



Law Council
OF AUSTRALIA

Supplementary submission: Whistleblower protections in the corporate, public and not- for-profit sectors inquiry

Parliamentary Joint Committee on Corporations and Financial Services

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Audit of current legislation on whistleblowing.....	6
Critique and transferability of Fair Work Registered Organisation amendments for whistleblowing in other sectors.....	8
Commonwealth ability to legislate with regard to subcontractors and whistleblowing protections	9
Lawyers' processes for whistleblowing and client legal privilege for whistle-blowers	10
Lawyers' processes for whistleblowing	11
Express client legal privilege protections for whistleblowers.....	11

About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Ms Fiona McLeod SC, President
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- Ms Pauline Wright, Executive Member
- Mr Konrad de Kerloy, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its Industrial Law Committee and Privileges and Immunities Committee of the Federal Litigation and Dispute Resolution Section, and the Corporations Committee and Foreign Corrupt Practices Committee of the Business Law Section in the preparation of these answers to questions on notice.

Executive Summary

1. The Law Council of Australia attended a hearing of the Joint Parliamentary Committee on Corporations and Financial Services' (**the Committee**) inquiry into whistleblower protections in the corporate, public and not-for-profit sectors inquiry (**the Inquiry**) on 28 April 2017 in Canberra.
2. At that hearing, the Law Council took a number of questions on notice from the Committee, which for convenience, are set out below:

- (a) Audit of current legislation on whistleblowing – Senator O' Neill asked:

Have you or are you aware of anyone who has done an audit of current legislation and identified all the sticking points [like inconsistency between State and federal legislation, mentioned by the Law Council in its answer prior to this question] that would be relevant in this case? ... Has any work been done that you are aware of?¹

- (b) Critique and transferability of Fair Work Registered Organisation amendments for whistleblowing in other sectors – Senator Xenophon asked:

[Y]ou have made reference to having a draft, and there is already legislation [the Fair Work Registered Organisations Amendment Act 2016] that is being passed ... I would welcome any critique or matters that need to be attended to... [i]f you could, please be as prescriptive as you wish to be in how you think it could be rolled out in the corporate and public sectors and what differences there could be.²

- (c) Commonwealth ability to legislate regarding subcontractors and whistleblowing protections – Senator Xenophon asked:

Further to [a line of questioning about the limited scope of Commonwealth constitutional power]... clearly under the High Court's WorkChoices decision employer and employee relations can be covered [by Commonwealth legislation]. What about in circumstances where there are subcontractors or those who do not have that employer-employee relationship and the subcontractor is not a corporation?³

- (d) Lawyers' processes for whistleblowing and express client legal privilege protection for whistle-blowers – Senator O'Neill asked:

What are the processes that [lawyers] have in place for whistleblowing? And what are you aware of in terms of whistleblowing within your own sector—good, bad and ugly? And do you have suggestions that might come from that? ... Can I just ask a very quick follow-up question on that? Is there a part of your submission that deals with [lawyers' experiences] in respect of legal professional privilege? ... I think you make a point [in your submission]

¹ Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 28 April 2017, p 17 (Senator O'Neill).

² Ibid p 16 (Senator Xenophon).

³ Ibid p 21 (Senator Xenophon).

*that it might be useful to make some aspects express where there are protections... or that other things do not aggregate those.*⁴

3. The Law Council's answers to each of these questions are set out below.

Audit of current legislation on whistleblowing

4. In the timeframe available for response, the Law Council has not been able to undertake a comprehensive audit of whistleblower legislation and identify where inconsistencies might arise. However, the Law Council refers the Committee to the below examples of whistleblower protection legislation.

5. The following pieces of legislation are examples of coverage of public sector whistleblower protection:

- *Public Interest Disclosure Act 2013* (Cth) (**PID Act**);
- *Public Interest Disclosure Act 2012* (ACT);
- *Public Interest Disclosure Act 2008* (NT);
- *Public Interest Disclosures Act 1994* (NSW);
- *Public Interest Disclosure Act 2010* (QLD);
- *Whistleblowers Protection Act 1993* (SA); *Public Sector Act 2009* (SA) s 7;
- *Public Interest Disclosures Act 2002* (TAS);
- *Protected Disclosure Act 2012* (VIC); and
- *Public Interest Disclosure Act 2003* (WA).

6. Legislation directed at official corruption may also protect whistleblowing activities, in addition to allegations made from outside the public sector or connected to some other bond of confidentiality. For example:

- *Independent Commission Against Corruption Act 1988* (NSW) ss 50 (protection of witnesses and persons assisting Commission), 70 (confidentiality of Parliamentary Joint Committee), Pt 3 (specific offences);
- *Commissions of Inquiry Act 1950* (QLD); and
- *Corruption and Crime Commission Act 2003* (WA) s 156.

7. Public administration legislation may also protect public servants from certain specified disclosures in certain circumstances, see for example:

- *Public Service Act 1999* (Cth) s 16;
- *Public Sector Management Act 1994* (ACT) s 243; *Public Interest Disclosure Act 1994* (ACT);
- *Public Interest Disclosures Act 1994* (NSW);
- *Whistleblowers Protection Act 1994* (QLD);
- *Whistleblowers Protection Act 1993* (SA); and
- *State Service Act 2000* (TAS) s 10(5).

8. Limited whistleblower protections are available for regulators in identifying breaches of industry-specific legislation, including for example:

⁴ Ibid.

- *Banking Act 1959* (Cth);
 - *Life Insurance Act 1995* (Cth);
 - *Superannuation Industry (Supervision) Act 1993* (Cth); and
 - *Insurance Act 1973* (Cth).
9. Private sector whistleblower protection legislation includes for example:
- Part 9.4AAA of the *Corporations Act 2001* (Cth) (**Corporations Act**); and
 - Part 41 of the *Fair Work (Registered Organisations) Act 2009* (Cth).
10. The Law Council's initial written submission to the Committee identified some inconsistencies in relation to the above legislation, for example the limited protections that appear to be available for tax whistleblowers.⁵
11. The Law Council is also aware that Professor AJ Brown and his colleagues have, as part of their research on whistleblower protection in Australia and worldwide, conducted an audit of current legislation and identified shortcomings in Australia's whistleblower regime, both at the State and federal levels. Professor Brown's submission to the Inquiry includes several attachments which set out the results of this research. The Law Council supports the position set out by Professor AJ Brown and his colleagues in the attachments to his submission as detailed below.
12. Attachment 1 is a 2015 report co-authored by Professor Brown on the state of whistleblowing laws in each of the G20 countries, including Australia.⁶ The report rates Australia's legislative regime⁷ against fourteen international principles⁸ in relation to both the private sector and public sector, and includes a discussion which identifies shortcomings, including that:
- (a) whistleblower reports about wrongdoing by members of parliament, ministerial staff or the judiciary are not protected on a federal level but typically are protected on a state level;
 - (b) on a federal level public servants who whistleblow to the media are protected while in some states they are still liable to criminal or disciplinary actions;
 - (c) protections do not apply to wrongdoing disclosed externally (for example to the media) which involves wrongdoing in or by an intelligence agency, or for any

⁵ See Law Council of Australia, *Submission to the whistleblower protections in the corporate, public and not-for-profit sectors inquiry* (9 February 2017) [49], [58], [135] <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

⁶ See Submission 23 – Attachment 1: Wolfe et al, *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (2015) 7, 26 – 28 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

⁷ The report examines Commonwealth legislation which provisions relevant to whistleblowing, namely the *Public Interest Disclosure Act 2013*, *Corporations Act 2001*, *Banking Act 1959*, *Life Insurance Act 1995*, *Superannuation Industry (Supervision) Act 1993*, *Insurance Act 1973*, *Australian Secret Intelligence Organisation Act 1979*, *Telecommunications (Interception and Access) Amendment (Data Retention) Act 2015*.

⁸ The principles are based on "essential" principles appearing in at least three of the five leading international set of standards on whistleblower protections: see Submission 23 – Attachment 1: Wolfe et al, *Breaking the Silence: Strengths & Weaknesses in G20 Whistleblower Protection Laws* (2015) 11 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

person (including a journalist or member of Parliament) from reporting about certain intelligence operations; and

(d) Legislative protection is weak and ill-defined in the private sector.⁹

13. In addition, the Law Council notes that Attachment 4, a document which sets out key data of relevance to the Inquiry, includes an assessment of public sector whistleblowing legislation in each State, Territory, and the Commonwealth, with each jurisdiction given a rating out of three in three categories, namely whether the legislation provides for an effective system and oversight; public disclosure; and effective remedies.¹⁰

Critique and transferability of Fair Work Registered Organisation amendments for whistleblowing in other sectors

14. The Law Council notes that the text of Senator Xenophon's second question on notice, based on the draft transcript, is as follows:

[Y]ou have made reference to having a draft, and there is already **legislation that is being passed** with some input from Professor AJ Brown. I would welcome any critique or matters that need to be attended to. The ACTU yesterday, to their credit, did make a number of references, including the fact that unions should be one of the bodies that people can go to, which I think is a very fair comment. If you could, please be as prescriptive as you wish to be in how you think it could be rolled out in the corporate and public sectors and what differences there could be. Because of course you have the Public Interest Disclosure Act that applies to the public sector.¹¹

15. While the Senator did not specifically mention to which legislation he was referring, based on context, the Law Council has presumed, for the purposes of providing an answer to his question, he was referring to the *Fair Work (Registered Organisations) Amendment Act 2016* (Cth) (**ROA Act**), which amends both the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) and *Fair Work Act 2009* (Cth) (**Fair Work Act**). This assumption is based on the fact that, as noted in the Law Council's initial submission to the Committee,¹² Senator Xenophon was involved in negotiating amendments that added protections for whistleblowers to the ROA Act, with some input from Professor AJ Brown.¹³

16. The ROA Act adds a new Part 4A to the RO Act on protection for whistleblowers, which provides protection for certain persons (including officers, employees, members and contractors of organisations) who disclose information about certain contraventions of the law. They also provide for investigation of protected disclosures, and remedies for

⁹ Ibid 27-28.

¹⁰ See Submission 23 – Attachment 4: Professor AJ Brown, *Key initial data of relevance* (2017) 3 <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

¹¹ Evidence to Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, Canberra, 28 April 2017, p 16 (Senator Xenophon) (emphasis added).

¹² See Law Council of Australia, *Submission to the whistleblower protections in the corporate, public and not-for-profit sectors inquiry* (9 February 2017) [7] <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

¹³ Commonwealth, *Parliamentary Debates*, Senate, 21 November 2016, 2744-45 (Nick Xenophon).

persons who have suffered a reprisal as a result of a protected disclosure, including, for example, the ability to seek exemplary damages from the Federal Court of Australia.

17. Whether or not the provisions enacted by the ROA Act are appropriate for the corporate, public and not-for-profit sectors respectively will require comparing those provisions with existing or proposed provisions for the relevant sectors to determine if there are gaps which need to be addressed. Although the time for this response has not permitted the Law Council to undertake such an inquiry, the research conducted by Professor AJ Brown, referred to above and contained in Attachments 1 and 4 of his submission to the Committee, identifies to some extent the differences in legislative whistleblower protection as between the private and public sectors. If gaps are identified which need to be addressed, then the Law Council considers that the provisions of the ROA Act would provide a useful template for future amendments as there is little about them which are specific to registered organisations.
18. It should be noted that the obligations and duties that fall on those who run registered organisations, and the remedies available against those who fail in their obligations, were closely modelled on the obligations and duties that fall on company directors under the Corporations Act.

Commonwealth ability to legislate with regard to subcontractors and whistleblowing protections

19. Whistleblower legislation should be as broad in its coverage as possible. The Law Council understands that the Commonwealth may lack constitutional power to enact comprehensive private sector whistleblower legislation. It encourages the Committee to inquire of the Attorney-General's Department and the Treasury:
 - The extent to which the Commonwealth may lack constitutional power to enact comprehensive private sector whistleblower legislation;
 - Where potential gaps may arise; and
 - Whether advice has been sought from the Solicitor-General on this issue.
20. Any identified potential for gaps may highlight the need for complementary Commonwealth, State and Territory laws across various sectors. The Law Council reiterates the point made in paragraph 18 of its initial written submission to the Committee (February 2017) that the legislation itself should be uniform and that the approach across the Commonwealth, States and Territories should be parallel.
21. Generally the constitutional basis for whistleblower laws will be the head of power that underpins the principal legislation, on the basis that such laws are reasonably incidental to the primary law. The Commonwealth can go into the legislation that provides the relevant offence in respect of which the whistle is being blown. Hence for corporations it would go into the Corporations Law and be supported by the heads of power that support that law, namely the corporations' power and the referral of power by the States.
22. As to those entities that are not corporations, consideration needs to be given to what unlawful conduct is the subject of the whistleblowing. Protection for whistleblowing does not arise simply where there is a view by a whistleblower that the conduct is inappropriate. Therefore, in respect of illegal conduct under the *Crimes Act 1914* (Cth) (**Crimes Act**), whistleblower provisions could be inserted into the Crimes Act. If the

conduct in question is adverse action under the Fair Work Act (which can be by a non-corporation in certain circumstances, e.g. where it affects a corporation) the whistleblower protection can be included in the Fair Work Act.

23. The Commonwealth Parliament may legislate to protect whistleblowers under for example the following heads of power in the Australian Constitution:

- section 51(xx), the corporations power, which confers power on the Commonwealth Parliament to enact legislation with respect to 'foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth' (constitutional corporations);
- section 61, the executive power, which provides for the executive power of the Commonwealth and may support whistleblowing legislation relating to a breach of Commonwealth law; and
- section 51(xx), the express incidental power, which may support whistleblower legislation which provides a Commonwealth body with requisite investigative and reporting powers.

24. Other heads of power may provide limited scope for Commonwealth whistleblower legislation, including for example:

- section 51(i), the inter-State or overseas trade and commerce power;
- section 51(v), the telecommunications and broadcasting power;
- section 51(vi), the defence power;
- section 51(xii), the banking power;
- section 51(xiv) the insurance power;
- section 51(xxxv), the industrial relations power;
- section 52(i), which confers exclusive powers on the Commonwealth Parliament to legislate for peace, order and good government in relation to all places acquired by the Commonwealth for public purposes; and
- section 122, which empowers the Commonwealth to make laws in relation to Territories.

25. The Corporations' power extends to permitting the Commonwealth to:

- regulate activities, functions, relationships and the business of a corporation;
- create rights, and privileges belonging to a corporation;
- imposing obligations on a corporation;
- regulating the conduct of those through whom a corporation acts, its employees and shareholders; and
- regulating those whose conduct is or is capable of affecting its activities, functions, relationships or business.¹⁴

Lawyers' processes for whistleblowing and client legal privilege for whistle-blowers

¹⁴ See *New South Wales v the Commonwealth* (2006) 229 CLR 1; [2006] HCA 52 (commonly known as the "Work Choices case").

Lawyers' processes for whistleblowing

26. The legal profession is not the most appropriate case study because of the professional obligations we owe to our clients. However, the Law Council supports a broad definition of whistleblower that could include professional advisors provided it does not violate professional obligations and with any special considerations that may need to be added as set out in paragraph 27 of our February submission.

Express client legal privilege protections for whistleblowers

27. The Law Council's initial written submission to the Committee highlighted the importance of client legal privilege. It should also be noted that client legal privilege is an "important common law immunity"¹⁵ and a "fundamental and general principle of the common law".¹⁶ Client legal privilege "exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers".¹⁷

28. In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*, the High Court held:

*Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps, more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.*¹⁸

29. Further:

*It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings. It may here be noted that the 'dominant purpose' test for legal professional privilege was recently adopted by this Court in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* in place of the 'sole purpose' test which had been applied in *Grant v Downs*.*

*Being a rule of substantive law and not merely a rule of evidence, legal professional privilege is not confined to the processes of discovery and inspection and the giving of evidence in judicial proceedings.*¹⁹

30. The privilege does not belong to the lawyer. It is held by the lawyer's client, as it exists for the benefit of the client. It is the duty of a lawyer to claim privilege on behalf of the client;²⁰ only the client has the power to waive privilege. In that sense, if a lawyer is not

¹⁵ *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543, [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁶ *Baker v Campbell* (1983) 153 CLR 52, 117 (Deane J).

¹⁷ *Esso Australia Resources v Commissioner of Taxation* (1999) 201 CLR 49, [35] (Gleeson CJ, Gaudron and Gummow JJ).

¹⁸ (2002) 213 CLR 543 [11] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

¹⁹ *Ibid* [9]-[10] (footnotes omitted).

²⁰ See *Legal Profession Uniform Conduct (Solicitors Rules) 2015* r 21.2 and *Legal Profession Uniform Conduct (Barristers Rules) 2015* r 61.

acting as the client's agent in 'waiving' the privileged information, the client should still be entitled to maintain the privilege claim and take action to prevent any associated breach of confidence. See for example, the discussion of a client's right in equity to restrain the use of confidential privileged materials or compel their return - in *Commissioner of Taxation v Donoghue* [2015] FCAFC 183].

31. The Law Council's initial written submission to the Committee also noted that advisors (who are subject to a strict duty of confidentiality) should not be forced to breach that duty to assist an investigation by a regulator initiated as a result of whistleblower information.²¹
32. Should there be any proposed coercive powers process under whistleblower reform, there may be benefit in expressly excusing a person from having to provide information or documents or answer questions which would contravene a law, incriminate or, make such a person liable to a penalty or where the information was subject to client legal privilege. It is submitted that any power to demand documents or information should not extend to circumstances where a legitimate claim for legal professional privilege applies. In other words, it should not abrogate the existing rule of substantive law. It is unnecessary as the law of privilege already contains an exception against communications between a legal adviser and a client which facilitate the commission of a crime or fraud²² or which are made to further a deliberate abuse of statutory power in order to frustrate the processes of the law.²³
33. The Law Council understands that whistleblowers are currently able to maintain a client legal privilege claim with respect to advice they receive concerning their position. In this context, the Law Council notes that the section 60 of the PID Act expressly notes that the PID Act does not affect the law relating to legal professional privilege.
34. However, to ensure that whistleblower reform is not ambiguous or uncertain, there may be benefit in expressly providing that client legal privilege is maintained or not abrogated.

²¹ See Law Council of Australia, *Submission to the whistleblower protections in the corporate, public and not-for-profit sectors inquiry* (9 February 2017) [27], [29] - [30], [53], [94], [141] - [142].
<http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections/Submissions>.

²² *Baker v Campbell* (1985) 49 ALR 385 at 409-410.

²³ *Attorney-General (NT) v Kearney* (1985) 158 CLR 500; *Players Pty Ltd (in liquidation) (receivers appointed) v Clone Pty Ltd* (2013) 115 SASR 547; *Commissioner of Taxation v Donoghue* [2015] FCAFC 183.