to royal commissions prescribed by regulation;³²⁶ the Antisemitism Royal Commission has been so prescribed.³²⁷ The Protections Bill also permits someone to seek legal advice and assistance in relation to these provisions and provides that doing so is not contrary to secrecy provisions.³²⁸ However, if the person seeking advice knew, or ought to have known, that the relevant information is security classified, then in communicating it to a lawyer, the lawyer must hold ‘the appropriate level of security clearance’.³²⁹

The third significant aspect of the Protections Bill was to give effect to the *Secrecy Review*’s recommendation of an addition to the *Criminal Code* general secrecy regime defences.³³⁰ It is now a defence to the general secrecy offences where ‘the person communicated, removed, held or otherwise dealt with the ... information for the primary purpose of communicating it to a [r]oyal [c]ommission’.³³¹ Critically, the defence applies to communications with a royal commission ‘whether or not as a result of a requirement’, provided ‘at that

³²⁴ Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PD(c).

³²⁵ Australian Government Solicitor, *Arrangement between the Royal Commission on Antisemitism and Social Cohesion and Commonwealth Agencies in Relation To Obtaining, Storing, Accessing, Using or Disclosing Intelligence Information Relating to an Intelligence Agency* (Arrangement, 2026) <https://asc.royalcommission.gov.au/system/files/2026-03/operationally-sensitive-information-protection_arrangement.pdf>, archived at <<https://perma.cc/K936-7Z3K>>; Australian Government Solicitor, *Arrangement between the Royal Commission on Antisemitism and Social Cohesion and Commonwealth Agencies in Relation To Obtaining, Storing, Accessing, Using or Disclosing Operationally Sensitive Information* (Arrangement, 2026) <https://asc.royalcommission.gov.au/system/files/2026-03/operationally-sensitive-information-protection_arrangement.pdf>, archived at <<https://perma.cc/8BAZ-8WNL>>.

³²⁶ Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PB.

³²⁷ Protections Bill (n 318) sch 2 item 2, inserting *Royal Commissions Regulations* (n 95) s 7A.

³²⁸ Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PE(1)–(2).

³²⁹ Protections Bill (n 318) sch 1 item 1, inserting *Royal Commissions Act* (n 9) s 6PE(1)(e).

³³⁰ Protections Bill Explanatory Memorandum (n 29) 22 [94]–[96].

³³¹ Protections Bill (n 318) sch 3 item 1, inserting *Criminal Code* (n 55) s 122.5(4B)(a).

time, the person reasonably believed that the relevant information was relevant' to the royal commission'.³³²

B Assessment

The Protections Bill is an important step forward. The new *Criminal Code* defence is significant, while the override regime will assist the Antisemitism Royal Commission to undertake its task effectively. However, because of the urgency with which the Protections Bill was introduced and passed, proper scrutiny was limited.³³³

In a submission to the Joint Committee, the HRLC's Whistleblower Project raised a number of concerns about the Protection Bill's shortcomings; the submission was prepared by this author.³³⁴ Three concerns are most salient to this article. First, the secrecy provision override is limited to intelligence and law enforcement related information.³³⁵ While the new *Criminal Code* defence is significant,³³⁶ it only operates in relation to the general secrecy offences, leaving whistleblowers exposed to potential criminal liability elsewhere in the federal statute book for engaging with a royal commission.³³⁷ While the present Antisemitism Royal Commission may benefit particularly from the national security context of the override provision, it may be of less utility for future royal commissions.³³⁸ It is noteworthy that the present reform seemingly will not address the concerns of the Veteran Suicide Royal Commission, which had otherwise been the prompt for the *Secrecy Review*. Much of the information relevant to Veteran Suicide Royal Commission would not fall within the scope of this new override provision.

Second, while the override provision excludes criminal liability, it is not clear that it has the same effect in relation to civil or administrative liability.³³⁹

³³² Protections Bill (n 318) sch 3 item 1, inserting *Criminal Code* (n 55) s 122.5(4B).

³³³ *Protections Bill Advisory Report* (n 316) 3, 6. See also above nn 315–16 and accompanying text.

³³⁴ See HRLC Submission (n 31) 2–5 [5]–[21].

³³⁵ *Ibid* 2 [5].

³³⁶ Protections Bill (n 318) sch 3 item 1, inserting *Criminal Code* (n 55) s 122.5(4B).

³³⁷ HRLC Submission (n 31) 2 [6]–[7].

³³⁸ *Ibid* 2 [7].

³³⁹ *Ibid* 4 [17]–[19]. Even the present Antisemitism Royal Commission may be impacted. The HRLC Submission (n 31) offered the following hypothetical example: at 2 [8].

An employee at the Department of Education is aware of information of relevance to [the] Royal Commission's inquiry into 'security arrangements for the Jewish community', in relation to, say, childcare. There are secrecy offences in federal laws relating to childcare. They may be applicable to the relevant information. Say the Department of Education employee

The broader scope of s 34 of the *Inquiries Act* has much to commend it. Finally, the requirement that lawyers assisting prospective royal commission whistleblowers have relevant security clearances leads to significant practical challenges, an issue which has been identified in the whistleblowing context generally.³⁴⁰ Given security clearance-holders are not supposed to advertise that fact, how is a prospective royal commission participant, desiring legal assistance, to locate an appropriately security-cleared lawyer?

In sum, then, while the Protections Bill is significant and important in the context of the present royal commission, it leaves many wider issues unaddressed. In addition to the above concerns, it does nothing to address the issue of an absence of civil remedies for royal commission whistleblowers who suffer detriment. The stopgap solution, rushed through Parliament given the Antisemitism Royal Commission's compressed timeline,³⁴¹ only underscores the need for more comprehensive, enduring reform.

VII CONCLUSION

The *Royal Commissions Act* was enacted by the first Parliament of the newly federalised Commonwealth of Australia.³⁴² The law was needed, the then Attorney-General Alfred Deakin explained in his second reading speech, to ensure sufficient investigative powers for a royal commission into the return voyage of troops from the Boer War, which had seen 17 soldiers die in transit.³⁴³

voluntarily provides the information to the Royal Commission. They may be in breach of those specific secrecy offences. Moreover, they may be prima facie liable under the *Criminal Code*, required to rely on the new proposed defence, and the burden of proof in establishing that defence would fall on them. It is not clear why an intelligence agent should have the benefit of this new regime, but the Department of Education employee should not, when both are seeking to do the same thing, in the public interest — provide relevant information to the Royal Commission to assist its inquiries.

³⁴⁰ Ibid 3–4 [12]–[15].

³⁴¹ See Letters Patent for the Royal Commission into Antisemitism and Social Cohesion, Attorney-General to Virginia Bell, 9 January 2025, 6–7 <<https://asc.royalcommission.gov.au/system/files/2026-01/letters-patent-royal-commission-on-antisemitism-and-social-cohesion.pdf>>, archived at <<https://perma.cc/YXM6-HYNY>>.

³⁴² Commonwealth, *Gazette*, No 1, 1 January 1901, 1; E G Blackmore, 'Acts of Parliament Assented to' in Commonwealth, *Gazette*, No 44, 12 September 1902, 8876; Baron Tennyson, 'Proclamation' in Commonwealth, *Gazette*, No 67, 23 November 1903, 873. See also Prasser (n 36) 28.

³⁴³ See Commonwealth, Parliamentary Debates, House of Representatives, 26 August 1902, 15355 (Alfred Deakin, Attorney-General); *Royal Commission Appointed To Inquire into and Report upon the Arrangements Made for the Transport of Troops Returning from Service in South Africa in the SS 'Drayton Grange'* (Final Report, October 1902) 11 <<https://parlinfo.aph.gov.au/>

There have been 140 subsequent federal royal commissions on everything from tobacco regulation and corporate scandals to British nuclear testing.³⁴⁴ In recent decades, royal commissions have had significant political, regulatory and cultural impact: the Banking Royal Commission led to substantial financial sector reform,³⁴⁵ while the Child Abuse Royal Commission significantly changed the national approach to institutional abuse, including by instituting a redress scheme and by prompting prime ministerial apology.³⁴⁶ In Australia, royal commissions play a critical if ad hoc role in democratic accountability.

The *Royal Commissions Act* has been amended over two dozen times,³⁴⁷ and was comprehensively reviewed by the ALRC in 2009, but in many respects it remains a product of its time.³⁴⁸ As this article, recent royal commissions and two reviews have made clear, reform is overdue. For royal commissions to be effective, they must have uninhibited access to information about their subject matter. Despite the coercive powers available to royal commissions, these will be ineffective unless the commission knows where to look. It is here that whistleblower-style participants can prove vital to informing the work of royal commissions.

This article began by canvassing existing protections for participants in the federal *Royal Commissions Act*, with comparative reference to Victoria's *Inquiries Act*. It then analysed two reviews, into confidentiality provisions and secrecy offences in the royal commission context respectively, before outlining

parlInfo/download/publications/tabledpapers/HPP022016000013/upload_pdf/HPP022016000013.pdf>, archived at <<https://perma.cc/JT7N-HC94>>; National Archives of Australia, *The Boer War: Australians and the War in South Africa* (Research Guide No 9, November 2000) 63 <<https://www.naa.gov.au/sites/default/files/2020-06/research-guide-the-boer-war.pdf>>, archived at <<https://perma.cc/45JS-XHPN>>.

³⁴⁴ For a complete list: 'Royal Commissions and Commissions of Inquiry', *Parliament of Australia* (Web Page, 9 September 2024) <https://www.aph.gov.au/About_Parliament/Parliamentary_departments/Parliamentary_Library/Browse_by_Topic/law/royalcommissions>, archived at <<https://perma.cc/3TCC-SSRY>>.

³⁴⁵ See generally Daniel Ziffer, 'Unintended Consequences and More Work To Do: Five Years after the Banking Royal Commission', *ABC News* (online, 5 February 2024) <<https://www.abc.net.au/news/2024-02-05/banking-royal-commission-five-years-on-asic/103423072>>, archived at <<https://perma.cc/FFT6-NZR2>>.

³⁴⁶ See National Office for Child Safety (Cth), *National Strategy To Prevent and Respond to Child Sexual Abuse 2021–2030* (Strategy, September 2021) 8, 15, 70 <<https://www.childsafety.gov.au/system/files/2025-05/national-strategy-prevent-and-respond-to-child-sexual-abuse-2021-2030.pdf>>, archived at <<https://perma.cc/4V9C-S7CK>>; 'National Apology', *National Office for Child Safety (Cth)* (Web Page) <<https://www.childsafety.gov.au/royal-commission/national-apology>>, archived at <<https://perma.cc/9PHX-YAHA>>.

³⁴⁷ *Royal Commissions Act* (n 9) endnote 3. See also *Making Inquiries* (n 8) 40 [1.5].

³⁴⁸ *Making Inquiries* (n 8) 7–8.

key shortcomings. The article considered avenues for legal and policy reform, including stronger immunities, enforceable protections and specialist support. Following the reviews, these are matters of active policy consideration; it is hoped that this article's analysis can aid policymakers as reforms are pursued. As the article demonstrated, recent reform as part of the current Antisemitism Royal Commission has not comprehensively addressed the extant problems.

Two of the most recent federal royal commissions, the Disability Royal Commission and the Veteran Suicide Royal Commission, have both raised concerns about participant protections. In the immediate term, these concerns were alleviated by royal commission-specific reform — a trend which continued with the passage of the Protections Bill. However, as the Veteran Suicide Royal Commission underscored in its interim report, 'a long-term solution' is necessary.³⁴⁹ Patchwork solutions will not solve systemic challenges. Royal commissions are an important policy mechanism in contemporary Australia; better protections are essential to ensuring their ongoing efficacy and legitimacy. Given the democratic and institutional significance of these forms of inquiry, reform to the *Royal Commissions Act* must be a priority for the federal Parliament.

³⁴⁹ *Veteran Suicide Royal Commission Interim Report* (n 1) 261 [16].