Chapter 3

Consistency across sectors

3.1 This chapter examines evidence put to the committee on the need for consistency of whistleblower protections in Australia. After summarising the whistleblower legislation that is currently in place, the fragmentation and areas of inconsistency in the legislation are then discussed. Suggestions put to the committee are then considered along with possible limitations including the need for flexibility in some areas and potential constitutional limitations.

Legislation currently in place that relates to whistleblowers

3.2 This section lists the legislation that relates to whistleblowers. While not exhaustive, the list below indicates there may be over 20 different statutes relating to whistleblower protection at a federal, state and territory level, as well as the protections that may apply to informants in the law enforcement sector. The following public sector legislation applies to whistleblowers in Australia:

- 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);
- *Public Interest Disclosures Act 2002* (TAS);
- *Protected Disclosure Act 2012* (VIC); and
- *Public Interest Disclosure Act 2003* (WA).[1]

3.3 At the Commonwealth level alone there are already six statutes covering private sector whistleblowing in Australia:

- *Banking Act 1959*;
- *Life Insurance Act 1995*;
- *Superannuation Industry (Supervision) Act 1993*;
- *Insurance Act 1973;*
- Part 9.4AAA of the Corporations Act; and
- Part 4A of the FWRO Act.[2]

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1 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

3.4 The Law Council also identified other legislation which may protect whistleblowing activities including:

- legislation directed at official corruption, such as:
  - *Independent Commission Against Corruption Act 1998* (NSW);
  - *Commissions of Inquiry Act 1950* (QLD);
  - *Corruption and Crime Commission Act 2003* (WA); and
- public administration legislation, such as:
  - *Public Service Act 1999* (Cth);
  - *Public Sector Management Act 1994* (ACT);
  - *Whistleblowers Protection Act 1994* (QLD); and
  - *State Service Act 2000* (TAS).[3]

Fragmentation of, and inconsistencies in, current legislation

3.5 Several submitters and witnesses drew the committee's attention to the fragmented and inconsistent nature of current whistleblower protection legislation in Australia. These submitters pointed, firstly, to the difficulties that can arise for both whistleblowers and businesses from a fragmented legislative approach, and secondly, to the potential benefits for both whistleblowers and businesses of a more coherent and consistent legislative approach.[4] For example, the AICD argued:

> The effect of this fragmentation makes the framework difficult for whistleblowers to access, interpret and rely on, and for businesses to understand their obligations.
>
> There is a significantly broader range of corporate misconduct that should be incorporated into one cohesive framework, thereby extending protections further and creating greater opportunity for information about corporate wrongdoing to come to light.[5]

2 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

3 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

4 See, for example, DLA Piper, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017); Australian Institute of Company Directors, *Submission 53*, pp. 4–5; Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 17; Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 60.

5 Australian Institute of Company Directors, *Submission 53*, p. 4.

3.6 Similarly, the Law Council argued that the current system failed to provide clarity and consistency for either whistleblowers or business, and failed to provide safety for whistleblowers.[6]

3.7 The Law Council also drew attention to inconsistencies in Australia's public and private sector whistleblower protections, including:

- the limited protections that appear to be available for tax whistleblowers;[7]
- the protections that typically apply at a state level to disclosures about wrongdoing by members of parliament, ministerial advisers or the judiciary that do not attract protections at a federal level;
- the protections that apply at a federal level to public servants who blow the whistle to the media that may incur liability to criminal or disciplinary actions in some states; and
- the lack of protections for disclosures about wrongdoing by an intelligence agency or intelligence operations.[8]

3.8 The Law Council also pointed to various shortcomings under current statutory protections for corporate whistleblowers enacted in 2004 and contained in the Corporations Act, such as the criteria that need to be met in order for a person to qualify for whistleblower protections, including in regard to who can make a disclosure and to whom:

> These criteria can give rise to significant gaps in protection; for example, anonymous whistleblowers are not protected, and disclosures made under the Corporations Act can only be made regarding corporate law, not tax or any other law.[9]

3.9 The committee also heard from regulators about issues arising from whistleblower protections currently being located in different Acts. For example, the Australia Competition and Consumer Commission (ACCC) informed the committee that it had concerns about the number of different whistleblower protections schemes at the Commonwealth level, noting that at least five schemes have been used by whistleblowers in recent years to bring issues to the ACCC.[10]

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6 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 17.

7 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

8 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017); Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws*, September 2015, pp. 7, 26–28.

9 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

10 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 60.

3.10 Mr Warren Day, Senior Executive Leader from ASIC noted that the whistleblower protection provisions under the Corporations Act, the FWRO Act and the proposed provisions for tax whistleblowers do not necessarily align. Yet, Mr Day pointed out that it is entirely possible that circumstances could arise where reportable conduct could relate to two or three separate pieces of legislation that had inconsistent criteria for disclosable conduct and related protections.[11]

Inconsistencies in whistleblowing processes and practice

3.11 Legislation provides the foundation for many other aspects including whistleblowing process and practice. As set out in Chapter 2 of this report, in May 2017 Professor A J Brown and his colleagues reported on their survey on the strength of organisational whistleblowing processes and procedures in Australia which was conducted as part of the *Whistling While They Work 2* research project. Table 3.5 summarises the results.

Table 3.1: Strength of whistleblowing processes by sector & jurisdiction / industry

Sector	Jurisdiction/Industry		Total score		Incident tracking	Support strategy	Risk assessment	Dedicated support	Remed-iation	
			Mean [a]	*Rank*	*Rank*	*Rank*	*Rank*	*Rank*	*Rank*	N
		All organisations	5.66							699
Public	Aust	Commonwealth government	6.95	***1***	*1*	*1*	*1*	*9*	*2*	26
Public	Aust	Queensland government	6.59	***2***	*2*	*4*	*6*	*1*	*4*	54
Public	Aust	New South Wales government	6.37	***3***	*=3*	*5*	*3*	*7*	*7*	86
Public	Aust	South Australia government	6.36	***4***	*=3*	*3*	*=4*	*4*	*8*	47
Public	Aust	Victoria government	6.32	***5***	*5*	*2*	*=4*	*2*	*12*	58
Public	Aust	Western Australia government	6.13	***6***	*6*	*6*	*7*	*=5*	*6*	61
Private	Aust	Finance & insurance	5.71	***7***	*=7*	*7*	*8*	*3*	*9*	53
Public	Aust	Australian Capital Territory government	5.67	***8***	*11*	*=16*	*2*	*12*	*1*	7
NFP	Aust	Health care & social assistance	5.21	***9***	*10*	*=8*	*9*	*11*	*11*	66
Private	Aust	Other private industry	5.11	***10***	*=7*	*=8*	*12*	*10*	*10*	28
Public	Aust	Northern Territory government	4.92	***11***	*=7*	*13*	*16*	*13*	*3*	12
Public	Aust	Tasmania government	4.70	***12***	*15*	*12*	*15*	*=5*	*16*	20
Private	Aust	Professional, technical, administrative etc services	4.67	***=13***	*=12*	*11*	*11*	*15*	*15*	13
NFP	Aust	Arts, recreation, accommodation, food & hospitality	4.67	***=13***	*=16*	*15*	*=13*	*8*	*13*	16
Private	Aust	Agriculture, forestry, fishing, mining & construction	4.44	***15***	*=12*	*14*	*10*	*16*	*17*	19
NFP	Aust	Other NFP industry	4.15	***16***	*=16*	*10*	*=13*	*18*	*18*	18
Private	Aust	Manufacturing, wholesale & retail trade	4.02	***17***	*=12*	*=16*	*17*	*17*	*14*	35
NFP	Aust	Education & training	3.89	***18***	*18*	*16*	*18*	*14*	*5*	15

[a] range (min-max score) = **.00 – 10.00.** NB: colours denote range/rank

Source: A J Brown and Sandra A Lawrence, *Strength of Organisational Whistleblowing processes – Analysis from Australia*, May 2017, p. ii.

3.12 The results of the survey identify a great deal of variation in the strength of whistleblowing processes across industry sectors as shown in Table 3.5. While many things will contribute to inconsistencies in whistleblowing processes across organisations, the task of achieving consistency is made much harder if the underlying legislation is fragmented and inconsistent.

11 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, pp. 60–61.

Achieving consistency across sectors

3.13 In December 2016, *Australia's First Open Government National Action Plan 2016–18* was finalised. The government's action plan includes a commitment to harmonise public and private whistleblower protections:

> Australia will ensure appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector.
>
> We will do this by improving whistle-blower protections for people who disclose information about tax misconduct to the Australian Taxation Office. We will also pursue reforms to whistle-blower protections in the corporate sector, with consultation on options to strengthen and harmonise these protections with those in the public sector.[12]

A single private sector Act

3.14 There was broad agreement amongst witnesses on the need for a single whistleblower protections Act to cover the private sector, with many submitters and witnesses noting that this would be of benefit to both potential whistleblowers and businesses.

3.15 The ACCC was in favour of a single, comprehensive national whistleblower scheme.[13] Likewise, ASIC also argued for a single piece of legislation that applies more universally.[14]

3.16 Professor A J Brown informed the committee that Australia had more scope to move to a single Act than some other countries:

> From a business regulatory point of view, we are in a position where we can do that, whereas the United States cannot because there is no federal employment law governing business in effect in the United States. However, obviously in Australia, especially since Work Choices and under the current Fair Work type regime that we enjoy, it means that the Commonwealth is in a position to legislate comprehensively for all corporations and all employers who are corporations and employees of corporations.[15]

3.17 Noting that whistleblower protections in the United States currently span 47 different pieces of legislation, Professor Brown pointed out that the limited progress on corporate sector whistleblowing protections in Australia to date meant

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12 Australian Government, *Australia's First Open Government National Action Plan 2016–18*, December 2016, p. 14.

13 Mr Marcus Bezzi, Executive General Manager Competition Enforcement, Australian Competition and Consumer Commission, *Committee Hansard*, 27 April 2017, p. 60.

14 Mr Warren Day, Senior Executive Leader, Assessment and Intelligence, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 69.

15 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, p. 20.

that Australia still has an opportunity to combine whistleblower protection legislation for the private sector into a single Act.[16]

3.18 Dr Vivienne Brand informed the committee that the current whistleblower protections in Part 9.4AAA of the Corporations Act are inadequate, and as a consequence, rarely used. Dr Brand therefore supported ASIC's suggestion of a single, essentially, private sector whistleblowing Act, noting that future reviews could always recommend the incorporation of additional elements in the legislation.[17]

3.19 Nevertheless, in terms of combining whistleblower protections for the private sector into a single Act, Dr Brand and Dr Sulette Lombard indicated that there would need to be amendments to a range of provisions to ensure synchronisation between the FWRO Act protections and the corporate regulatory regime. For example, in relation to persons who may make an application, the categories specifically mentioned in the FWRO Act whistleblower protections would not necessarily be appropriate in the context of corporate whistleblowing.[18]

3.20 Professor Brown set out a potential path for bringing the private (including tax) and not-for-profit sectors into a single piece of whistleblower protections legislation, based on the corporations power as well as other heads of power:

> (1) the main framework;
>
> (2) categories of disclosable wrongdoing;
>
> (3) investigative and regulatory agencies involved (including ASIC, the Australian Charities and Not-for-profits Commission, ACCC, APRA, Environment Australia, ROC, the Australian Taxation Office, AFP etc);
>
> (4) main protections and duties on employers/companies, including provisions for the making of regulations and codes of practice to assist employers;
>
> (5) provisions and procedures for bounty/penalty recovery, across all Commonwealth recovery avenues;
>
> (6) circumstances for third party/media disclosures;
>
> (7) relations with State agencies;
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> (8) establishing and empowering the oversight agency; and
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> (9) review and oversight.[19]

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16 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 23 February 2017, pp. 20–21.

17 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 55.

18 Dr Vivienne Brand and Dr Sulette Lombard, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017).

19 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Answers to questions on notice*, 18 and 24 May 2017 (Received 15 June 2017).

3.21 The AICD was of the view that a single standalone Act for the private sector would be of benefit to both potential whistleblowers and businesses. The AICD argued that a whistleblower cannot be expected to be an expert on the Corporations Act and that they should not have to consult a piece of legislation before they make a report. If a whistleblower is a witness of serious corporate wrongdoing, they should feel confident in making a disclosure to their company or to an appropriate regulator, without fear that it might fall outside the definition because of a technicality.[20]

3.22 DLA Piper noted that a single corporate sector Act would provide whistleblowers with increased certainty and ensure a more consistent approach to the handling and investigation of disclosures. DLA Piper suggested that it would be preferable to have all whistleblower protection laws, insofar as they relate to the corporate sector, within a single Act.[21]

3.23 The GIA also supported broadly based standalone legislation for whistleblower protections:

> The institute is very supportive of the provisions in the Public Interest Disclosure Act serving as a starting point for standalone whistleblowing legislation applying to the private sector, particularly the wide coverage of the misconduct it covers and the disclosers it applies to. Provisions affected by the Fair Work (Registered Organisations) Amendment Act in relation to whistleblowers should also be considered. The institute is very much in favour of standalone legislation rather than recommending multiple reforms to multiple pieces of legislation.[22]

3.24 The Australian Institute of Superannuation Trustees (AIST) supported the use of the principles in the *Breaking the Silence Report*[23] in new stand-alone legislation to replace whistleblower provisions across several private sector Acts and the charity sector. The AIST also informed the committee that:

> We would support one piece of national legislation that covers the field. It would certainly make it easier for whistleblowers to understand what their rights and obligations are. Also, as one piece of legislation is amended, others are not necessarily, so there could be differences in standards. As people move between industries, they may not be aware of what the possibilities are for making disclosures and what the different protections might be that are offered.[24]

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20 Mr Lucas Ryan, Senior Policy Advisor, Australian Institute of Company Directors, *Committee Hansard*, 28 April 2017, p. 27; Ms Louise Petschler, General Manager, Advocacy, AICD, *Committee Hansard*, 28 April 2017, p. 28.

21 DLA Piper, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017).

22 Ms Maureen McGrath, Chair, Legislation Review Committee, Governance Institute of Australia, *Committee Hansard*, 28 April 2017, p. 24.

23 Simon Wolfe, Mark Worth, Suelette Dreyfus, and A J Brown, *Breaking the Silence: Strengths and Weaknesses in G20 whistleblower protection laws*, October 2015.

24 Ms Eva Scheerlinck, Chief Executive Officer, Australian Institute of Superannuation Trustees, *Committee Hansard*, 27 April 2017, pp. 22–23.

3.25 The Media, Entertainment & Arts Alliance (MEAA) also supported consolidated public and private sector whistleblower legislation.[25]

3.26 Ms Serene Lillywhite, Chief Executive Officer of Transparency International argued that there should be flexibility within a private sector legislative scheme to account for differences in the size and nature of private sector organisations because the size of the corporation may impact on the level of protection that can be provided:

> So there needs to be some flexibility with regard to considering the level of protection that may be required and the process of reporting that may be required. That depends on the size and scope of the corporate entity and depends on where within the supply chain or the value chain of the business the alleged misconduct has taken place. All of those things may be important considerations in terms of designing a mechanism to ensure there is some flexibility to bring about a response that is appropriate for the misconduct that has been reported.[26]

3.27 Dr Simon Longstaff, Executive Director of the Ethics Centre also argued for some flexibility for the private sector and did not support legislation that would set out precise measures that corporations had to employ in addressing whistleblowing issues.[27]

A single Act for the public and private sectors

3.28 While there was general agreement amongst submitters and witnesses on the need to harmonise, as far as possible, whistleblower protection provisions across the public and private sectors, several witnesses pointed to the need to take account of the differences between public and private sector organisations in designing legislative approaches, as well as recognising areas where the current public sector provisions could be improved to meet best practice criteria.

3.29 By contrast, the IBACC informed the committee that in its view there should be one Commonwealth statute covering the field for private and not-for-profit sector whistleblower protections:

> The [IBACC] strongly believes that it is desirable for consistency and for transparency across the private and not-for-profit sectors that the whistleblower protection laws should be consistent and the same. It would, in the [IBACC]'s opinion, be detrimental to the success of any reforms if different protection regimes applied to different sectors in the country or in different industry sectors. That position is only likely to highlight a risk that a genuine whistleblower may, depending upon the conduct in question, fail

25 Mr Matthew Chesher, Director Legal and Policy, Media, Entertainment & Arts Alliance, *Committee Hansard*, 27 April 2017, p. 26.

26 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 3.

27 Dr Simon Longstaff AO, Executive Director, The Ethics Centre, *Committee Hansard*, 27 April 2017, p. 7.

> to be properly protected if he or she does not fit neatly into a narrow, industry or sector focused definition.[28]

3.30 Ms Rebecca Maslen-Stannage, Chair of the Corporations Committee, Law Council told the committee that the Law Council supported harmonised reforms to whistleblower protections. The Law Council saw that there would be value in combining public and private sector legislation into a single Act in order to maintain consistency between the two sectors:

> …the Law Council supports harmonised reforms to other existing whistleblower protections such as improved protections for public sector whistleblowers as well as those contained in the Corporations Act either by amendment to each relevant act or by introduction of overarching whistleblower legislation.[29]

3.31 Importantly, the Law Council also stressed the importance of harmonising federal, state, and territory laws:

> More broadly, the Law Council considers it is vital that any regime introduced is uniform across the board, with a view to having states and territories adopting a similar or parallel approach through collaboration with the Council of Australian Governments and that it be built on a sound foundation of the culture of corporate compliance, as is already promoted by relevant provisions of the criminal code. Perhaps to highlight the key points in our submission, the Law Council's view is that the laws should be uniform in structure and operation, applying across all contexts and sectors. The law should apply to any whistleblower without regard to narrow specifications of relationship to the entity in question.[30]

3.32 ASIC Commissioner, Mr John Price, told the committee that while ASIC considered it desirable to align whistleblowing approaches across the not-for-profit, public and corporate sectors, there might be some benefit in having slightly different approaches between the public and private sectors to account for the different nature of the organisations that operate in those sectors.[31]

3.33 Ms Lillywhite from Transparency International noted that in order to harmonise public and private sector whistleblower protections, it would be necessary to reform the public sector protections first:

> …we note that given improvements to that act are required to meet international best practice, and the need for greater flexibility in the implementation of protection across the private and not-for-profit sectors,

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28 International Bar Association Anti-Corruption Committee, *Answers to questions on notice*, 11 April 2017 (received 18 May 2017).

29 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

30 Ms Rebecca Maslen-Stannage, Chair, Corporations Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 28 April 2017, p. 15.

31 Mr John Price, Commissioner, Australian Securities and Investments Commission, *Committee Hansard*, 27 April 2017, p. 60.

> we believe this harmonisation objective is unlikely to be useful, at least in the short-term.[32]
>
> …the existing public sector protection is not at a high enough standard and is not robust enough. So we would not want to harmonise with something we believe is not yet at best practice standards.[33]

3.34 Transparency International also argued that the public sector should be subjected to higher levels of accountability and therefore there may need to be differences between the public and private sector acts:

> TI [Transparency International] Australia considers that as a general principle a one-size-fits-all approach designed to work for the public sector—even when that is brought up to a higher standard—should not necessarily be imposed on the private and not-for-profit sectors. It is our view that public officials have a heightened responsibility to uphold the principles of transparency and accountability.[34]

3.35 DLA Piper argued that public and private sector whistleblower legislative regimes should remain separate but be harmonised where appropriate:

> In principle, we are in favour of harmonisation of whistleblower provisions across the public, corporate and not-for-profit sectors. Harmonisation has the benefit of reducing confusion and increasing confidence for whistleblowers, these sectors and regulators…we consider that there are provisions of the ROC amendments which could be usefully adapted for the corporate sector.[35]

3.36 DLA Piper also suggested that the details of internal whistleblower programs could be left to guides developed and provided by regulators:

> We have suggested, instead, that it would be beneficial for ASIC, and, indeed, other regulators, to offer regulatory guidelines which offer best practice principles which internal programs could reflect. They could also be incentivised by an offering of a reduction in liability in circumstances where internal programs do in fact reflect such features, and perhaps other conditions as well.[36]

3.37 With respect to a single piece of whistleblower legislation for *both* the public and private sectors, Dr Lombard noted that corporate behaviour can be influenced in a number of ways through statutory disclosure requirements that would not necessarily operate in the same way in the public sector. She therefore expressed concern that a

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32 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, pp. 1–2.

33 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 4.

34 Ms Serene Lillywhite, Chief Executive Officer, Transparency International, *Committee Hansard*, 27 April 2017, p. 2.

35 DLA Piper, *Answers to questions on notice*, 27 April 2017 (received 18 May 2017).

36 Ms Rani John, Partner, DLA Piper Australia, *Committee Hansard*, 27 April 2017, p. 10.

single whistleblowing Act may struggle to cope with the differences between public and private sector entities:[37]

> It would be necessary for it to have to be framed in broader terms than you would be able to do for particular sectors. Once again, it comes down to the drafting and paying careful attention to what you actually want to achieve by the legislation. In my view, it is all about making sure that people with information come forward. If you adopt that as a central focus and build the regulation around that, hopefully it could succeed.[38]

3.38 Likewise, Dr Brand informed the committee that she considered it would not be appropriate to try to combine public and private sector whistleblower protections into a single Act:

> As nice as it would be to have an office of the whistleblower and one act, and we are done, I do not think it works that way. The corporations power will get you a fair part of the way with the big money, with the corporations which do the things that cost the economy a lot of money. And there will be other powers that might get you there with other things like the fair work amendments. It probably will not be a beautiful neat system but then our regulatory system for corporations already is not and for most things is not.[39]

3.39 Similarly, Professor Brown indicated that it is really important to articulate the principles that should be common across the public and private sectors, while noting that areas of difference may include thresholds and requirements for procedures that would be imposed on the private sector. Professor Brown also argued for:

> …a high level of consistency and with both of them being clear on when they are relying on the Fair Work Act and the existing employment and civil remedies for enforcement of the legislation. I think there is a real need for the government to look at making sure that its reform of the Public Interest Disclosure Act and the new legislation are as consistent as possible, but I do suspect that they are going to still end up being two pieces of legislation.[40]

3.40 The AFP was of the view that while consistency across sectors is desirable, whistleblowing in a public sector context raises separate issues requiring specific consideration. The AFP suggested that any harmonisation of whistleblower protections at a Commonwealth level should take into account the relationships

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37 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, pp. 54–55.

38 Dr Sulette Lombard, Academic, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 55.

39 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 53.

40 Professor A J Brown, Program Leader, Public Integrity and Anti-Corruption, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 31 May 2017, p. 4.

between regulatory and criminal misconduct, and the need to support interagency partnerships so wrongdoing can be addressed in the most appropriate manner.[41]

3.41 The AFP also informed the committee that the Criminal Code applies to the public, private and not-for-profit sectors equally:

> From a law enforcement investigative perspective, the AFP is not concerned with the type of sector in which wrongdoing occurs, or whether it is committed by an individual, corporation or not-for-profit body. The AFP is only concerned as to the type of wrongdoing which has been committed: that is, whether it involves a breach of Commonwealth criminal law. As noted above, the AFP's priorities relate to complex, transnational, serious and organised crime, and include serious financial crime.[42]

Constitutional limitations

3.42 One of the issues that arose during the inquiry concerned the extent of the Commonwealth's power to legislate for whistleblower protections across the private sector.

3.43 The Parliamentary Library summarised potential constitutional limitations on the Federal Parliament in a research note on whistleblowing in Australia:

> The Federal Parliament lacks a general power to implement comprehensive whistleblower legislation covering the public and private sectors. However, the Federal Parliament has used its constitutional powers to provide for whistleblower protection mechanisms in specific areas. For example, it used its corporations power (paragraph 51(xx) of the Constitution) to legislate a framework to encourage whistleblowing in relation to suspected breaches of the Corporations Act. This legislation applies to any 'constitutional corporation', that is, any incorporated body.
>
> To reach unincorporated associations including charities, which otherwise are under state jurisdiction, the Commonwealth could, for example, use the taxation power (paragraph 51(ii) of the Constitution). With respect to charities, the government could prescribe that tax exemptions may only be available if internal whistleblower protection standards such as AS 8004 are established, or if the charity became part of an external whistleblowing scheme.[43]

3.44 The Parliamentary Library research note suggested that comprehensive and fully uniform legislation would require either cooperation between the states to enact uniform legislation or the referral of power from the states to the Commonwealth under paragraph 51(xxxvii) of the Constitution.[44]

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41 Australian Federal Police, *Submission 43*, pp. 4–5.

42 Australian Federal Police, *Submission 43*, p. 6.

43 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability … but above all, the truth*, Research Note, February 1995, p. 2.

44 Parliamentary Library, *Whistleblowing in Australia – transparency, accountability … but above all, the truth*, Research Note, February 1995, p. 2.

3.45 In 1994 the Senate Select Committee on Public Interest Whistleblowing encouraged the states, territories and industry to work with the Commonwealth to address areas of Commonwealth constitutional limitations in relation to private sector whistleblowing, including consideration of an industry ombudsman.[45]

3.46 The 1994 Select Committee received information from the Attorney-General's Department that the Commonwealth Parliament could legislate to protect whistleblowers under the following heads of power in the *Commonwealth of Australia Constitution Act 1900*:

> Section 51(xx), the corporations power, would support a law which empowered a Commonwealth body to investigate and report on the activities of a foreign, trading or financial corporation;
>
> Section 61, the executive power, would support a law in respect of whistleblowing which relates to breaches of a Commonwealth law, and Section 51(xx), the express incidental power, would support laws giving the Commonwealth body the requisite investigative and reporting powers.[46]

3.47 Dr Brand advocated using the corporations power because the vast majority of Australian businesses are run through a corporation. Dr Brand also suggested that:

> You might then go via other heads of power for any gaps that are left. But if you divide whistleblowing regulation into private versus public—and we would say put not-for-profit somewhere in the corporate power basket but that does get messy because of the lack of constitutional support—then you have pretty much taken care of it, I think.[47]

3.48 The Law Council argued that whistleblower legislation should be as broad as possible in its coverage and:

- if gaps arise due to constitutional limitations, there may need to be complementary laws across the Commonwealth, states and territories; and
- the legislation should be uniform and the approach across the Commonwealth, states and territories should be parallel.[48]

3.49 The Law Council provided further suggestions for establishing an appropriate constitutional basis for whistleblower protections:

> Generally the constitutional basis for whistleblower laws will be the head of power that underpins the principle legislation, on the basis that such laws are reasonable incidental to the primary law. The Commonwealth can go

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45 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, p. xvi.

46 Senate Select Committee on Public Interest Disclosures, *In the Public Interest*, August 1994, pp. 133–134.

47 Dr Vivienne Brand, Flinders Law School, Flinders University, *Committee Hansard*, 27 April 2017, p. 53.

48 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

> into the legislation that provides the relevant offence in respect of which the whistle in 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.[49]

Committee view

3.50 The vast majority of the evidence to the committee strongly supported greater consistency and harmonisation across public and private sector whistleblower protection legislation, including combining all private and not-for-profit sector whistleblower protection legislation into a single Act.

3.51 While some submitters argued that the public sector should be subject to a greater degree of accountability, the committee notes that following the privatisation of services previously provided by the public sector, as well as the greater use of outsourcing, the private sector now plays a significant role in providing public services and these privately-provided services should have appropriate accountability.

3.52 To this end, the committee considers that there is much to be gained from consistent and harmonised whistleblower legislation, including:

- keeping the process simple for whistleblowers and avoiding whistleblowers being repeatedly referred from one body to another;
- ensuring that businesses which provide public services directly or through contracts to public sector bodies are not subjected to inconsistent legislation;
- reducing regulatory compliance burdens on business; and
- making it easier and more efficient for the body of legislation to be maintained into the future.

3.53 The weight of evidence to this inquiry did not favour combining public and private whistleblower protections into a single Act. The committee is not averse to further exploration of appropriate ways to combine public and private sector legislation into a single Act. On balance, however, the committee considers that the Commonwealth public sector whistleblower protections should be retained in a separate single Act at the present juncture.

3.54 There was broad support for a single Act to capture all private sector whistleblower protections, with submitters and witnesses pointing out that this would not only provide a much clearer framework for whistleblowers and businesses alike, but would also reduce regulatory compliance burdens on business.

3.55 In this regard, the committee notes that, in a previous Parliament, it endorsed the creation of a single piece of whistleblower legislation for the private sector that would be consistent with public sector whistleblower protection schemes:

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49 Law Council of Australia, *Answers to questions on notice*, 28 April 2017 (received 18 May 2017).

> Indeed the longer term solution may be found in the development of a more comprehensive body of whistleblower protection law that would constitute a distinct and separate piece of legislation standing outside the Corporations Act and consistent with the public interest disclosure legislation enacted in the various states.[50]

3.56 The committee therefore reiterates its continuing support for a single Act to combine all private sector whistleblower protections.

3.57 Furthermore, the committee notes the evidence presented in this chapter indicates that it may be constitutionally possible for a single Act to combine all private sector whistleblower protection, even if multiple heads of power are needed.

3.58 While the committee considers it preferable to have separate whistleblower protection legislation for the public and private sectors, the committee recommends that the government explore mechanisms to ensure the ongoing consistency between the public and private sectors, including examining the potential to maintain both public and private sector whistleblower protections in a single Act. In this regard, the committee notes the example of the *Privacy Act 1988*, which sets out the Australian Privacy Principles that apply to Australian government agencies, all private sector and not-for-profit organisations with an annual turnover of more than $3 million, all private health service providers and some small businesses.[51]

3.59 The committee considers that many of the best practice criteria for whistleblower protections could be aligned across the public and private sectors, while for other criteria the principles could be the same, but the details may need to differ. The committee has set out some suggestions for each best practice criterion in Table 3.2 below.

Recommendation 3.1

3.60 The committee recommends that:

- **Commonwealth public sector whistleblowing legislation remain in a single updated Act, redrafted in parallel with the private sector Act;**
- **Commonwealth private sector whistleblowing legislation (including tax) be brought together into a single Act;**
- **The Government examine options (including the approach taken in the *Privacy Act 1988*) for ensuring ongoing alignment between the public and private sector whistleblowing protections, potentially including both in a single Act; and**
- **The Commonwealth, states and territories harmonise whistleblowing legislation across Australia.**

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50 Parliamentary Joint Committee on Corporations and Financial Services, *CLERP 9 Bill 2003*, 4 June 2004, p. xxii.

51 Office of the Australian Information Commissioner, *Australian Privacy Principles*, https://www.oaic.gov.au/privacy-law/privacy-act/australian-privacy-principles, accessed 24 May 2017).

3.61 The following provides an explanation for reading table 3.2:

- Column 1 sets out the best practice criteria for whistleblowing legislation;
- Column 2 indicates the best practice criteria where the amended public sector legislation and the new private sector legislation could be aligned; and
- Column 3 indicates the particular aspects of the best practice criteria where the new private sector legislation would differ from that in the public sector.

Table 3.2: Potential differences similarities between new public and private sector legislation.

Best Practice Criteria for Whistleblowing Legislation		***Could be the same***	***Private sector differences***
1	Broad coverage of organisations	No	Privacy Act definitions
2	Broad definition of reportable wrongdoing	No	Limit to a breach of a Commonwealth or state or territory law.
3	Broad definition of whistleblowers	No	Take account of different organisational structures and regulatory arrangements.
4	Range of internal / regulatory reporting channels	No	Take account of different organisational structures and regulatory arrangements.
5	External reporting channels (third party / public)	Yes	
6	Thresholds for protection	Yes	
7	Provision and protections for anonymous reporting	Yes	
8	Confidentiality protected	Yes	
9	Internal disclosure procedures required	No	Requirements are appropriate for the private sector.
10	Broad protections against retaliation	Yes	
11	Comprehensive remedies for retaliation	Yes	
12	Sanctions for retaliators	Yes	
13	Oversight authority	Yes	Different oversight authority for public and private sectors.
14	Transparent use of legislation	Yes	Likely to require different reporting arrangements involving regulators.