

Engagement Team
Legislative Reform
Department of Health and Aged Care
Commonwealth of Australia

21 September 2023

A New Aged Care Act: the foundations
Consultation paper No. 1 – Disclosure protections for
whistleblowers

Dear Colleagues,

Thank you for the Department's invitation to provide feedback in relation to its Consultation Paper, *A New Aged Care Act: the foundations Consultation paper No. 1*. Please find **enclosed** a joint submission from Human Rights Law Centre, Griffith University's Centre for Governance & Public Policy and Transparency International Australia. Our joint submission is directed to the issue of the Department's proposed approach to disclosure protections for whistleblowers.

We are happy for the submission to be published. We would be pleased to provide more information if this would assist.

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

Kind regards,



Kieran Pender
Senior Lawyer
Human Rights Law Centre



Professor A J Brown, Griffith University
Boardmember
Transparency International Australia



Jade Tyrrell
Senior Lawyer (Seconded)
Human Rights Law Centre

Ensuring a Consistent and Efficient Approach: Protecting Whistleblowers in Aged Care and Beyond

Submission to the Australian Government
Department of Health and Aged Care
Consultation on ‘Foundations of a New Aged
Care Act’

Human Rights Law Centre

Centre for Governance and Public Policy, Griffith University

Transparency International Australia

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Authors

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.

Dr A J Brown AM is 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.

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.

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.

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 joint submission addresses the need for comprehensive, consistent, and holistic reform of Commonwealth whistleblower protection legislation; an approach which should be embedded into the foundations of the Bill for a new Aged Care Act.

This submission pays particular attention to the relevant proposals in the Department of Health and Aged Care's Consultation Paper No. 1, '*A New Aged Care Act: the foundations*' (**Consultation Paper**) concerning disclosure protections for whistleblowers and the following consultation questions posed:

21. What challenges could there be with the proposed whistleblower framework, and do you have any proposed solutions?

22. What other barriers are there to people disclosing information about what they observe in the aged care system, and how can these best be overcome?

Unfortunately, at present, Australia's whistleblowing framework is failing those who speak up about wrongdoing. The out-of-date, substandard whistleblower protections in the current *Aged Care Act 1997* (Cth) (**Aged Care Act**) amplify these failures in the aged care sector. Prospective whistleblowers are also deterred from raising their concerns or making complaints due to fears of retribution or reprisal.¹ This in turn has a 'chilling effect' on potential complaints about providers in the sector, which militates against the interests of older persons, aged care workers, and the public interest.

Effective disclosure protections for whistleblowers in legislation, as well as policies and reporting pathways, are central to the regulatory and cultural settings that will ensure misconduct in the operations of aged care is prevented, detected and addressed. Accordingly, we strongly support the need for reform.

However, we equally strongly recommend that the best way to protect whistleblowers in the sector is to include the sector in a reformed, state-of-the-art whistleblower protection law which covers all employers and entities under Commonwealth legislation or subject to Commonwealth regulation, rather than separate legislation just for the aged care sector.

The existing and proposed Aged Care Act whistleblowing provisions exemplify why this approach is needed.

The Commonwealth Parliament overhauled whistleblower protections in 2013 for the public sector (**Public Interest Disclosure Act**) and in 2019 for the bulk of the private and not-for-profit sectors (through reform of the *Corporations Act 2001* (Cth) (**Corporations Act**)). Yet, in 2021, the current protections for whistleblowers in the Aged Care Act were re-legislated despite being already out of date, substantially narrower, manifestly inadequate, and – as with other areas – riddled with gaps. Some of those manifestly inadequate provisions, such as prohibitions on anonymous disclosures and 'good faith' requirements, are also now proposed by the Department to be preserved in its replacement regime, rather than abolished in line with other Commonwealth whistleblowing laws.

¹ Royal Commission into Aged Care Quality and Safety (**Royal Commission**) Final Report, [14.4.8], 520.

In 2017, the Parliamentary Joint Committee on Corporations & Financial Services (**Parliamentary Joint Committee**) conducted a comprehensive inquiry which recommended a single Whistleblower Protection Act in preference to multiple, duplicatory and but different and potentially inconsistent pieces of legislation for different industries and sectors, such as the Aged Care Act provisions.² We strongly endorse this approach, as it is the key to:

- Preventing the current inconsistencies and piecemeal approach to reform from being replicated in the future;
- Ensuring whistleblowers get equal protection irrespective of what wrongdoing they are blowing the whistle on, especially when it may involve more than one type of wrongdoing (e.g. both breaches of patient care, and fraud);
- Simplifying the regulatory burden on entities which are subject to multiple regimes (e.g. any company which provides aged care services is already subject to whistleblower protection provisions in the Corporations Act, which cover disclosures about “any improper state of affairs” in the company); and
- Ensuring that protections are effective and up-to-date (a statutory review of the Corporations Act provisions is due to commence in 2024, which should lead to further improvements to Commonwealth whistleblower protections... which means that a separate aged care whistleblowing regime will either once again fall behind, or need to be further updated).

Effective whistleblower protections require a consistent, harmonised, and holistic regulatory approach.

Section 1 outlines the context for the need for stronger whistleblower protections, including in the aged care sector. We annex two recent reports which provide an overview of the reforms currently needed to Australia’s federal whistleblowing laws:

- *Protecting Australia’s Whistleblowers: The Federal Roadmap* (updated as at June 2023) (**Appendix 1**)
- *The Cost of Courage: Fixing Australia’s Whistleblower Protections* (September 2023) (**Appendix 2**).

Section 2 considers the challenges with the proposed whistleblower framework, and outlines solutions, including via comprehensive reform of federal whistleblowing legislation for both the public and private sector if existing gaps and inconsistencies are to be addressed. We also discuss various other barriers to people disclosing information about what they observe in the aged care system, and how that can best be overcome.

To this end, on 8 June 2023, our organisations wrote to both the Minister for Health and Aged Care, and the Minister for Aged Care (**Appendix 3**), outlining the need for comprehensive, consistent reform, including to the Aged Care Act, and seeking meetings for that purpose. We are presently awaiting a response.

Section 3 Outlines the Proposed Way Forward. In our submission, realistic, accessible whistleblower protections in the aged care sector are best pursued in a manner that supports simplified, consistent, and enhanced protections and support for whistleblowers across all sectors, rather than adding to the confusion, complexity

² Parliamentary Joint Committee on Corporations and Financial Services, ‘*Whistleblower Protections*’ (Final Report, September 2017). Recommendation 3.1.

and avoidable regulatory burdens arising from the current fragmented, duplicatory, and inconsistent landscape of federal whistleblower protections.

Accordingly, we suggest the following as important recommendations for the Department to consider, if the Royal Commission into Aged Care Quality and Safety (**Royal Commission**) recommendation concerning the need for enhanced whistleblower protections in aged care is to be addressed effectively, in a holistic rather than further piecemeal way. A comprehensive, consistent approach is also the most pragmatic and efficient way of ensuring the enhanced whistleblower protection arrangements which the public have a right to expect across all our major sectors and institutions.

Recommendations

Recommendation 1: That the Government enhance the regulation and protection of whistleblowing in the aged care sector by adopting the comprehensive, uniform approach recommended by the landmark report of the Parliamentary Joint Committee on Corporations and Financial Services (2017), namely by establishing a **single Whistleblower Protection Act** covering all non-government entities and employers and entities under Commonwealth legislation or subject to Commonwealth regulation – not another separate, duplicatory, potentially inconsistent and burdensome scheme for the specific aged care sector, such as currently exists, enacted as recently as 2021.

Recommendation 2: That the Department support, as part of the enhanced whistleblower protections that will apply to aged care, through the above legislation or otherwise:

- all elements of the proposed reforms in the whistleblower framework for the aged care sector **except** for:
 - (i) the requirements for the discloser to provide their name in order to be protected as a whistleblower; and
 - (ii) the ‘good faith’ requirement;both of which are out-of-date, substandard requirements which were deleted from the Commonwealth’s other main whistleblowing laws in 2017; **plus**
- each of the overdue reform priorities also needed to make all *other* Commonwealth whistleblowing laws fit-for-purpose, as laid out in *Protecting Australia’s Whistleblowers: The Federal Roadmap* (Appendix 1) – especially items 5-12 in that report.

1. Context

The present consultation by the Department arises from the Royal Commission into Aged Care Quality and Safety established on 8 October 2018. The Royal Commission made 148 recommendations in its Final Report titled ‘Care, Dignity and Respect’, which was tabled on 1 March 2021.

The Royal Commission found, among other matters, that the extent of substandard care in the current aged care system is “*deeply concerning and unacceptable by any measure*”.³ The Commission commented that the abuse of older people in residential care is also “*far from uncommon*”⁴. In 2019–2020 alone, 5718 allegations of assault were reported by aged care services under the mandatory reporting requirements of the Aged Care Act. By way of example, Ms Noleen Hausler gave evidence about the experience of her father, Mr Clarence Hausler, who was living with dementia. The Royal Commission’s Final Report referred to the findings of Commissioners Tracey and Briggs that Mr Hausler was “*the subject of a series of degrading assaults*” and the Commissioners said that “*...beyond the indignity and criminality of the assaults committed against her father, Ms Hausler had to contend with an organisation determined to avoid accountability for its actions*”.⁵ Further, the Final Report referred to a study conducted by KPMG, which estimated that almost a further 27,000 to 39,000 alleged assaults occurred in the same time period that were exempt from mandatory reporting because they were resident-on-resident incidents.⁶

The Royal Commission emphasised the lack of transparency and accountability, describing it as a ‘pervasive feature’ of the current aged care system, with profound consequences for the quality and safety of care.⁷ The Commission also echoed the Australian Law Reform Commission’s views in its report into elder abuse that mistreatment is more likely to be a cultural issue than a ‘bad apple’ problem’, and ensuring quality of care is paramount for protecting against abuse and neglect.⁸ The Royal Commission disagreed with the views of Ms Glenys Beauchamp PSM, then Secretary of the Australian Department of Health, who said that based on the “*evidence and information available to the Department...serious instances of substandard care do not appear to be widespread or frequent*”⁹. Further to this, the Royal Commission also criticised the leadership in aged care facilities. The Final Report said that when the people in charge do not have the appropriate skills, do not prioritise high quality care, and are not accountable for their actions, the quality of care becomes compromised. Staff at aged care facilities therefore need their leaders to empower them to put the person at the centre of care.¹⁰ Such fundamental failings, particularly in terms of the lack of transparency and accountability in the aged care sector, underscore the need for greater whistleblower protections in aged care.

A key recommendation made by the Royal Commission was the creation of a new Aged Care Act which set out the rights of older people, including their entitlement to care

³ Royal Commission into Aged Care Quality and Safety Final Report Volume 2, 91

⁴ Royal Commission into Aged Care Quality and Safety Final Report Volume 1, 68

⁵ Royal Commission into Aged Care Quality and Safety Final Report Volume 2, 95

⁶ Royal Commission into Aged Care Quality and Safety Final Report Volume 2, 145.

⁷ Royal Commission into Aged Care Quality and Safety Final Report Volume 1, 52

⁸ Royal Commission into Aged Care Quality and Safety Final Report Volume 2, 93. See also Australian Law Reform Commission (2017), *Elder Abuse—A National Legal Response*.

⁹ Royal Commission into Aged Care Quality and Safety Final Report Volume 2, 91.

¹⁰ Royal Commission into Aged Care Quality and Safety Final Report Volume 2, 206.

and support based on their needs and preferences.¹¹ As to the unfortunate state of affairs for whistleblowers in aged care, the Royal Commission heard troubling evidence, including from witness Sarah Holland-Batt, who provided a statement to the Royal Commission.¹² Ms Holland-Batt's evidence is that she became aware of "*a pattern of neglectful care*"¹³ of her father, who had been diagnosed with Parkinson's Disease and was heavily reliant on carers at his aged care facility due to his high care needs. Ms Holland-Batt later became aware of allegations that a carer was abusing her father in the aged care facility after a registered nurse spoke to her mother.

Ms Holland-Batt stated (in part):

*"Sadly, due to his diminished capacity, my Dad was not able to report any of this abuse he endured. My mother and I were alerted to it by the whistleblower. She told my mother she was concerned that the carer was abusing my father, and said she was telling his family rather than management, who she knew would 'do nothing' and would 'sweep it all under the carpet.'"*¹⁴

Further, after Ms Holland-Batt and her mother complained to facility management, they were told that management could not do anything in response until they knew the identity of the whistleblower, and the investigation was later closed. Ms Holland-Batt then proceeded to raise the matter with the Aged Care Complaints Commission (ACCC), to no avail. Ms Holland-Batt and her mother then resorted to asking the whistleblower to come forward. She stated:

*"...Mum and I went to the whistle blower and begged her to come forward. She was extremely worried about doing this.... She was afraid, but eventually Mum and I convinced her to help us.' The whistle blower eventually came forward and substantiated the allegations of abuse."*¹⁵

The system should not be reliant on individuals alone and should not require those individuals to identify themselves in order to expose wrongdoing. Relevantly, after her experience with the inadequacies of the system, Ms Holland Batt's gave evidence about potential improvements that would be of use to whistleblowers seeking to expose wrongdoing. In this regard, she stated:

*"It would be useful to have an officer involved in the process who was not responsible for resolving the complaint; someone more independent from the process that could provide disinterested support."*¹⁶

Further to this, Ms Holland-Batt offered the following evidence in support of the need for greater institutional oversight, beyond individuals and their families:

"...patients like my Dad who are receiving care in the aged care sector are among the most vulnerable members of our community, and have little recourse to on their own behalf...The complaints process should be geared towards supporting and empowering the victims and their families, rather

¹¹ Consultation Paper No. 1 p. 1; Royal Commission into Aged Care Quality and Safety, *Care, Dignity and Respect* (Royal Commission Final Report), Recommendation 1.

¹² Exhibit 8-28, Brisbane Hearing, Statement of Sarah Holland-Batt dated 24 July 2019, WIT.0330.0001.0001 (Holland-Batt Statement).

¹³ Holland-Batt Statement, [21], [86].

¹⁴ Holland-Batt Statement, [51].

¹⁵ Holland-Batt Statement, [78].

¹⁶ Holland-Batt Statement, [88].

*than simply accepting the assurances of facilities at face value. From my experience, I believe the current protections and processes available in cases of abuse are manifestly inadequate. Responsible and meaningful oversight of the sector belongs in the hands of empowered bodies and ombudsmen, not in individual citizens like my mother and me.*¹⁷

Not only did the evidence heard by the Royal Commission and the Royal Commission's findings underscore the need to protect and empower whistleblowers in the aged care sector to speak up about wrongdoing, they were emblematic of the broader inadequacies in Australia's whistleblowing laws. The Royal Commission made a recommendation for comprehensive whistleblower protections to be included in the new Aged Care Act, with protections for a person receiving aged care, their family, carer, independent advocate or significant other and employees.¹⁸ However, as Ms Holland-Batt's evidence makes patently clear, whistleblowers – particularly those in the aged care sector – require an independent body with wide-ranging oversight to support and protect whistleblowers at all stages of their disclosure journey, and in order to provide an independent, meaningful and empowered approach to ensure the protection is adequate.

In November 2022, we published a report (updated in June 2023), *Protecting Australia's Whistleblowers: The Federal Roadmap*. This report provided an overview of the shortcomings of Australian whistleblowing law, and the resulting need for robust, comprehensive reform (**Appendix 1**). 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**).

The Cost of Courage provided a compilation of whistleblower cases which have proceeded to judgment in Australia since enactment of the relevant legislation to April 2023.¹⁹ Relevantly, the report found no cases in respect of the *Aged Care Act 1997* (Cth). This emphasises the need for well-considered and comprehensive reform, coupled with an independent oversight body to ensure whistleblowers are not deterred from speaking out.

Each of the reports at Appendix 1 and Appendix 2 drew heavily from the recommendations of the landmark 2017 report published by the Parliamentary Joint Committee on Corporations and Finance Services, *Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors* – recommendations which are yet to be implemented in full.

The Department's present consultation touches not only on the aged care sector, but how to ensure effective whistleblower protection in a manner that achieves simplified, consistent (as and when necessary), and seamless protections between the public and private sectors, including suppliers of services to the Department (and other Departments) and on behalf of the Commonwealth Government, and other relevant areas.

In that context, the Department's consultation is timely.

¹⁷ Holland-Batt Statement, [89].

¹⁸ Royal Commission Final Report, Recommendation 99.

¹⁹ Human Rights Law Centre, *The Cost of Courage: Fixing Australia's Whistleblower Protections*, 4.

However, for the reasons set out in Appendices 1 and 2, and the Parliamentary Joint Committee's 2017 report, it is vital that reforms to enhance protections for whistleblowers in the aged care sector not be pursued in a 'piecemeal' manner, with different or inconsistent requirements placed on whistleblowers that carry the risk of creating additional barriers to making a disclosure depending on what they are blowing the whistle on, and excessive compliance burdens for entities who may become subject to multiple regimes – such as is already the case with any company, for profit or not-for-profit, that provides aged care services.

In this regard, the current government has committed to reforming the public sector *Public Interest Disclosure Act 2013* (Cth) (**PID Act**), and a suite of initial reforms commenced in 2023 as the first stage of a more comprehensive reform agenda.

Further to this, the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* introduced a number of improvements to whistleblowing provisions in relation to the corporate and financial sectors – most notably the *Corporations Act* (Part 9.4AAA) and *Taxation Administration Act 1953* (Part IVD).

However, while that reform at least partially implemented about half of the Parliamentary Joint Committee's recommendations in its 2017 report, it did not achieve many of the reforms that remain needed. The failure to implement a number of the recommendations of the Committee resulted in a private sector whistleblowing regime that is imperfect, and a public sector regime that has remained largely unamended since its introduction in 2013. It was only earlier this year that the first phase of reform to the *PID Act*, implementing some but not all of the recommendations from the 2016 review, was achieved. A significant overhaul remains foreshadowed and well overdue.

It is in this context that the Department's consultation is considering the adequacy of whistleblowing laws and its proposed amendments to the aged care whistleblower disclosure protections. In short, the current regime is manifestly inadequate – especially for the sector specifically, but also for the economy as a whole given the inconsistent, overlapping regimes and the absence of an oversight body such as a whistleblower protection authority. The best way to prevent significant wrongdoing and the current chilling effect on disclosures, and the best way to ensure that wrongdoing is effectively identified and swiftly addressed, is to protect, support, and empower those who wish to speak up – in all sectors, in a holistic and consistent way.

2. Whistleblower Protections in the Aged Care Sector and proposed whistleblower framework for a new Aged Care Act, barriers to disclosure, and how existing barriers may be overcome

We welcome the Department’s commitment to strengthen disclosure protections for whistleblowers in the aged care sector for its intended purpose of ensuring through its proposed approach that people feel empowered to disclose information of suspected breaches of aged care legislation, “*without fear of repercussions*”.²⁰

We also support, in principle, expanded aged care disclosure protections for whistleblowers that align more closely with the *Corporations Act*. We also acknowledge that in the aged care sector, it may be desirable that updated whistleblower protections are extended to additional categories of people in the sector, consistent with the Royal Commission’s observations²¹ as well as the well-recognised vulnerability of older persons in aged care in particular.

However, in the context of the Department’s current proposed whistleblower framework, the significant gaps and inconsistencies in whistleblower protections across the whistleblower protection legislative framework are a notable challenge arising from the current proposed framework. Accordingly, we recommend that the Department endorse an approach to reform which eliminates gaps in the aged care sector by simply including that sector in a comprehensive **Whistleblower Protection Act** applying consistently to all sectors and industries, rather than, rather than only to aged care.

In particular, the Department’s proposed whistleblower framework is being considered in the context of anticipated potential further amendments to the *Corporations Act* under the statutory review due to commence in 2024 and foreshadowed further amendments to the *PID Act*. It would be a missed opportunity if the future *Corporations Act* and/or *PID Act* reforms expanded whistleblower protections beyond the Department’s current proposals when the current intention is to more closely align protections with at least the *Corporations Act*, noting the clear importance of the *PID Act* in the sector.

We therefore call on the Department to support the Parliamentary Joint Committee’s 2017 recommendation to bring all Commonwealth-regulated entities and employers under a common Whistleblower Protection Act (replacing the *Corporations Act*, *Taxation Administration Act* and other provisions, which would naturally include the *Aged Care Act*) – rather than re-legislating another duplicatory and potentially inconsistent scheme for aged care alone.

Despite some consolidation in the 2019 reforms to the *Corporations Act*, Australia’s whistleblower protection system remains fragmented, complex, and confusing, with at best dangerous uncertainties and at worst, clear gaps in whistleblower protections. As was recognised by the Royal Commission, such problems also extend to the aged care sector given the narrow approach to whistleblower protections in the existing *Aged Care Act*.²²

²⁰ Consultation Paper, 36.

²¹ Royal Commission Final Report, [14.4.8], 521.

²² Royal Commission Final Report, [14.4.8].

We consider that further comparative narrowing of protections and legislative fragmentation may become an unintended consequence of the Department's current proposed whistleblower framework unless further consideration is given to reform across the Commonwealth whistleblower protection framework.

Two deficiencies in the proposed aged care framework exemplify this problem:

- The proposal to require a person, when making a disclosure, to provide their name to the official in order to be protected as a whistleblower. This perpetuates out of date provisions in the current Aged Care Act, which dated from 2004 and were re-legislated in 2021, but which by then had already been removed from most other Commonwealth whistleblowing laws.

Whistleblowers should not be forced to trade their anonymity to receive protection as a whistleblower, particularly given the immediate increased risk of potential reprisals or victimisation should they be forced to identify themselves at the outset of the disclosure process. The proposed retention of this provision is inconsistent with the *Corporations Act* which allows for anonymity.²³ Further, this proposal appears to operate under a misguided assumption that a name is required in order for a complaint to be made, to be treated with legitimacy, or to be investigated. The current power imbalance between whistleblowers and those the subject of their complaints has already been shown – with supporting evidence²⁴ – to deter disclosures. This may be further compounded when the Department's proposed disclosure recipients are taken into account under its proposed whistleblower framework.²⁵

- The requirement for a disclosure be made in “good faith”. This has also already been removed from other whistleblowing laws, as it adds an uncertain, unwelcome layer of complexity to disclosures, and has been recognised previously as undermining protections and creating risk for whistleblowers.²⁶ It is enough that the whistleblower have reasonable grounds to suspect that:
 1. a registered provider, aged care worker, (whether directly employed or contracted, or paid or unpaid), a responsible or governing person of a registered provider has, or even may have, contravened any provision of the aged care legislation; or
 2. that the information concerns misconduct, or an improper state of affairs or circumstances by a registered provider, aged care worker, (whether directly employed or contracted, or paid or unpaid), a responsible or governing person of a registered provider.

The fact that these inappropriate requirements were retained in the Aged Care Act when abolished from other legislation, and are still now proposed for re-inclusion without apparent recognition of that fact, exemplifies why a more consistent, uniform approach is needed.

However, for the reasons laid out in Appendices 1 and 2, there are also further reforms needed to render updated protections effective, including to the *Corporations Act*

²³ See the note at section 1317AA of the *Corporations Act 2001* (Cth).

²⁴ See, for example, the Holland-Batt Statement at [89].

²⁵ Consultation Paper, 35 – 36.

²⁶ Explanatory Memorandum, Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017, p. 22.

provisions. This means simply updating the *Aged Care Act* provisions to match the *Corporations Act* will not be good enough.

As well as bringing the protections up to standard, a different approach is needed which:

- Prevents the current inconsistencies and piecemeal approach to reform from being replicated in the future;
- Ensures whistleblowers get equal protection irrespective of what wrongdoing they are blowing the whistle on, especially when it may involve more than one type of wrongdoing (e.g. both breaches of patient care, and fraud);
- Simplifies the regulatory burden on entities which are subject to multiple regimes (e.g. any company which provides aged care services is already subject to whistleblower protection provisions in the *Corporations Act*, which cover disclosures about “any improper state of affairs” in the company)
- Ensures that protections are effective and up-to-date. This is especially the case given that, in addition to further reforms which the Government has already promised to the *PID Act* for the public sector, but which are yet to be exposed for public discussion, the whistleblowing provisions of the *Corporations Act* and *Taxation Administration Act 1953* must undergo statutorily-required reviews, commencing within the next 12 months. While this should lead to further improvements to Commonwealth whistleblower protections, it means a separate aged care whistleblowing regime will either once again fall behind, or need to be further updated.

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

3. Suggested Way Forward

As is evident from the above, Australia's whistleblower protection framework is not presently fit for purpose, including in the aged care sector. The consequence is that those who may wish to speak up about wrongdoing are afraid to do so, do not have adequate support, and face uncertainty and risk despite their courageous conduct. Whistleblower protections should be simple and accessible and apply to all workers – at present, the federal regime does not meet these criteria.

As detailed in Appendix 3, there are 10 different federal legislative regimes containing some form of whistleblower protections. Many of these, including the current *Aged Care Act* are out of date and inconsistent with the latest reforms located in the *Corporations Act*.

The legitimate need to adapt some protections to account for the vulnerability in the aged care sector does not prevent our suggested uniform approach. Appropriate exceptions and adapted provisions could be drafted into the new Aged Care Act that could otherwise simply reference and trigger, rather than duplicating, the Commonwealth's core whistleblower protection legislation.

For example, the new Aged Care Act may extend the meaning of 'eligible whistleblower' to the proposed persons under the Department's proposed whistleblower framework, to put it beyond doubt that a protected disclosure in the aged care sector can be made by people, including:

1. aged care workers (whether directly employed or contracted, and paid or unpaid)
2. responsible and/or governing persons of registered aged care providers, and
3. older persons accessing funded aged care services, and those close to those persons such as carers, family members and advocates.

Similar changes could also be implemented in respect of eligible recipients in the aged care sector. Of course, the intersection of application legislation such as the new Aged Care Act, the *PID Act* and the proposed Whistleblower Protection Act (or current *Corporations Act*) would need to be simple and clear for ease of navigation by whistleblowers and other stakeholders.

As the matters canvassed in this submission made clear, including the evidence heard by the Royal Commission, a whole-of-economy reform is required to ensure whistleblowers in all workplaces have access to robust protections and feel empowered to speak out about wrongdoing so that it may be addressed, in the interests of all. With statutory reviews of the *Corporations Act* and *Taxation Administration Act 1953* protections due next year, we encourage the Department to seize the opportunity to take part in, and recommend that the government pursue, a uniform approach to public and non-public sector whistleblower protections, ideally culminating in a single Whistleblower Protection Act. Such an approach would go a long way towards ensuring consistency and minimising loopholes, and would also seek to ensure that no particular sectors are left behind again.

Our recent report, *Protecting Australia's Whistleblowers: The Federal Roadmap* (Appendix 1) details the 12 areas of reform needed, including the proposed single Act for the non-government sectors, and the establishment of a whistleblower protection authority to oversee and enforce whistleblower protection laws and support Australian

whistleblowers (as also recommended by the Parliamentary Joint Committee in its 2017 report)²⁷. We encourage the Department to heed all these important priorities for reform in its final suite of proposals, irrespective of where the improved protections are then located. These are vital to ensure an effective, comprehensive approach to the federal whistleblowing framework, for the aged care sector along with all other sectors.

Accordingly, we make the following recommendations in response to the proposed whistleblower protection framework in the Consultation Paper.

²⁷ Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections* (Final Report, September 2017) 158-159.

Recommendations

Recommendation 1: That the Government enhance the regulation and protection of whistleblowing in the aged care sector by adopting the comprehensive, uniform approach recommended by the landmark report of the Parliamentary Joint Committee on Corporations and Financial Services (2017), namely by establishing a **single Whistleblower Protection Act** covering all non-government entities and employers and entities under Commonwealth legislation or subject to Commonwealth regulation – not another separate, duplicatory, potentially inconsistent and burdensome scheme for the specific aged care sector, such as currently exists, enacted as recently as 2021.

Recommendation 2: That the Department support, as part of the enhanced whistleblower protections that will apply to aged care through the above legislation or otherwise:

- all elements of the proposed reforms in the whistleblower framework for the aged care sector **except** for:
 - (i) the requirements for the discloser to provide their name in order to be protected as a whistleblower; and
 - (ii) the ‘good faith’ requirement;

both of which are out-of-date, substandard requirements which were deleted from the Commonwealth’s other main whistleblowing laws in 2017; **plus**

- each of the overdue reform priorities also needed to make all *other* Commonwealth whistleblowing laws fit-for-purpose, as laid out in *Protecting Australia’s Whistleblowers: The Federal Roadmap* (Appendix 1) – especially items 5-12 in that report.