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4 September 2023

Senator Deborah O'Neill
Chair, Parliamentary Joint Committee on
Corporations & Financial Services
Parliament House
Canberra ACT 2600

Dear Senator O'Neill

Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry

Thank you for the Committee's invitations to make a submission to this Inquiry. Please find **enclosed** a joint submission from Griffith University's Centre for Governance & Public Policy, Human Rights Law Centre and Transparency International Australia.

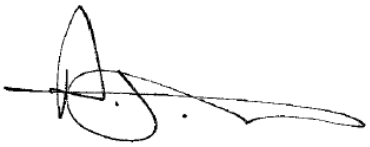
While we have a general interest in all terms of reference being addressed by the Committee, our joint submission is especially directed to terms of reference 2(i) and 3(d) (whistleblower protections, policies and pathways).

We are happy for the submission to be published in full. We would also be pleased to appear before the Committee if this would assist.

If invited, we would be joined by a member of Transparency International Australia's national whistleblowing advisory group, **Mr Dennis Gentilin**, a former banking sector whistleblower who also has direct experience of consulting firm integrity systems through his previous employment with Deloitte. Currently a senior risk officer at Unisuper, he is also the author of *The Origins of Ethical Failures*.

We can be contacted at a.j.brown@griffith.edu.au or kieran.pender@hrlc.org.au.

Yours sincerely



Professor A J Brown AM
Professor of Public Policy & Law | Griffith University
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Kieran Pender
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Enclosed:

Submission

Appendix 1 – *Protecting Australia's Whistleblowers: The Federal Roadmap*, A J Brown & Kieran Pender (Griffith University, Human Rights Law Centre and Transparency International Australia, June 2023)

Appendix 2 – *The Cost of Courage: Fixing Australia's Whistleblower Protections*, Kieran Pender (Human Rights Law Centre, August 2023)

Appendix 3 – Letter to the Prime Minister, 'Whistleblower Protection Reforms Across the Commonwealth' (Transparency International Australia, Griffith University & Human Rights Law Centre, 13 June 2023).

Loopholes, Gaps and Inconsistencies: Whistleblower Protections at the Big Four and Beyond

Submission to the Parliamentary Joint Committee on Corporations & Financial Services' inquiry into Ethics and Professional Accountability: Structural Challenges in the Audit, Assurance and Consultancy Industry

Centre for Governance and Public Policy, Griffith University
Human Rights Law Centre
Transparency International Australia

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About the Authors

Dr A J Brown AM is Professor of Public Policy and Law at Griffith University, and co-leader of the Centre for Governance and Public Policy's integrity, leadership and public trust program. Formerly a senior investigator with the Commonwealth Ombudsman and Associate to Justice Tony Fitzgerald AC KC, he has led seven Australian Research Council projects into public integrity and governance reform including three into public interest whistleblowing, including the Whistling While They Work 1 and 2 projects. He is a Fellow of the Australian Academy of Law, past President of the Australian Political Studies Association (2017-18), and was a member of the Commonwealth Ministerial Expert Advisory Panel on Whistleblower Protection (2017-2019). In 2023, he was made a Member of the Order of Australia for services to the law and public policy, particularly through whistleblower protection. Professor Brown is also an elected member of both the Australian and global boards of Transparency International.

Kieran Pender is a senior lawyer at the Human Rights Law Centre, where he works to protect whistleblowers through the Whistleblower Project. Kieran is also an honorary lecturer at the ANU College of Law. He is globally-recognised for his expertise in whistleblower protections, with prior roles at the International Bar Association in London and consulting to the CEELI Institute in Prague.

Centre for Governance and Public Policy
Griffith University's Centre for Governance and Public Policy engages in world-class research into the capacity, accountability and sustainability of the public service and government, providing insights into improved management structures and making a tangible mark on standards and institutions of governance in Australia and beyond.

Human Rights Law Centre
The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia. Our work includes supporting whistleblowers, who are crucial to exposing human rights abuses and government and corporate wrongdoing, and to ensuring accountability.

Transparency International Australia
Transparency International Australia is the national chapter of Transparency International, a global coalition against corruption operating in over 100 countries. Each chapter is independent and unique, and together we aspire to a unified vision: a world free of corruption. Our mission is to tackle corruption by shining a light on the illegal practices and unfair laws that weaken our democracy, using our evidence-based advocacy to build a better system.

Summary

This submission addresses the need for comprehensive reform of Commonwealth whistleblower protection legislation, if the issues raised by recent allegations of misconduct in the Australian operations of major accounting, audit, and consultancy firms are to be effectively addressed. Our submission pays particular attention to two aspects of the terms of reference for this inquiry:

2. *The extent to which governance obligations applying to a professional services firm may vary depending on the structure adopted, such as a partnership, a company, a trust, or other structure. Consideration of any gaps and international best practice in areas such as:*
   i. access to whistle-blower protections; and

3. *Mechanisms available to governments, government departments, statutory authorities, professional standards bodies, regulators, and non-government clients to monitor and sanction misconduct and poor performance, including any gaps and overlaps across service and entity types for:*
   d. whistle-blower policies and established pathways to report.

Effective whistleblower protections, policies and reporting pathways are central to the regulatory and cultural settings that will ensure misconduct in the operations of consulting firms is prevented, detected and addressed. Unfortunately, at present Australia's whistleblowing framework is failing employees and organisations in this sector just as much, if not more than others throughout the private, public and not-for-profit sectors. As a result, too many prospective whistleblowers are staying silent, and too many who do speak up about wrongdoing are receiving insufficient support and protection.

Section 1 outlines the context to the current focus on the need for stronger whistleblower protections. We also attach two recent reports which provide an overview of the reforms currently needed to Australia's federal whistleblowing laws (**Appendices 1 and 2**). These draw heavily on the unimplemented recommendations of your Committee's landmark 2017 report on whistleblower protections in the corporate, public and not-for-profit sectors, also touching directly on the above questions.

Section 2 confirms there continue to be significant gaps and inconsistencies in whistleblower protection for employees of consulting firms or other contractors, wherever these contractors are partnerships or individuals, compared to bodies corporate or other financial licensees or trustees covered by Australia's main private sector whistleblower protection regime under the *Corporations Act 2001* (Cth) (Part 9.4AAA).

Section 3 confirms there are also significant uncertainties, gaps and inconsistencies in the whistleblower protections for consulting firm employees provided by the public sector the *Public Interest Disclosure Act 2013,* when such firms are Commonwealth service providers.

Section 4 highlights the continuing need for comprehensive reform of federal whistleblowing legislation for both the public and private sector – together – if such gaps and inconsistencies are to be addressed. In our submission this is not only imperative for the effective implementation of realistic, accessible whistleblower protections in the consulting sector, but, consistently with prior recommendations of the Committee, is also best pursued in a manner that supports simplified, consistent, and enhanced protections across all sectors, rather than adding to the complexity and avoidable regulatory burdens arising from the current fragmented, duplicatory and inconsistent landscape of federal whistleblower protections.

We also attach (**Appendix 3**) an additional summary of the Commonwealth's various whistleblowing laws, including known problems with each, which we were pleased to provide to the Government recently via a letter to the Prime Minister and other relevant ministers following passage of initial, welcome improvements to the *Public Interest Disclosure Act* 2013.

In our submission, the time is right for a clear process for ensuring comprehensive, consistent, timely reform is achieved across this debilitatingly complex and counterproductive legislative landscape. The need for enhanced whistleblowing processes and protections in the consulting sector simply reinforces this need.

This is especially the case given that, in addition to further reforms which the Government has already promised to the *Public Interest Disclosure Act 2013* for the public sector, but which are yet to be exposed for public discussion, the whistleblowing provisions of the *Corporations Act 2001* and *Taxation Administration Act 1953* must also undergo a statutorily required review commencing within the next 12 months.

We have received welcome advice from the Government that this private sector review will "be informed" by proposed further reforms to public sector whistleblowing. However, we note this is not necessarily the same as achieving a consistent, simplified, enhanced protection regime across the current legislative landscape, and where necessary replacing that landscape, as previously recommended by the Committee.

Accordingly, we suggest the following as important recommendations for the Committee to consider, if the accountability and governance deficits surrounding the major consulting firms are to be addressed effectively, in a holistic rather than further piecemeal way. This is needed if Australia is to achieve realistic implementation of the types of enhanced whistleblower protection arrangements which the public have a right to expect across all our major institutions.

Recommendations

1. That the Government and Parliament:

   - take a comprehensive, uniform approach to the enhanced regulation and protection of whistleblowing in consulting firms and other entities, consistent with the Committee's 2017 recommendation, by establishing a single Whistleblower Protection Act covering all non-government entities and employers and entities under Commonwealth legislation or subject to Commonwealth regulation, in preference to multiple, overlapping and inconsistent pieces of legislation for different industries and sectors; and
   - include that objective in stakeholder consultations and terms of reference for all reviews of existing legislation (including the 2024 statutory reviews of whistleblowing provisions in the *Corporations Act* and *Taxation Administration Act*).

2. That the Government and Parliament expand the application of the *Public Interest Disclosure Act 2013*, when reformed, to:

   - require Commonwealth contractors and non-government service providers to have their own whistleblowing policies, pathways and protections meeting consistent minimum standards, and
   - extend the legislative protections to those internal disclosures,

   unless the entity is required to have a whistleblowing policy and is subject to legislated whistleblower protections of no lesser standard under the proposed private sector Whistleblower Protection Act (or, pending that Act, equivalent existing legislation).

3. That the Committee renew its 2017 recommendations for an integrated, comprehensive approach to federal whistleblower protection – including in respect of consulting firms – by noting and endorsing:

   - all 12 areas of reform set out in *Protecting Australia's Whistleblowers: The Federal Roadmap* (Appendix 1), and
   - the opportunity presented by the Government's proposed discussion paper on a whistleblower protection authority for charting the establishment of an authority to enforce protections in and across all sectors (public, private and not-for-profit), and not simply the public sector.

1. Context

Recent revelations of wrongdoing in the audit, assurance and consultancy sector underscore the need to protect and empower employees to speak up about wrongdoing. Effective whistleblower protections, policies and reporting pathways are central to the regulatory and cultural settings that will ensure misconduct in the operations of major accounting, audit, and consultancy firms is prevented, detected and addressed.

However, achieving such outcomes requires comprehensive reform of Commonwealth whistleblower protection legislation.

In November 2022, we published *Protecting Australia's Whistleblowers: The Federal Roadmap* which provided an overview of the shortcomings of Australian whistleblowing law and the need for robust, comprehensive reform (**Appendix 1** – updated in June 2023 to reflect legislative developments). More recently, the Human Rights Law Centre published a review of whistleblowing cases under Australian law which highlighted the many shortcomings of the current patchwork regime: *The Cost of Courage: Fixing Australia's Whistleblower Protections* (**Appendix 2**).

These reports drew heavily on the unimplemented recommendations of the Committee's landmark November 2017 report on whistleblower protections, *Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors.*

As detailed below, the Committee's present inquiry highlights the important decisions that face the Commonwealth parliament in considering how to ensure effective whistleblower protection not simply in the consulting sector, but:

- across the wider private sector of which consulting firms form a part; and
- in a manner that achieves simplified, consistent, seamless protections between the public and private sectors, especially given the role of consultants and other contractors as crucial suppliers of services to and on behalf of the Commonwealth Government.

These decisions are now pressing, not only due to the immediate questions before this inquiry, but because of the widely acknowledged need for comprehensive reform across both public and private sector laws. The submissions below reinforce the reasons laid out in Appendices 1 and 2, and the Committee's 2017 report, for why it is vital that reforms to enhance ethics and accountability in the consulting sector are not pursued 'piecemeal' but as part of a program addressing protection responsibilities across all forms of organisations.

In this regard, the Committee will be aware that the previous and current Governments have already committed publicly to reform of the public sector *Public Interest Disclosure Act 2013,* with the present Government having embarked on initial reforms in 2023. In addition, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* achieved many overdue improvements to whistleblowing provisions applying to the corporate and financial sectors – most notably the *Corporations Act 2001* (Part 9.4AAA) and *Taxation Administration Act 1953* (Part IVD). Those reforms:

(i) achieved some consolidation and simplification in whistleblowing laws, by replacing separate, out-of-date protections in banking, financial services and superannuation with a central, common regime in the *Corporations Act*;

(ii) broadened the scope of 'eligible whistleblowers' to include not only officers and employees of corporate, financial service and tax entities, but also contractors, unpaid

workers, suppliers, employees of suppliers and close relatives of key individuals in those entities;

(iii) substantially broadened the scope of wrongdoing about which protected disclosures may be made;

(iv) removed and replaced the 'good faith' requirement for disclosures of corporate, financial services and tax wrongdoing;

(v) removed preclusions on anonymous disclosures;

(vi) upgraded criminal penalties for victimisation against whistleblowers

(vii) introduced civil penalty orders for victimisation;

(viii) extended legal costs rules in favour of whistleblowers seeking civil remedies, e.g. compensation, for detriment suffered;

(ix) widened the scope of civil remedies, including provisions for exemplary damages, and an additional basis for employer liability where detriment is caused as a result of an organisational failure to prevent detrimental acts or omissions;

(x) reversed the onus of proof for civil remedies, in favour of whistleblowers; and

(xi) introduced enforceable requirements for larger companies to have detailed internal whistleblowing policies, including for support and protection of whistleblowers.

However, while that reform at least partially implemented about half of the 35 recommendations of your Committee's 2017 report, it did not achieve many other key reforms including:

(i) Comprehensive coverage for all private and not-for-profit sector employees who reveal wrongdoing under Commonwealth regulation, beyond corporate, financial service and tax entities – i.e. including partnerships and other entities;

(ii) Providing business with a single, simple Whistleblower Protection Act covering all relevant Commonwealth regulation, rather than multiple legislative requirements (in fact, despite consolidating financial services provisions in the *Corporations Act*, the 2019 reforms simultaneously created a duplicate regime for tax whistleblowing contrary to the Committee's recommendation 3.1);

(iii) Clear coverage of wrongdoing, and roles for other Commonwealth regulatory and law enforcement agencies beyond the Treasury portfolio;

(iv) Other improvements to the accessibility of protections across the public, private and not-for-profit sectors as detailed in Appendix 1, including evidentiary rules and access to remedial avenues beyond the courts;

(v) A whistleblowing protection authority with full powers and duties to implement the regime, including to enforce protections and ensure compensation; and

(vi) Effective resourcing for this implementation, including the Committee's recommended option of a reward-based scheme.

Instead, the private sector whistleblowing regime was left only half-reformed, while the public sector regime – enacted in 2013 and reviewed in 2016 – remain entirely unamended. It was only in June this year that an initial phase of reform commenced to the *Public Interest Disclosure Act*, implementing some but not all of the recommendations from the 2016 review or the Committee's

2017 report. The more substantial overhaul recommended by the Committee remained, and remains, unfinished business.

It is in this context that the allegations of wrongdoing in the audit, assurance and consultancy sector arose, and that the Committee's inquiry is considering the adequacy of whistleblowing laws. The best way to prevent significant wrongdoing of the nature giving rise to this inquiry, and the best way to ensure when it happens it is swiftly identified and addressed, is to protect and empower those who wish to speak up. However, in short, the current regime is inadequate. It is especially inadequate for the consulting sector, as seen from the loopholes and limitations outlined below. However, it is also inadequate for the economy as a whole, including for the reasons of inconsistent, confusing, overlapping regimes and the absence of an oversight body. This has important implications for the approach that should be taken to reform.

2. Protections in the Audit, Assurance and Consultancy Industry

Even after the first tranche of private sector whistleblowing reforms in 2019, there continue to be significant gaps and inconsistencies in whistleblower protection for employees of consulting firms or other contractors, wherever these contractors are partnerships or individuals. This makes it even more difficult for whistleblowers in the sector to speak up safely and lawfully about wrongdoing, and underscores the need for reform.

This is in contrast to those employed by bodies corporate or other financial licensees or trustees covered by Australia's main private sector whistleblower protection regime under the *Corporations Act 2001* (Part 9.4AAA).

As is well known, the "Big Four" accounting firms in Australia (KPMG, Deloitte, E&Y and PwC) are partnerships in their basic legal form, even if most employees or workers are engaged by service companies owned or controlled (directly or indirectly) by the partnership. Many other professional firms, including accounting and law firms, follow similar structures.

However, as a result, whistleblower protections in such firms are substantially weakened by the problem that in general, for the purposes of Part 9.4AAA of the *Corporations Act 2001*:

- a partnership is not a "regulated entity" (as required by s 1317AAA)
- a partner is not an "eligible recipient" for protected disclosures of wrongdoing (s 1317AAC), despite being an owner and typically an important leader (unless they happen to also be a director or officer of a service company that employs or instructs the employee blowing the whistle);
- a partner may also not themselves be a "eligible whistleblower" (ss 1317AA) and capable of benefiting from the protections, if they disclose wrongdoing, other than in possibly in a very indirect sense.

Under s 1317AAA, an eligible whistleblower of a company or corporation is someone who is or has been an officer, employee, an individual who supplies services or goods to the regulated entity, or an individual prescribed by the regulations of the regulated entity.[1]

There is no reference to partners in a partnership in this section. Moreover, a partner cannot be an officer of a regulated entity, as currently provided for, because limited partners cannot take part in

[1] *Corporations Act 2001* (Cth) s 1317AAA (a), (b) and (i).

the management of the business of a limited partnership.[2] Section 9(b)(ii) of the *Corporations Act* states an officer as being "a person… who has the capacity to affect significantly the corporation's financial standing"; and the High Court has applied a broad interpretation of 'officers' in *ASIC v King* [2020] HCA 4 (where Mr King was found to be an officer despite not holding a director or associated position). However, if the partner is not taking a significant part in the day to day management of the regulated entity, such as to impact the company's financial standing, they could not be considered 'officers' under statute or case law.

Nor does it appear that partners in a limited liability partnership (**LLP**) arrangement can access whistleblower protections as employees of a regulated entity, because they cannot be considered 'employees'. In the British case of *Cowell v Quilter Goodison Co Ltd*, it was held that partners cannot be employees, as "[h]e would be both workman and employer, which is a legal impossibility"[3] and "[t]he very concept of employment presupposes as a matter of sociological fact a hierarchical relationship whereby the worker is to some extent subordinate to the employer . . . Where the relationship is one of partners in a joint venture, that characteristic is absent".[4] This case has been applied in Australian courts.[5]

Under s 1317AAA (c), an eligible whistleblower can also be somebody who has supplied goods or services to the regulated entity (either paid or unpaid). This is intended to capture contractors, business advisors, accountants, interns or volunteer workers, in addition to direct employees and officers.

Arguably, depending on the partnership agreement, this section might capture the services provided by a partner of the LLP to the entity. This possibility is somewhat strengthened by a UK case, *Clyde & Co LLP and another v Bates van Winkelhof* [2014] UKSC 32, where an LLP partner was considered a 'worker' for the purposes of whistleblower protections against retaliation in the *Employment Rights Act 1996* (UK). Ms Bates van Winkelhof was an LLP partner of a firm and was terminated from the partnership agreement after she reported money laundering. It was 'common ground' that Ms van Winkelhof worked under a contract personally to perform work or services for the LLP.[6] She worked under a contract and could not perform her services to anyone other than the LLP and was an integral part of their business.[7]

However, this case relies on the term 'worker' as the operative term in that legislation,[8] not employee nor 'supplier of services' as defined in the *Corporations Act*. As a result, it is at best highly uncertain as to whether the legislation could stretch to protect a partner in this way, even if the partnership was somehow a regulated entity.

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[2] Partnership Act 1892 (NSW) s 67(1).

[3] *Cowell v Quilter Goodison Co Ltd* [1989] IRLR 392 at 63.

[4] Ibid at 64.

[5] *Jackson v P/T Constructions WA Pty Ltd* [2015] FCCA 1014 at 29;*Scott v Cmr of Taxation* [2002] AATA 778 ; (2002) 50 ATR 1235 at [16] per Member McCabe.

[6] *Clyde & Co LLP and another (Respondents) v Bates van Winkelhof* (Appellant) [2014] UKSC 32 at 16.

[7] Ibid at 40.

[8] In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)— (a)a contract of employment, or (b)any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly. (s 230(3) of the *Employment Rights Act 1996* (UK)

By contrast, the matching whistleblower protections in the *Taxation Administration Act 1953* (Cth) – introduced at the same time in 2019 – *do* apply to partnerships and partners. This is because LLP partnerships are regulated i.e. tax entities under those provisions, as they are required to pay tax and have their own TFN, with obligations to the Australian Taxation Office. Under s 14ZZU of the *Taxation Administration Act* (**TAA**), an eligible whistleblower is an officer of the entity,[9] an employee of the entity or an associate (within the meaning of section 318 of the Income Tax Assessment Act 1936 (**ITA**)) of the primary entity.[10] Unlike under the *Corporations Act*, this means that:

- partners of an entity (and trustees of a trust of an entity) are classified as 'associates' and are eligible whistleblowers.[11]
- partners of a company or trustees of the trust of a company are eligible whistleblowers.[12]
- partners of a partnership (both natural person or company) are also considered eligible whistleblowers.[13]
- partners in a partnership are also considered eligible recipients to receive disclosures under the s 4(a) of the TAA.

However, the whistleblowing requirements and protections in the TAA only apply to wrongdoing or other information relating to **taxation matters** – not the much wider scope of wrongdoing about which protected disclosures may be made under the primary scheme in the *Corporations Act*.

This means that in some of the matters that have given rise to the Committee's inquiry, the TAA protections *might* arguably apply. But this is highly dependent on the specific nature of the matter, and its link to either a breach of taxation legislation or something that an eligible whistleblower reasonably regards as being information which should be drawn to the attention of the Australian Taxation Office.

It is also worth noting that in Chapter 7 of the *Corporations Act*, a partnership is taken to constitute a regulated 'person' in relation to the provisions and liabilities relating to responsibility and liability under the financial markets provisions.[14] However, Part 9.4AAA does not then also reach to include partners or partnerships in any similar way.

In short, 'partners are the people most likely to become aware of wrongdoing in LLPs but risk being at the greatest disadvantage with respect to protection'.[15] They are also crucial individuals who need to be able to receive disclosures from employees, which will then trigger protections for others. Clearly, the logic of the expanded definitions of 'eligible whistleblower' and 'recipient' as created in 2019 should equally capture such people, given that the intention was that:

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[9] A company; a partnership; a person in a particular capacity of trustee; a body politic; a corporation sole; any other person.

[10] Non exhaustive list of eligible whistleblowers.

[11] *Income Tax Assessment Act 1936* (Cth) subsections 318 (1)(b) and (d).

[12] *Income Tax Assessment Act 1936* (Cth) subsections 318 (2)(b) and (d).

[13] *Income Tax Assessment Act 1936* (Cth) subsections 318 (4).

[14] *Corporations Act 2001* (Cth) s 761F(1).

[15] Joanna Blackburn of Mishcon de Reya, acting in C*lyde & Co LLP and another (Respondents) v Bates van Winkelhof* (2014) accessed here: Whistleblowing judgment: partners are 'workers' | News | Law Gazette.

A qualifying disclosure can be made by an individual who is or has been in a relationship, such as employee, with the regulated entity about which the disclosure is made.[16]

The term 'relationship' was referenced as being such that it 'may place them in a position to identify wrongdoing by that entity'.[17] These relationships are 'intended to cover individuals likely to have information about misconduct or other disclosable matters in relation to the entity'[18] wherever that information is 'reliable'.[19]

This result affirms why the Committee was correct, in 2017, to recommend a more expansive approach which sought to bring all forms of Commonwealth-regulated entities and employers under a common Whistleblower Protection Act (replacing the *Corporations Act*, *Taxation Administration Act* and other provisions alike). Despite some consolidation in the 2019, the system remains fragmented, complex, and confusing, with at best dangerous uncertainties and at worst, clear gaps in terms of protections for whistleblowers in the vitally important categories of entities being examined by the Committee. Indeed, these problems extend beyond the major consulting firms, to many other types of important entities that despite the *Corporations Act* provisions, remain outside the scope of private or not-for-profit whistleblower protections.

3. Protections for Public Sector Consultants

Similarly, there are significant albeit different gaps and inconsistencies when considering whether officers and employees of consulting firms are covered by public sector whistleblower protections, as contracted service providers to the Commonwealth Government.

Section 69 of the *Public Interest Disclosure Act*, Items 15 and 16, provide that a 'public official' whose disclosures may trigger the Act do include any individual who as:

15 *'a contracted service provider for a Commonwealth contract', or*

16 *(a) 'an officer or employee of a contracted service provider for a Commonwealth contract' who (b) 'provides services for the purposes (whether direct or indirect) of the Commonwealth contract.'*

Section 30(3) provides that a 'Commonwealth contract' is a contract to which the Commonwealth or a prescribed authority is a party, under which goods or services are provided:

- *'to' the Commonwealth or a prescribed authority; or*
- *'for or on behalf of' the Commonwealth or prescribed authority, in connection with the performance of its functions or the exercise of its powers.*

Section 30(2)(b) extends the application of the Act to subcontractors or anyone responsible under a subcontract for the provision of goods or services for the purposes (whether direct or indirect) of the Commonwealth contract.

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[16] *Explanatory Memorandum Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (legislation.gov.au) at 2.16.

[17] Ibid 2.39.

[18] Ibid 2.40.

[19] Ibid 2.42.

This means that the officers and employees of *any* consultants may be covered – to some degree – by the whistleblowing pathways and protections available to all other Commonwealth government employees, irrespective of whether the consulting firm is a body corporate, partnership or individual.

However, there are two immediate major differences, and potential gaps, in how the public sector whistleblower protections apply to Commonwealth consultants:

1. *What wrongdoing is covered*

   Under section 30(1), the wrongdoing ('disclosable conduct') about which a consultant's officer or employee may blow the whistle must be 'conduct… in connection with entering into, or giving effect to, the contract'.

   In other words, it is at best unclear whether all relevant wrongdoing would be included – for example, conduct undertaken by the consultant in the course of other, non-contracted business, such as use of confidential information gained in the course of a Commonwealth contract, for the provision of other advisory or consulting services to a non-government client. It is arguable that such use of information is not conduct undertaken 'in connection with entering into, or giving effect to, the contract', since it lies outside the purpose of the contract.

2. *Who can the whistle be blown to*

   Under sections 26 and 34, the processes and protections of the Act are triggered when a public official discloses wrongdoing to an 'authorised internal recipient' – which essentially means an 'authorised officer' of either:

   - 'the agency' to whom the disclosed wrongdoing relates, or
   - the Ombudsman, if the discloser believes on reasonable grounds that it would be appropriate for the disclosure to be investigated by the Ombudsman, or
   - any other 'investigative agency' (if prescribed by the PID rules under the Act) which has power to investigate the disclosure, under other legislation.

   However, for officers or employees of consultants, this means that protections are only triggered once they make a disclosure to the Commonwealth agency who is the party to, or responsible for, the consultancy contract (or to an independent agency like the Ombudsman).

   This means the protections are not triggered if an employee blows the whistle internally, in their consulting firm – being the first and often the only way, as shown by research, that the vast majority of employees blow the whistle. Employees of consultants and contractors working on public contracts are thus left in a very different situation to normal public officials, directly employed by the Commonwealth, who obviously trigger the protections as soon as they blow the whistle within their own agency, not only if they make a disclosure to the Ombudsman or other relevant (prescribed) investigative agencies.

These differences leave a major gap in protection for persons in the consulting sector, even when their work supposedly is covered by the public sector whistleblowing regime. For corporate contractors, covered by the *Corporations Act* whistleblowing regime, the required internal whistleblowing policies, pathways and protections will apply to employees who blow the whistle on any wrongdoing provided it is occurring within the contract or relates to their own company. However, for non-corporate entities providing services to or for the Commonwealth, such as partnerships or individuals (section 2 above), the public sector regime does not currently fill the gaps left by the non-application of the *Corporations Act* whistleblowing regime.

4. Way Forward

As is evident from the above, Australia's whistleblower protection framework is not presently fit for purpose. The loopholes, inconsistencies and shortcomings of the framework in the context of the audit, assurance and consultancy sector underscore wider challenges. The consequence is that those who may wish to speak up about wrongdoing face uncertainty and risk in relation to their often courageous conduct, despite the continued proliferation of federal whistleblowing laws.

As previously recognised by the Committee's recommendations in this area, whistleblower protections should be simple and accessible and apply to all workers – with minimum differences and inconsistencies between sectors, including so that managers and employees can clearly understand and implement their common, fundamental obligations and have confidence in the application of the protections, irrespective of which sector they are technically employed within, or if, as is often the case, they move between sectors or work across sectors.

Problems in the consulting sector simply highlight the extent of shortcoming across the entire federal regime. Moreover, the analysis in the previous sections is restricted to questions of what protection regimes apply to the sector. It does not go into the next layer of problems addressed by Appendix 1, that even if one or more regimes *do* apply, key thresholds and protections are different and even inconsistent between sectors. For insights into the adverse impacts and regulatory burdens this creates for private and not-for-profit entities, the Committee may wish to note a recent client consultation on navigating Australia's multiple regimes, conducted by YourCall, Australia's largest independent whistleblowing service provider.

Importantly, the challenge of reform also does not relate only to the application or reach of protections contained in the *Corporations Act* and *Public Interest Disclosure Act*, as reviewed in the preceding sections. As set out in **Appendix 3**, there are at least 10 different Commonwealth laws which contain some form of whistleblower protections – many of them out of date and inconsistent with the latest iteration of protections found in the *Corporations Act*.

As set out in Appendix 3, the passage of initial, welcome but largely technical improvements to the *Public Interest Disclosure Act* 2013, in June this year, provides the present Government and its many relevant Ministers with a historic opportunity to progress comprehensive, consistent, timely reform across this debilitatingly complex and counterproductive legislative landscape. The need for enhanced whistleblowing protections in the consulting sector simply reinforces opportunity. So does the fact that, the whistleblowing provisions of the *Corporations Act 2001* and *Taxation Administration Act 1953* must undergo a statutorily required review commencing within the next 12 months.

In response to the letter at Appendix 3, we have received welcome advice that this private sector review will "be informed" by the Government's proposed second stage of reform to the federal public sector whistleblowing regime. That second stage, which is also yet to commence, will "include public consultation on:

- "further reforms to address the underlying complexity of the scheme and provide effective and accessible protections to public sector whistleblowers, and
- "a discussion paper on whether there is a need to establish a whistleblower protection authority or commissioner".[20]

[20] Hon Mark Dreyfus MP KC, Attorney-General, Second Reading Speech, *Public Interest Disclosure Amendment (Review) Bill 2022*, Hansard, House of Representatives, 30 November 2022.

However, we note that enabling one stage of reform to inform the next, is not necessarily the same as achieving a consistent, simplified, enhanced protection regime across the legislative landscape, as previously recommended by the Committee – including where necessary, replacing parts of that landscape altogether, rather than separately reviewing each of its bits.

Accordingly, we suggest the following recommendations for the Committee to consider, if the accountability and governance deficits surrounding the major consulting firms are to be addressed in a holistic rather than piecemeal way. The audit, assurance and consultancy sector demonstrates the pressing need for comprehensive, whole-of-economy reform to ensure whistleblowers in *all* workplaces have access to robust protections. This is sorely needed if Australia is to achieve realistic implementation of the types of enhanced whistleblower protection arrangements which the public have a right to expect across all our major institutions.

Especially with the statutory reviews of the *Corporations Act* and *Taxation Administration Act 1953* protections fast approaching, we encourage the Committee to recommend the Government grasp the opportunity to pursue a simplified, uniform approach to whistleblower protections across the sectors, culminating in a single Whistleblower Protection Act for the private and not-for-profit sectors, and a whistleblower protection authority operating across all sectors, including the public sector. No other approach is likely to prove effective in ensuring consistency and removing gaps or loopholes for the consulting, or indeed any, sector.

Recommendation 1:

That the Government and Parliament:

- **take a comprehensive, uniform approach to the enhanced regulation and protection of whistleblowing in consulting firms and other entities, consistent with the Committee's 2017 recommendation, by establishing a single Whistleblower Protection Act covering all non-government entities and employers and entities under Commonwealth legislation or subject to Commonwealth regulation, in preference to multiple, overlapping and inconsistent pieces of legislation for different industries and sectors; and**
- **include that stated objective in stakeholder consultation and drafting of the terms of reference for all reviews of existing legislation (including the 2024 statutory reviews of whistleblowing provisions in the *Corporations Act* and *Taxation Administration Act*).**

As noted in section 3, the intersection between public sector and private sector whistleblowing is also insufficiently addressed by the *PID Act*. Private sector contractors on government contracts, such as those in the audit, assurance and consultancy sector, do not necessarily benefit from cognate protections – even in speaking up about wrongdoing related to the contract to the contracting government agency. There is also the added confusion for entities if or when they become subject to both regimes, about how to manage the differences and inconsistencies in obligations and protections between the regimes.

As part of the second stage of *PID Act* reform, it is therefore important to close the gaps but also manage any duplication, by requiring contractors to be subject to further minimum standards for whistleblower protections, except where already subject to comparable obligations under existing whistleblowing laws (and, in the future, the proposed Whistleblower Protection Act).

Recommendation 2:

That the Government and Parliament expand the application of the *Public Interest Disclosure Act 2013,* when reformed, to:

- **require Commonwealth contractors and non-government service providers to have their own whistleblowing policies, pathways and protections meeting consistent minimum standards, and**
- **extend the legislative protections to those internal disclosures,**

unless the entity is required to have a whistleblowing policy and is subject to legislated whistleblower protections of no lesser standard under the proposed private sector Whistleblower Protection Act (or, pending that Act, equivalent existing legislation).

Finally, much work remains to fully address the significant recommendations made by this Committee in its 2017 inquiry. Many of those outstanding recommendations were included and updated where necessary in our recent report, *Protecting Australia's Whistleblowers: The Federal Roadmap* (Appendix 1). We encourage the Committee to reiterate and update its recommendations for reform, with reference to all 12 areas of action identified there, to ensure an effective, comprehensive approach to Australia's federal whistleblowing framework.

Among those areas of reform, the top priority remains the establishment of a whistleblower protection authority to oversee and enforce whistleblower protection laws and support Australian whistleblowers. As already noted, the Government has so far committed to a discussion paper regarding the need for a whistleblower protection authority or commissioner, in respect of the public sector. While this is an important opportunity, it is already clear that this need is not confined to just one sector and that reform should proceed accordingly.

Recommendation 3:

That the Committee renew its 2017 recommendations for an integrated, comprehensive approach to federal whistleblower protection – including in respect of consulting firms – by noting and endorsing:

- **all 12 areas of reform set out in *Protecting Australia's Whistleblowers: The Federal Roadmap* (Appendix 1), and**
- **the opportunity presented by the Government's proposed discussion paper on a whistleblower protection authority for charting the establishment of an authority to enforce protections in and across all sectors (public, private and not-for-profit), and not simply the public sector.**
