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Submission to the Inquiry into Whistleblower Protection Authority Bill (No 2) 2025

Senate Legal and
Constitutional Affairs
Committee



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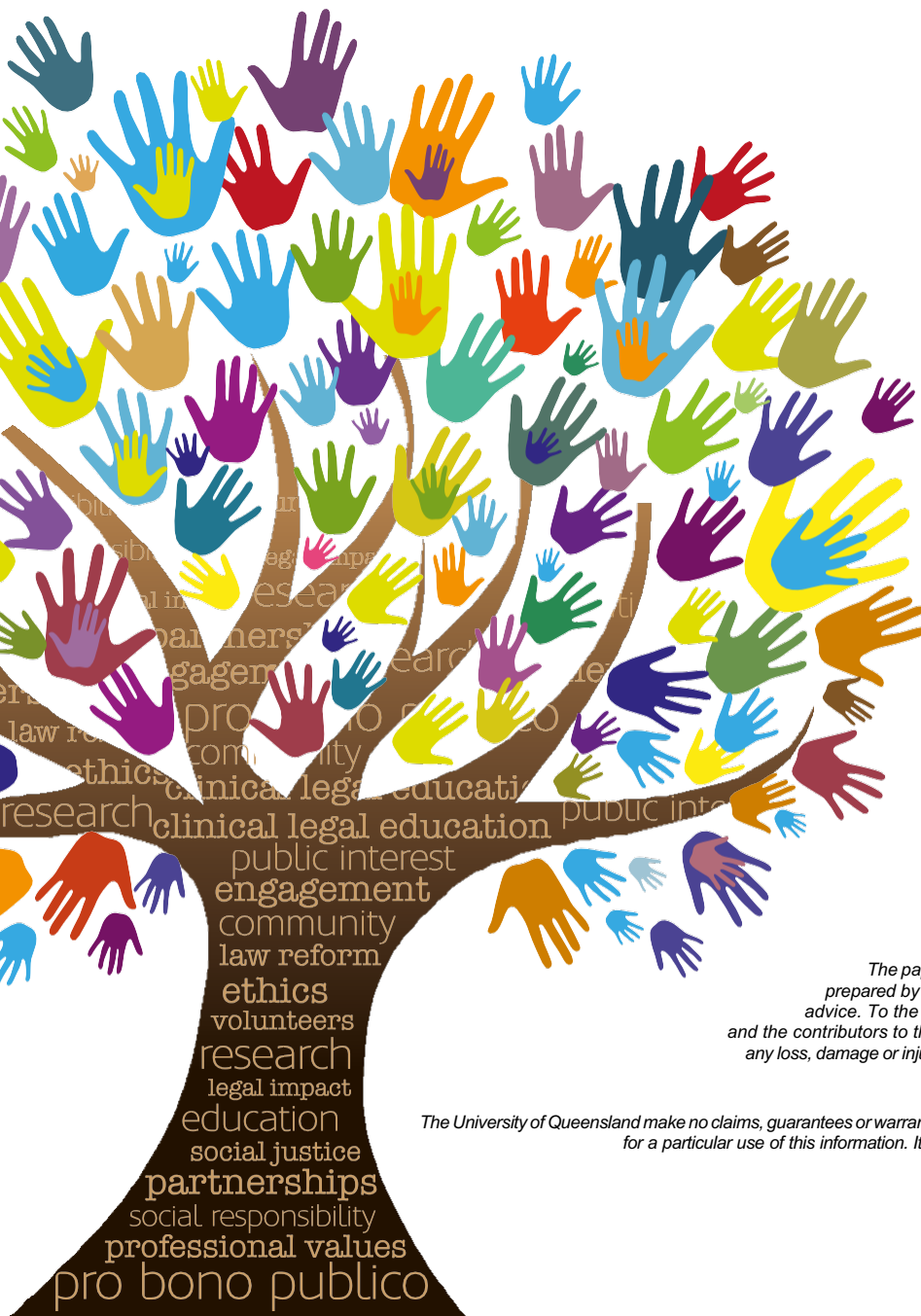
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Overview

The establishment of a federal Whistleblower Protection Authority (**WPA**) is a long overdue and vital reform. Whistleblowing is one of the most effective tools for detecting misconduct by providing early warnings of corruption and abuse that often evade formal oversight. Yet despite more than three decades of legislative development, Australia's whistleblower protection frameworks remain fragmented, under-resourced, and largely ineffective in practice.

This submission supports the enactment of the Whistleblower Protection Authority Bill 2025 (No 2) (**WPA Bill**) and outlines three structural reforms needed to ensure the WPA is meaningfully protective.

Whistleblowers play a critical role in safeguarding Australia's democracy. They expose wrongdoing that undermines public trust, from white-collar crime to systemic failures in public services. Yet in doing so, they face considerable personal risks. Research indicates that over half of public interest whistleblowers experience serious detriment – including harassment, job loss, or damage to mental health – with only 6% of those affected receiving any compensation for employment, personal, or health impacts.¹ Alarming, there has only been one case in which an Australian whistleblower has received court-ordered compensation.²

The proposed WPA represents a structural solution to these failings. It would function as a dedicated statutory authority with powers to advise and support whistleblowers, investigate reprisals, and ensure meaningful remedies. Such a body is not without precedent: international jurisdictions including the United States³ and European Union⁴ have all introduced independent authorities to oversee whistleblowing systems. These have been critical in transforming laws that look strong on paper into rights that work in practice.

This submission identifies three key areas for legislative strengthening to complement the WPA's establishment:

1. Mandatory Internal Reporting Mechanisms

While many organisations already operate internal channels, the quality, accessibility, and oversight of these mechanisms remain highly variable. The WPA should be empowered to mandate and monitor internal reporting channels for entities with 50 or more staff, similar to EU Directive 2019/1937.⁴

2. Onus of Proof

Currently, and under the proposed WPA Bill, whistleblowers must still prove their disclosure caused any reprisal, despite clear power imbalances. A 2019 corporate

¹ A J Brown and Jane Olsen, 'How Well Have Australian Whistleblowing Laws Worked to Date? Repercussions and Remedies for Australasian Whistleblowers' (Paper presented at the 3rd Australian National Whistleblowing Symposium, 11 November 2021), cited in A J Brown and Kieran Pender, *Protecting Australia's Whistleblowers: The Federal Roadmap* (Griffith University, Human Rights Law Centre and Transparency International Australia, 2022) 18–19.

² Kieran Pender, *The Cost of Courage: Fixing Australia's Whistleblower Protections* (Human Rights Law Centre, 2023) 6 - 9 (reviewing 78 judgments across 70 cases under 23 whistleblower laws over three decades).

³ *Whistleblower Protection Act of 1989*, 5 USC § 1211 (US). The Office of Special Counsel is an independent federal agency responsible for investigating whistleblower retaliation complaints from US public servants. *Directive (EU) 2019/1937 on the Protection of Persons Who Report Breaches of Union Law*, arts 10–14. These provisions require all EU Member States to establish competent authorities that receive, assess, and follow up on protected disclosures.

⁴ *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law* [2019] OJ C 305/17.



law reform reversed this burden once a 'reasonable possibility' of reprisal is shown.⁵ The WPA should extend this reverse onus across all sectors to ensure consistent protection.

3. Compensation Scheme

Whistleblowers often suffer lasting financial and emotional harm, yet Australia lacks a fair and effective compensation pathway. Existing legal remedies are limited, inaccessible, and rarely used.⁶ The WPA should administer a flexible, publicly funded scheme – similar to state-based victims of crime models⁷ – that ensures timely redress for both public and private whistleblowers.

This submission supports the WPA Bill and urges the Committee to ensure the WPA is not merely an administrative body, but a robust statutory authority capable of making whistleblower protections real. Protecting those who speak up is not just a matter of accountability - it is a democratic imperative.

Recommendations

1. Mandatory Internal Reporting Mechanisms

Whistleblower protections are reactive to issues of non-compliance and inept or corrupt governance. Systemic change ought to be implemented that fosters strong internal culture and governance to prevent the issues that lead to employees blowing the whistle. Empirical studies show that the majority of whistleblowers tend to report internally, within the organisation in which they work.⁸ Internal reporting is the best method to get information to the persons who can contribute to the early and effective resolution of risks to the public interest.

There ought to be a statutory mandate requiring corporations, government bodies and charities to implement an internal reporting mechanism. Australia can be guided by European jurisdictions on this issue that have adopted the *European Union Directive on the protection of persons who report breaches of Union law*.⁹ There should be either an internal person, department designated by the employer or an external third party authorised by employers for the purposes of internal reporting. Section 1317AI of the *Corporations Act 2001* (Cth) (**Corporations Act**) require public and proprietary companies to establish whistleblower policies that set out information such as available protections and the process of investigative disclosures. This recommendation, in effect, would extend the requirements set out in s 1317AI of the *Corporations Act* to include smaller corporations and charities. For practicality, the mandate for internal mechanisms should be imposed on corporations or charities that have more than 50 employees or volunteers. The nature and scope of internal reporting channels ought to be indicative of the extent of risk inherent to an organisation's activities.¹⁰

This recommendation should be implemented amongst broader reform to enshrine a proactive

⁵ *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*.

⁶ *Corporations Act 2001* (Cth), Pt 9.4AAA.

⁷ *Victims of Crime Assistance Act 2009* (Qld).

⁸ *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law* [2019] OJ C 305/17; Peter Roberts, A. J. Brown and Jane Olsen, *Whistling While They Work: A good-practice guide for managing internal reporting of wrongdoing in public sector organisations* (ANU Press, 2011).

⁹ *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law* [2019] OJ C 305/17.

¹⁰ *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law* [2019] OJ C 305/17.



response to addressing issues of public and corporate interest in a timely and effective manner. Further, this recommendation should not limit a person's ability to report to the WPA.

2. Onus of Proof

Historically, the onus of proof has fallen on whistleblowers to establish that their public interest disclosure acted as the substantial cause for the alleged reprisal action by their employer.¹¹ Given the asymmetry of power between employers and employees, these actions often fail as whistleblowers lack access to the evidence required to successfully prove that the reprisal actions were caused by their disclosure.¹³ Ultimately, this prevents whistleblowers from obtaining just outcomes after suffering harassment, discrimination and even termination due to their decision to blow the whistle.¹²

Recent law reform for corporate whistleblowing protections have addressed this significant barrier. Pt 9.4AAA of the Corporations Act¹³ significantly updated the corporate whistleblowing regime by introducing a reverse onus of proof in relation to victimisation claims in s 1317AD(1A).¹⁴ If a plaintiff demonstrates a 'reasonable possibility' that reprisal actions occurred in response to their public interest disclosure, the company bears the legal and evidential burden to discharge the onus.¹⁵ This is a significant step towards an equal balance of power between corporations and whistleblowers, as these evidential and legal burdens may incentivise companies to embed further internal whistleblower protections to justify their actions.¹⁶

It is imperative that this reverse onus measure is made consistent across all industries in Australia. Whistleblowers are increasingly significant in protecting vulnerable populations and preventing further wrongdoing across several industries. In cases where reprisal action is taken shortly after a public interest disclosure, only the company or employer is fully aware of the nexus between the reprisal action and the disclosure. Hence, they should carry the burden of proof in justifying their actions. **The WPA Bill should establish a uniform reverse onus of proof mechanism, so all whistleblowers can seek relief for reprisal actions they are subject to due to their disclosure.**

3. Compensation Scheme

Rather than encouraging truth telling, Australian society punishes whistleblowing disclosures by villainising the individual rather than the wrongdoing they expose.¹⁷ As individuals are ostracised for blowing the whistle, wrongdoing within organisations may go unchecked.¹⁸ **To address this issue, Australia should introduce a whistleblower compensation scheme to reduce the personal cost of speaking out and prevent unbridled misconduct.**¹⁹

There is clear evidence that individuals are often placed in a significantly worse financial and emotional position after exposing wrongdoing. The Harvard Business School study '*Effects on whistleblowing and consequences for whistleblowers*' revealed that out of 1600 reported whistleblowing cases, nearly all whistleblowers experienced significant drops in income post

¹¹ Pender (n 2) 7.

¹² Ibid. Identified as the most common barrier to successful claims.

¹³ As introduced by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* (Cth).

¹⁴ *Corporations Act 2001* (Cth) s 1317AD(1A).

¹⁵ David A. Chaikin, 'Blowing the Whistle: A Critical Analysis of the Treasury Laws Amendment (Enhancing Whistleblowing Protections) Act (Cth) 2019' (2019) 47(3) *Australian Business Law Review* 162, 175.

¹⁶ Ibid.

¹⁷ Human Rights Law Centre, 'Former Military Lawyer David McBride Faces Prosecution for Exposing Alleged War Crimes' (Web Page, 14 May 2024) <https://www.hrlc.org.au/news/2024-05-14-mcbride-prosecuted>

¹⁸ Ibid.

¹⁹ Aiysha Dey, Jonas Heese, and Gerardo Pérez Cavazos, 'Cash-for-Information Whistleblower Programs: Effects on Whistleblowing and Consequences for Whistleblowers.' (2021) 59(5) *Journal of Accounting Research* 1689.



disclosure. Disclosers may also face legal battles which result in large emotional and financial costs.²⁰ Overall, the risk of these large personal costs has created a culture where the moral and ethical obligations of the individual are overshadowed by the threat of severe financial and personal consequences.²¹

A compensation scheme would aim to shift the narrative, ensuring that whistleblowers are protected by providing tangible benefits for exposing misconduct. Jurisdictions like the US have successfully implemented reward-based systems, demonstrating substantial positive impacts on accountability culture and regulatory enforcement.²² The main system that the US uses is a percentage-based rewards scheme where the whistleblowers receive 15-30% of recoveries resulting from their claims.²³ Not only have these schemes been proven to offset some of the personal costs of whistleblowing, their enactment saw a drop in baseless claims and an increase in corporate accountability.²⁴

It is suggested that Australia incorporate a scheme with compensatory, rather than rewards-based goals.²⁵ This is because the idea of "rewarding" whistleblowers poses distinct normative concerns. Whistleblowing ought to be encouraged on the basis of it being the socially and morally correct action, rather than on the possibility of being rewarded significant monetary sums. Australia should strive for corporate cultures in which social good is emphasised and wrongdoing minimised, and this ought to be the basis for whistleblower disclosures. The introduction of a rewards system sits uncomfortably with this overarching goal.²⁶ Nonetheless, there is a clear need for whistleblowers to be compensated for the loss they suffer when delivering public benefit.

As flagged above, Australia ostensibly provides whistleblower protections in the corporate sphere via Pt 9.4AAA of the Corporations Act (if disclosures were made after the commencement date on 1 July 2019).²⁷ Under this scheme, the whistleblower's identity should be kept confidential,²⁸ there should be protection from civil, criminal and administrative liability,²⁹ a prohibition of victimisation,³⁰ and compensation if the whistleblower suffers detriment.³¹ Though legislation does provide for payment of compensation, it is only available through court order, and is only payable by an individual (who may not necessarily be an employer). In effect, compensation is costly and slow to obtain as it requires a court process, and may only yield low levels of quantum payable by individuals. The lacuna of public cases where whistleblowers have been compensated under Pt 9.4AAA is concerning given the detriment and harms whistleblowers suffer.

Our recommendation is the establishment of a whistleblower compensation scheme, akin to the victims of crime compensation schemes that exist at a state level (e.g. *Victims of Crime Assistance Act 2009* (Qld)). This scheme should establish a general pool of funds available to compensate both public and private whistleblowers, with the level of compensation to be assessed by the WPA. Factors in assessing that compensation may include those already set out in s 1317AE, including the level of loss, damage or injury suffered by the whistleblower as a result of detrimental conduct. The flexibility

²⁰ For further discussion see Vivienne Brand, 'The Ethics of Corporate Whistleblowing Rewards' in Sulette Lombard, Vivienne Brand and Janet Austin (eds), *Corporate Whistleblowing Regulation: Theory, Practice, and Design* (Springer, 2020) 37, 40–50.

²¹ EQS Integrity Line, 'A Closer Look at The Ethics Behind Whistleblower Rewards' (Web Page, 2024) <https://www.integrityline.com/expertise/blog/ethics-behind-whistleblower-rewards/>.

²² Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019 (Cth).

²³ Brand (n 20).

²⁴ Ibid.

²⁵ Jack Thrower, 'Whistleblowing While You Work: Using Rewards for Whistleblowing to Uncover White-Collar Crime' (Discussion Paper, Australia Institute, October 2024).

²⁶ Brand (n 20).

²⁷ *Watson v Greenwoods & Herbert Smith Freehills Pty Ltd* (2023) 413 ALR 227; [2023] FCAFC 132.

²⁸ *Corporations Act 2001* (Cth), s 1317AAE(1).

²⁹ Ibid s 1317AB.

³⁰ Ibid s 1317AC.

³¹ Ibid ss 1317AD, 1317AE.



of this scheme as an administrative process engaged in by the WPA would allow for more effective and efficient compensation, thereby remedying many of the adverse consequences of whistleblowing.

Conclusion

Whistleblowers are vital to the integrity of Australia's public and private institutions, yet the law continues to fail them. The WPA Bill offers a long-overdue opportunity to establish a dedicated body with the mandate and powers needed to make protections real in practice. To ensure the WPA is not merely symbolic, this submission recommends three structural reforms:

1. Mandatory internal reporting mechanisms
2. A uniform reverse onus of proof
3. A fair, accessible compensations scheme

Together, these changes will not only protect individuals who speak up but strengthen Australia's democracy through transparency, accountability, and the rule of law.





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