Chapter 3

Views on the bill

3.1 Many submissions concentrated on highlighting the difference between the bill and the recommendations of the prior Parliamentary Joint Committee (PJC) inquiry into whistleblowing protections in the corporate, public and not-for-profit sectors.[1] Most stakeholders noted that the bill falls short of implementing all the recommendations of the PJC inquiry. One submitter said that the present bill was merely 'fiddling around the edges' when it should have addressed the PJC inquiry's recommendations in full.[2] Professor A J Brown's submission provides a detailed comparison of the bill and the PJC inquiry's recommendations.[3]

3.2 Due to the level of interest between the inquiry and the bill, those main areas which have not been addressed in the bill are briefly discussed below. This section is then followed by evidence received addressing elements of Part 1 of Schedule 1 before finalising with some brief remarks concerning Part 2 of Schedule 1—Amendments to the Taxation Administration Act 1953.

Unaddressed recommendations of the Parliamentary Joint Committee on Corporations and Financial Services report

A single act

3.3 Many said that it would be desirable to create a single Whistleblower Act,[4] or a single act for the whole of the private sector.[5] One submitter said:

> The Bill effectively hides this whistleblowing legislation in a clutter of corporate and tax laws which should ensure that only the most legally aware or persistent whistleblower will ever find it.[6]

3.4 The Law Council of Australia pointed out that a whistleblower does not think in terms of legislation, but in terms of breaches of the law. They may not be able to work out which act is being breached.[7]

3.5 Some specifically wanted the arrangements to be extended to the charities and not-for-profit sector.[8] The Law Council of Australia pointed out that many

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1 Whistleblower protections in the corporate, public and not-for-profit sectors, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections (accessed 13 March 2018).

2 Whistleblowers Australia, *Submission 29*, p. 1.

3 Professor A J Brown, *Submission 21*, Appendix 2.

4 For example, Governance Institute of Australia, *Submission 11*, p. 2.

5 For example, Dr Vivienne Brand, *Submission 4*, pp. 1–2.

6 Whistleblowing Information Network, *Submission 26*, p. 1.

7 Mr Greg Golding, Chair, National Integrity Working Group and Foreign Corrupt Practices Committee, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 15.

charities and not-for-profits are companies limited by guarantee, and so will come under the act. There will therefore be inconsistent treatment for bodies operating in similar areas.[9]

3.6 It is not clear that the Commonwealth could constitutionally cover non-corporate bodies, which include not only some charities but also partnerships, trusts and unincorporated associations. It might be possible to seek referral by the states of the appropriate power, or to use elements of the external affairs power.[10] There are already state whistleblower laws, so action could be taken at that level.[11] Some leverage might be available where Commonwealth funding was available.[12] Many big partnerships in fact have a service company which is the employer, and so are covered.[13]

3.7 All taxpaying entities are covered for the purposes of Commonwealth tax whistleblowing.[14]

3.8 However, some witnesses were sceptical of the need for a single act. What they saw as important was more the outcomes, and demand for a single act might be more 'a question of form over substance'.[15] Dr David Chaikin offered the view that legislation is designed for interpretation by the judiciary, and attempting to simplify it for whistleblowers and the general public was difficult and unnecessary.[16]

A Whistleblower Protection Authority

3.9 Many submissions and witnesses called for the creation of a Whistleblower Protection Authority. Most envisaged that it would advocate for whistleblowers, assist them in making disclosures, give them general personal support, and assist them in

8 For example, Queensland Nurses and Midwives Union, *Submission 6*, p. 2.

9 Law Council of Australia, *Submission 32*, p. 3.

10 Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 6 March 2018, p. 10.

11 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 37.

12 Dr Mark Zirnsak, Senior Social Justice Advocate, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 6 March 2018, p. 11.

13 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 37; Ms Kate Mills, Principal Adviser, Financial System Division, Department of the Treasury, *Committee Hansard*, 6 March 2018, p. 59.

14 Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 6 March 2018, p. 4.

15 Mr John Price, Commissioner, Australian Securities and Investments Commission (ASIC), *Committee Hansard*, p. 46.

16 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 38.

making out cases for compensation.[17] It might also advocate for whistleblowers, potentially enforcing their rights in court.[18]

3.10 Some witnesses thought that a Whistleblower Protection Authority could be established within an existing authority, as long as that authority would see it as core business and give it priority. It would also need to be resourced appropriately.[19] There were also suggestions that such an authority should have the power to waive legal professional privilege, but it was agreed that this was a difficult area.[20]

3.11 Professor A J Brown emphasised that, whatever the agency charged with implementation is, it should actually have the obligation, not just the power and ability, to provide protection and support functions.[21]

3.12 ASIC has an established Office of the Whistleblower. Mr Warren Day, of ASIC, suggested that the role that is envisaged for ASIC in the bill is akin to a Whistleblower Protection Authority. It would be a bigger task than the Office of the Whistleblower currently has, and would require careful communication with a number of other authorities.[22]

3.13 Dr David Chaikin argued that ASIC was already established as a gateway. He said:

> You have to have a pretty strong reason for creating a new institution… After all, when you create a new institution, although people have argued that they are going to make ASIC more accountable, that institution would have to find its own feet and create its own networks. That is a costly and time-consuming process. At this stage, I do not see any advantage to that…
>
> …who's to say a whistleblower protection authority, unless you threw a lot of the money at it, would have the power or influence over ASIC? [23]

17 For example, International Bar Association Anti-Corruption Committee, *Submission 10*, p. 8; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 5; Whistleblowing Information Network. *Submission 26*, pp. 2–3; Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 29.

18 Mr Greg Golding, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 18.

19 Dr Mark Zirnsak, Uniting Church in Australia, *Committee Hansard*, 6 March 2018, p. 5; Mr Greg Golding, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 15.

20 Ms Kate Mills, Principal Adviser, Financial System Division, Department of the Treasury, *Committee Hansard*, 6 March 2018, p. 56, p. 62; Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 30.

21 Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 6 March 2018, p. 5.

22 Mr Warren Day, Senior Executive Leader, ASIC, *Committee Hansard*, 6 March 2018, p. 46.

23 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 38, p. 40.

Compensation outside the judicial system

3.14 The need for a system of compensation that did not require whistleblowers to go to court was raised, often in the context of discussion of a Whistleblower Protection Authority.[24] As Professor A J Brown remarked:

> Most people do not want to fight it out in court, and most people shouldn't have to fight it out in court.[25]

3.15 Mr Jeffrey Morris argued that whistleblowers were '…often too broken by their experience' to deal with the court system which '…would be making them suffer through it all over again.' Besides, they rarely had the resources to take on a big corporation in court.[26]

3.16 The Law Council of Australia described the courts as 'a blunt instrument' in this context, and favoured a cheaper, non-judicial body such as a tribunal. It also suggested the Fair Work Commission as a model.[27]

Rewards for whistleblowers

3.17 Several submissions noted that the bill did not provide for any reward system for whistleblowers. Some supported the idea.[28] Others welcomed the omission of such a scheme.[29]

3.18 Dr Mark Zirnsak noted that there were international examples to learn from, and that the Australian Taxation Office (ATO), after being initially cool, was beginning to embrace the idea of rewards.[30] Mr Jeffrey Morris pointed out that, in his own case, millions of dollars had been secured in compensation for victims of financial wrongdoing because of his actions. It would not be unreasonable for some reward or bounty to be paid to him—although it was not entirely clear that Mr Morris was distinguishing between rewards and bounties on the one hand and compensation on the other.[31]

3.19 Dr David Chaikin was unconvinced. He believed that the bounty system had been abused in the United States.[32] The Australian Institute of Company Directors

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24 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 3; Law Council of Australia, *Submission 32*, p. 2.

25 Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 6 March 2018, p. 13.

26 Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 25, p. 26.

27 Mr Greg Golding, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 17, p. 18.

28 For example, International Bar Association Anti-Corruption Committee, *Submission 10*, p. 7.

29 For example, Governance Institute of Australia, *Submission 11*, p. 2.

30 Dr Mark Zirnsak, Uniting Church in Australia, *Committee Hansard*, 6 March 2018, p. 6.

31 Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 25.

32 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 39.

also thought that there were hazards in bounty schemes.[33] Professor A J Brown noted that the PJC recognised the cultural differences between Australia and the United States and set out principles that should govern an Australian scheme.[34]

Scope of disclosures that qualify for protection

3.20 In general, submitters supported the broadening of the range of disclosures that would be protected. Some thought it should be further broadened. However, some pointed to ways in which the new scope was too broad.

3.21 Proposed ways in which the scope should be extended included:

- covering disclosures of any breach of any law[35] or at least of any Commonwealth law, without the qualifier that the conduct would attract a penalty of 12 months imprisonment;[36]
- expanding the list of acts in section 1317AA(5)(c) to include other acts such as the *Competition and Consumer Act 2010,*[37] workplace health and safety legislation, and the *Fair Work Act 2009*,[38] and the *Australian Charities and Not-for-Profits Commission Act 2012;*[39]and
- expanding the scope to include breaches of human rights such as discrimination.[40]

3.22 There was some discussion in the hearing as to whether the phrase 'improper state of affairs' could in fact pick up wrongdoing in areas not covered by the specified acts, such as breaches of environmental laws.[41]

3.23 The law firm Herbert Smith Freehills submitted that the definitions of 'misconduct' and 'improper state of affairs' needed to be tightened. Mr Chris Wheeler, New South Wales Deputy Ombudsman, observed:

> The current wording of the Bill casts a very wide net, and would appear to have the potential to include a great deal of conduct that should not be included within a whistleblower protection scheme…the scope of

33 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 6 March 2018, pp. 33–34.

34 Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard,* 6 March 2018, p. 5.

35 Financial Planning Association of Australia, *Submission 5*, p. 2.

36 Maurice Blackburn Lawyers, *Submission 12*, p. 7.

37 Australian Competition and Consumer Commission, *Submission 30*, p. 3.

38 Australian Council of Trade Unions, *Submission 19*, p. 7.

39 Queensland Nurses and Midwives Union, *Submission 6*, p. 2.

40 Australian Lawyers Alliance, *Submission 16*, p. 5.

41 Mr Ben Carrruthers, Senior Manager Litigation, Australian Prudential Regulation Authority, *Committee Hansard*, 6 March 2018, pp. 49–50.

disclosable conduct should be redefined to focus on fraud, serious misconduct and corrupt conduct.[42]

3.24 KPMG called for a clear statement that the scheme applies only in Australia.[43]

3.25 It was argued that some matters should be explicitly excluded, including all personal employment matters,[44] and that matters covered by tax legislation should be excluded from the regime established under the Corporations Act.[45]

Defining 'eligible whistleblower'

3.26 Most submitters supported broadening the categories of people who can make disclosures. The Australian Council of Trade Unions (ACTU) in particular welcomed the inclusion of contractors as well as employees.[46] ASIC noted that ex-employees had come to them in the past, only to be told that they were not technically whistleblowers; it welcomed their inclusion.[47]

3.27 The Governance Institute argued that there should not be an exclusive list of eligible whistleblowers.[48]

3.28 On the other hand, the Australian Institute of Company Directors (AICD) thought that relatives of people with a connection to an entity should not be included as they did not have relevant knowledge.[49]

Recipients of disclosures

3.29 It was argued that the Australian Federal Police (AFP) should be specified as a prescribed body along with ASIC and APRA, especially given the test of a Commonwealth office with a penalty of 12 months or more imprisonment.[50] It was observed in the hearing that whistleblowers going direct to the AFP or the Australian Competition and Consumer Commission (ACCC) would not be protected: they had to go first to their own firm or to one of the prescribed bodies, who would presumably refer the matter to the appropriate investigating body.[51]

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42 Mr Chris Wheeler, New South Wales Deputy Ombudsman, *Submission 33*, pp. 3–4.

43 Herbert Smith Freehills, *Submission 14*, p. 2; KPMG, *Submission 15*, p. 6; Law Council of Australia (*Submission 32*) also thought 'improper state of affairs' too broad (p. 2).

44 For example, KPMG, *Submission 15*, p. 7; Australian Council of Superannuation Investors, *Submission 13*, pp. 2–4.

45 Professor A J Brown, *Submission 21*; KPMG, *Submission 15*, p. 8.

46 Australian Council of Trade Unions, *Submission 19*, p. 3.

47 Mr Warren Day, ASIC, *Committee Hansard*, 6 March 2018, p. 53.

48 Governance Institute of Australia, *Submission 11*, p. 3.

49 Australian Institute of Company Directors, *Submission 31*, p. 2.

50 International Bar Association Anti-Corruption Committee, *Submission 10*, p. 4; Mr James Shelton, *Submission 24*, p. 1.

51 Mr Warren Day, ASIC, *Committee Hansard*, 6 March 2018, pp. 48–49.

3.30 The AICD observed that the whistleblower in effect chooses between their own firm and the prescribed authority. This creates a very good incentive for the company to have good whistleblower policies and practices.[52]

3.31 There were several suggestions for expanding the list of eligible recipients. The Institute of Internal Auditors noted that 'auditors' generally means 'external auditors' in the Corporations Act, but internal auditors are more likely to receive information from both internal and external disclosers, and should be protected.[53] (Internal auditors are specified in the amendments to do with tax disclosures.[54]) The Financial Planning Association of Australia suggested that compliance schemes and code monitoring bodies should be eligible recipients.[55]

3.32 The ACTU and the Queensland Nurses and Midwives Union both suggested that unions should be eligible recipients, at least for the purposes of advice and advocacy in a similar way to legal practitioners.[56] The ACTU argued in the hearing that unions deal with legal frameworks frequently, and the provisions against victimisation are similar to the adverse action provisions in the *Fair Work Act 2009*.[57]

3.33 Furthermore, the Whistleblowing Information Network noted that that there is no guarantee that an eligible recipient will be able to provide assistance to the person making the disclosure.[58]

3.34 Many submissions pointed out that the inclusion of 'a person who supervises or manages the individual' is far too broad. It would, in the first place, involve a huge training effort to catch every team leader in every organisation, and this would involve a large and continuing expense. It would include people who were relatively junior in organisations, who, even with training, could not be expected to take on the responsibility of dealing with disclosures and would not have the confidence of staff. Because it broadens the scheme hugely, it could compromise confidentiality. One solution might be that an entity should specify people in the organisation who are competent to receive disclosures. Disclosure to someone who does not know what to

52 Ms Louise Petschler, Australian Institute of Company Directors, *Committee Hansard*, 6 March 2018, p. 35.

53 Institute of Internal Auditors, *Submission 1*, pp. 1–3.

54 Explanatory Memorandum, p. 71, commenting on proposed section 14ZZV.

55 Financial Planning Association of Australia, *Submission 5*, p. 1.

56 Australian Council of Trade Unions, *Submission 1*, p. 3; Queensland Nurses and Midwives Union, *Submission 6*, p. 2.

57 Mr Trevor Clarke, Director, Industrial and Legal, Australian Council of Trade Unions, *Committee Hansard*, 6 March 2018, p. 21.

58 Whistleblowing Information Network, *Submission 26*, p. 7.

do with the information could be worse than useless.[59] The AICD warned that allowing as eligible recipients people who might not be competent to take effective action could lead to emergency disclosures.[60]

3.35 Professor A J Brown noted that the person a whistleblower would normally go to is their line manager, so it was appropriate that protection should begin from when that person was approached. He suggested that the solution would be to separate who could receive disclosures from who should then manage the case.[61]

3.36 Deloitte argued that where the bill refers to a 'person' it should be extended to include body corporates and entities as able to receive disclosures.[62]

3.37 Law Firm DLA Piper suggested that there was a need for further definition in the provision for disclosure to lawyers. While the Corporations Act defines 'lawyer' it does not define 'legal practitioner', so either the former term should be used or the latter should be defined. In particular, it was not clear whether foreign legal practitioners were included. It was also not clear what the relationship to legal privilege would be.[63]

Emergency disclosure

3.38 Several submissions expressed reservations about the provision for emergency disclosure.[64] One questioned whether a whistleblower—who is generally already stressed—is in a position to know whether an emergency, as defined in the bill, exists, or what steps might already have been taken to address the matter. It was also questionable whether a journalist or a member of Parliament are especially qualified to deal with disclosures.[65]

3.39 The AICD noted that disclosure to the media had the potential to do great reputational damage to a company, even if it were later exonerated. There was also a risk of industrial espionage. As the bill stands, emergency disclosures are protected only if the whistleblower has first made a disclosure to a prescribed authority (ASIC or APRA), but the general settings of the bill and good governance suggest that

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59 Financial Services Council, *Submission 8*, pp. 3–4; International Bar Association Anti-Corruption Committee, *Submission 10*, p. 5; Herbert Smith Freehills, *Submission 14*, pp. 2–3; KPMG, *Submission 15*, p. 5–6; Australian Banking Association, *Submission 20*, pp. 2–3; Whistleblowing Information Network, *Submission 26*, p. 7; Mr Morry Bailes, President, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 14.

60 Australian Institute of Company Directors, *Submission 31*, p. 3.

61 Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 6 March 2018, p. 10.

62 Deloitte, *Submission 18*, Appendix 1.

63 DLA Piper, *Submission 25*, pp. 1–2.

64 For example, Financial Services Council, *Submission 8*, p. 4; Governance Institute of Australia, *Submission 11*, p. 4.

65 Financial Planning Association of Australia, *Submission 5*, p. 3; Mr Greg Golding, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 15.

whistleblowers should be encouraged and given incentives to disclose first to the company. In any event, fairness demands that the company should be notified and given the opportunity to remedy a situation before an emergency disclosure is made.[66]

3.40 There was also concern that any disclosure to the media could prejudice an investigation. Further, while ASIC in particular does try to maintain contact with the whistleblower, because an investigation is undertaken in confidence, it is often not appropriate for the regulator to keep the whistleblower informed of progress of that investigation.[67]

3.41 Some said that journalists in particular should not be recipients of disclosures.[68] They have an interest in a story for its own sake, and would in fact have a conflict of interest. However, Mr Jeffrey Morris said that in his particular case as a discloser of wrongdoing in financial advice, going to the media was the only way to get an outcome, after he had disclosed to both the company and the regulator over a period of some years.[69] However, it should be noted that because Mr Morris made his disclosures anonymously, and at a time when he was no longer employed by the relevant company, he did not qualify as a protected whistleblower under the Act. As a result, it is not surprising that ASIC did not keep Mr Morris updated on its investigative and enforcement action, as he was not at the time a protected whistleblower under the Act.

3.42 Some submitters and witnesses argued that the threshold for emergency disclosure should be lowered,[70] or that it was too limited.[71] One pointed out that the criteria would justify an immediate disclosure along these lines without first having gone through the usual disclosure process.[72] Professor A J Brown suggested that emergency disclosure would be justified either where there was a risk of serious harm or death or where no action had been taken on a disclosure within a reasonable length

66 Ms Louise Petschler, Australian Institute of Company Directors, *Committee Hansard*, 6 March 2018, p. 33; Mr Lucas Ryan, Senior Policy Adviser, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 6 March 2018, p. 34.

67 Mr John Price, Commissioner, ASIC, *Committee Hansard*, 6 March 2018, p. 53; Mr Warren Day, ASIC, *Committee Hansard*, 6 March 2018, p. 47.

68 Herbert Smith Freehills, *Submission 14*, p. 10; DLA Piper, *Submission 25*, p. 3; [Name withheld], *Submission 3*, p. 2.

69 Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, pp. 30–31.

70 International Bar Association Anti-Corruption Committee, *Submission 10*, p. 5; Maurice Blackburn Lawyers, *Submission 12*, p. 5; Professor A J Brown, Centre for Governance and Public Policy, Griffith University, *Committee Hansard*, 6 March 2018, p. 12.

71 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 5; Whistleblowers Australia, *Submission 29*, p. 2; Government Accountability Project, *Submission 23*, pp. 2–3.

72 Transparency International Australia, *Submission 28*, Attachment, p. 5.

of time—that is, the criteria should be alternatives rather than both having to be satisfied.[73]

3.43 Mr James Shelton, who had been involved in the Securency case, suggested that it would not cover the circumstances that existed in that particular situation.[74] However, the Securency case involved whistleblower disclosures about the misconduct of public officials, which are matters currently dealt with under the *Public Interest Disclosure Act*, and it is unclear how Mr Shelton could have formed this view, given that the relevant provision in this bill focusses on misconduct of private entities, and specifically private financial institutions. Mr Jeffrey Morris also suggested that his case would not have satisfied the test in the bill,[75] although noting that this is merely an opinion on how a member of the judiciary might interpret the test in the bill, in the context of a given factual scenario.

3.44 There were suggestions that the scope for emergency disclosures be broadened. One submitter suggested that the criteria should also include an imminent threat to the environment.[76] It was suggested that police should be in the list of recipients, given that they might be needed to respond to the emergency.[77]

3.45 Professor A J Brown argued that there should also be protection for the recipient of the disclosure.[78]

3.46 Some submitters argued that the definition of 'journalist' is too narrow. In particular, the requirement that an internet news service be 'operated commercially' would exclude many modern reporters, including, for example, someone who worked exclusively for the online service of a major media organisation such as the ABC, or for a community organisation.[79] Ms Kate Mills of the Treasury said:

> It was never the intention to exclude publicly funded entities, such as the ABC or even SBS. It was really more to try to draw an appropriate distinction between them and social media and people who might say that they're conducting some form of journalism when in fact that's not the case.[80]

3.47 The Media, Entertainment and Arts Alliance suggests that the bill should use the definition specified in the *Evidence Act 1995*:

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73 Professor A J Brown, answers to questions on notice, no. 3, p. 10, 2 March 2018 (received 8 March 2018).

74 Mr James Shelton, *Submission 24*, p. 2.

75 Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 26.

76 Australian Lawyers Alliance, *Submission 16*, p. 5.

77 Professor David Lewis, *Submission 7*, p. 2.

78 Professor A J Brown, *Submission 21*, p. 10.

79 Australian Council of Trade Unions, *Submission 19*, p. 7; Mr Trevor Clarke, ACTU, *Committee Hansard*, 6 March 2018, p. 22.

80 Ms Kate Mills, Principal Adviser, Financial System Division, Department of the Treasury, *Committee Hansard*, 6 March 2018, p. 56.

- 'journalist' means a person who is engaged and active in the publication of news and who may be given information by an informant in the expectation that the information may be published in a news medium; and
- 'news medium' means any medium for the dissemination to the public or a section of the public of news and observations on news.[81]

3.48 It was pointed out that the requirement to notify the original recipient of the disclosure served no purpose as it had no time frame attached so did not guarantee that there would be time to remedy the situation.[82] It would also compromise anonymity, which was all the more necessary if a whistleblower was going to the media.[83]

3.49 Dr David Chaikin's view was that the bill struck an appropriate balance between law enforcement and regulatory interests on the one hand and the need to put pressure on an unresponsive regulator on the other.[84]

'Reasonableness'

3.50 Most submissions supported the replacement of the 'good faith' requirement with a test of 'reasonableness'.

3.51 However, one submission said that the good faith requirement should be maintained; if it were not, there should be a requirement to disclose any related payments or any conflict of interest.[85] The Financial Services Council also argued that the good faith requirement should be kept.[86]

Confidentiality

3.52 It is generally agreed that the identity of disclosers should not be revealed. Some submitters thought that disclosure should be permitted where there was a risk to safety, or where it would assist an investigation. As it stands, a junior manager could receive information and be hampered in referring the matter to someone in the organisation better placed to handle it. One solution might be for companies to nominate external investigators.[87]

3.53 Mr Chris Wheeler, New South Wales Deputy Ombudsman, submitted that when a report of misconduct is made, others in the workplace generally can guess who

81 Media, Entertainment and Arts Alliance, *Submission* 2, p. 3.

82 DLA Piper, *Submission 25*, p. 2; Law Council of Australia, *Submission 32*, p. 2.

83 Mr James Shelton, *Submission 24*, p. 2.

84 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 42.

85 [Name withheld], *Submission 3*, p. 2.

86 Financial Services Council, *Submission 8*, p. 3, p. 4.

87 Australian Council of Trade Unions, *Submission 19*, p. 6; Mr Trevor Clarke, ACTU, *Committee Hansard*, 6 March 2018, p. 22.

has made it. If that is the case, attempts to investigate without identifying the discloser are a waste of time and can compromise the investigation.[88]

3.54 Ms Kate Mills of the Treasury noted that the bill explicitly allows for the referral of information for the purposes of investigation, as long as reasonable steps are taken to avoid identifying the whistleblower.[89]

3.55 The Commonwealth Director of Public Prosecutions expressed the view that the penalties for revealing a whistleblower's identity were too low.[90] On the other hand, law firm Herbert Smith Freehills suggested that the penalties should be reduced where it could be demonstrated that no victimisation had taken place.[91]

3.56 Most submissions and witnesses welcomed the fact that anonymous submissions would now be possible. Some said that it should be explicit in the bill, rather than contained in a note to the text.[92]

3.57 One submission did not support the provision for anonymous disclosures, arguing that:

> …fairness and transparency dictate that the identity of the whistleblower be known before they can obtain the benefit of the protections.[93]

What protection is offered to whistleblowers?

Immunity in criminal and other proceedings

3.58 While conceding that certain notes in the bill state that the various subsections did not prevent a whistleblower being subject to criminal liability, the Commonwealth Director of Public Prosecutions expressed concern that the bill could create a loophole where wrongdoers could avoid liability by exposing their wrongdoing: '…a carefully crafted disclosure could be tantamount to achieving immunity by self-reporting'. The submission called for an 'avoidance of doubt' provision. The ACTU expressed reservations about the immunities involved.[94]

3.59 Dr David Chaikin pointed out that information that has been disclosed can be used if it can be obtained from another source.[95] Once the disclosure has been made, investigators know what to look for.

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88 Mr Chris Wheeler, New South Wales Deputy Ombudsman, *Submission 33*, p. 4.

89 Ms Kate Mills, Department of the Treasury, *Committee Hansard*, 6 March 2018, p. 61.

90 Commonwealth Director of Public Prosecutions, *Submission 17*, p. 2.

91 Herbert Smith Freehills, *Submission 14*, p. 7, p. 9.

92 Australian Council of Trade Unions, *Submission 19*, p. 6; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 2.

93 [Name withheld], *Submission 3*, p. 2.

94 Commonwealth Director of Public Prosecutions, *Submission 17*, p. 1; Australian Council of Trade Unions, *Submission 19*, pp. 3–4, p. 9.

95 Dr David Chaikin, *Committee Hansard*, 6 March 2018, p. 37.

Protection from victimisation

3.60 There was support for the creation of a civil offence of victimisation with a lower standard of proof and for protection from costs for claimants.[96]

3.61 There was some discussion of the need to separate civil liability from criminal remedies. Ms Kate Mills of the Treasury argued that this was already provided for in the bill: the existing criminal offences have been retained, and a civil penalty has also been introduced in each case.[97]

3.62 Professor A J Brown noted that a requirement for the criminal offence to be made out was that the respondent had a belief or suspicion that the claimant had made a disclosure, and that that belief or suspicion was at least in part the reason for the detrimental conduct. He argued that the bill as it stands applies that standard to civil claims, and that proving a 'state of mind' was not an appropriate requirement for a civil claim. It should be available where detriment had flowed as a result of the disclosure, whether it was intended or not.[98]

3.63 On the other hand, Dr David Chaikin's view was that:

> For all practical litigation purposes, the criminal liability and civil remedies provisions in the Bill are separate. This is not a problem.[99]

3.64 The ACTU submitted that it should be sufficient that detriment had occurred, and it should not be necessary to prove that someone had 'engaged in conduct' to cause it.[100] On the other hand, Herbert Smith Freehills were of the view that this '...could capture a significantly broader range of conduct…which may only be remotely linked to the victimising conduct.'[101]

3.65 The ACCC submitted that the bill should expressly state that detriment involves acts, omissions (such as not renewing a contract) and threats.[102]

3.66 Other submitters called for penalties for failure to support a whistleblower.[103] Dr David Chaikin suggested that it would be difficult to specify the content of a duty

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96 For example, Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 2; International Bar Association Anti-Corruption Committee, *Submission 10*, p. 5; Mr Chris Wheeler, New South Wales Deputy Ombudsman, *Submission 33*, p. 1.

97 Ms Kate Mills, Department of the Treasury, *Committee Hansard*, 6 March 2018, p. 57.

98 Professor A J Brown, answers to questions on notice, no. 1, pp. 2–3, 2 March 2018 (received 8 March 2018).

99 Dr David Chaikin, answers to questions on notice, no. 1, p.1, 2 March 2018 (received 5 March 2018).

100 Australian Council of Trade Unions, *Submission 19*, p. 9.

101 Herbert Smith Freehills, answers to questions on notice, no. 5, p. 3, 2 March 2018 (received 8 March 2018).

102 Australian Competition and Consumer Commission *Submission 30*, p. 2.

103 Government Accountability Project, *Submission 23*, p. 2; Whistleblowing Information Network, *Submission 26*, p. 4; Professor A J Brown, *Submission 21*, p. 6.

to support. Further, an employer should support all employees: there would be cases where not only someone making a disclosure but also the person who the disclosure is about should both be supported.[104]

Increased penalties for victimisation

3.67 There was support for the increases in penalties.[105] The Commonwealth Director of Public Prosecutions argued that they were still too low.[106] The AICD suggested that there should be some attention to the interaction of increased penalties and a broader scope of recipients of disclosures, who could now be quite junior people in a company, and further with the reversal of the onus of proof.[107]

3.68 One submission suggested that there should be costs protection for the defendant as well. It also says that it should not be possible to make out a case of victimisation because of a belief that the person 'may have made' a disclosure.[108]

3.69 Some submitters were critical of the difficulty and/or expense of the processes.[109] The ACCC proposed that the bill should empower regulators to act on behalf of whistleblowers. Mr Jeffrey Morris suggested that a simple bounty scheme would be preferable to having to make a case for compensation.[110] Note however that a bounty scheme is concerned with sharing the fruits of successful enforcement action with the whistleblower who provided the information that led to that successful action, whereas compensation is concerned with compensating a whisleblower who has suffered loss as a result of reprisal/retaliation action. The two concepts are therefore quite different and it is not clear why Mr Morris suggests that one should replace the other.

3.70 A submitter with firsthand experience suggested that there should be financial impact statements with full making good of the costs to the whistleblower, not just compensation for victimisation.[111]

Onus of proof

3.71 There was a range of reactions to the reversal of the onus of proof. Some submitters flatly rejected it on the basis that it did not accord with normal fairness.[112]

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104 Dr David Chaikin, *Committee Hansard*, 6 March 2018, pp. 39–40; answers to questions on notice, no. 9, p.4, 2 March 2018 (received 5 March 2018).

105 Professor A J Brown, *Submission 21*, p. 3.

106 Commonwealth Director of Public Prosecutions, *Submission 17*, p. 2.

107 Ms Louise Petschler, Australian Institute of Company Directors, *Committee Hansard*, 6 March 2018, p. 34.

108 Herbert Smith Freehills, *Submission 14*, p. 6, p. 3.

109 Whistleblowing Information Network, *Submission 26*, *passim*; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 3.

110 Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 25.

111 Mr James Shelton, *Submission 24*, p. 2.

112 Financial Services Council, *Submission 8*, p. 4; Herbert Smith Freehills, *Submission 14*, p. 3.

DLA Piper thought the test was too easy for the claimant, while the AICD thought it would be impossible for the defendant to prove a negative case.[113] The Law Council of Australia suggested that there should be compulsory conciliation, given the reversal of the onus, and that the standard was a 'reasonable possibility' rather than the balance of probabilities.[114]

3.72 On the other hand there was a good deal of support, based on the power imbalance in a whistleblowing situation.[115] Dr David Chaikin wrote:

> The whole point of the reversal of the burden on proof is to change the balance of power between the alleged abuser, which will frequently be a powerful company, and the abused individual whistleblower, who in nearly every case will have few resources to pursue his or her claims.[116]

3.73 The Scrutiny of Bills Committee noted that a reversal of the onus of proof is an interference with a common law right which must be justified.

> The committee notes that the explanatory memorandum does not provide a justification for the reversals of the evidential burden of proof in the provisions identified above, merely stating the operation and effect of those provisions.[117]

Whistleblower policy

3.74 The AICD submitted that the new regime for whistleblowers would lead entities to develop their own policies. There was no need for intervention, nor for law to dictate the content of the policies.[118]

3.75 Others supported the provision.[119] There were various suggestions for improving it, including making the policies publicly available so that they could be used by external disclosers;[120] and requiring time frames to be specified in the policy.[121]

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113 DLA Piper, *Submission 25*, p. 4; Australian Institute of Company Directors, *Submission 31*, p. 4.

114 Law Council of Australia, *Submission 32*, p. 2; Mr Morry Bailes, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 14.

115 For example, Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 2; International Bar Association Anti-Corruption Committee, *Submission 10*, p. 6; Mr Trevor Clarke, ACTU, *Committee Hansard*, 6 March 2018, p. 20.

116 Dr David Chaikin, answers to questions on notice, no. 6, p. 3, 2 March 2018 (received 5 March 2018).

117 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, p. 102.

118 Australian Institute of Company Directors, *Submission 31*, pp. 4–5.

119 Professor A J Brown, *Submission 21*, p. 3; Dr David Chaikin, *Submission 27*, p. 2; Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 2.

120 Dr Vivienne Brand, *Submission 4*; Financial Planning Association of Australia, *Submission 5*, pp. 5–6.

121 Queensland Nurses and Midwives Union, *Submission 6*, p. 3.

3.76 The Scrutiny of Bills Committee noted that section 1317AI, which permits ASIC to relieve specified classes of companies from these requirements, effectively allows ASIC to amend the legislation by legislative instrument. It does not consider the explanation in the Explanatory Memorandum to be satisfactory, as it does not set out any criteria nor give examples of when the power may be used.[122]

Amendment of the Taxation Administration Act 1953

3.77 The following section draws on evidence taken regarding Part 2 of Schedule 1 of the bill.

3.78 The ACTU suggests several enhancements to the tax whistleblower provisions:

- Lawyers and unions ought to be able to represent a person making a disclosure, and they ought to be protected when doing so.
- The right to make an anonymous disclosure should be clear and explicit.
- Consideration be given as to how the usual information gathering, investigative and prosecutorial functions of the Commissioner might be complicated by the receipt of information through those channels being deemed by operation of law to be disclosures that qualify for protection under the Bill.
- There is no clear rational basis for persons who disclose internally to receive a different immunity from those who disclose directly to the Commissioner, and, in any event, the immunity is too broad.
- Victimisation should be able to be constituted and actionable where it is effect by an act or omission, rather than "conduct".
- Standing to bring proceedings for civil penalties and compensation orders should be conferred on persons including the whistleblower and their union (Registered Organisation).
- The Commissioner should be empowered to provide financial and other support to whistleblowers.[123]

3.79 It also proposes an emergency disclosure provision for tax matters, recognising that it would have to be modified to guard against compromising investigations and to protect the tax secrecy of individuals.[124] The Uniting Church in Australia, Synod of Victoria and Tasmania, also expressed concern that there were no provisions for emergency disclosures on tax matters, noting however that, where a corporation was concerned, the amendment to the *Corporations Act 2001* would be available.[125]

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122 Senate Standing Committee on the Scrutiny of Bills, *Scrutiny Digest 1 of 2018*, p. 103.

123 Australian Council of Trade Unions, *Submission 19*, p. 11.

124 Australian Council of Trade Unions, *Submission 19*, p. 11.

125 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 5.

3.80 In general, the tax provisions attracted relatively little comment from submitters and witnesses.

Other matters

3.81 Several submitters pointed to the need for resources for the responsible authorities to implement the arrangements.[126]

3.82 Some also suggested that transition arrangements needed to be adjusted. KPMG suggested that the date of effect be deferred to 1 January 2019, to align with the date for policies to be implemented. On the other hand the International Bar Association Anti-Corruption Committee thought that a 1 July 2018 starting date gave 'more than reasonable' notice.[127]

Committee view

3.83 The committee is aware that many contributions have commented that the bill has not implemented all recommendations of the PJC inquiry. The committee also notes that many said that the bill strikes a good balance.[128] Nevertheless, a minority of contributors continue to believe that the bill is inadequate, suggesting that passing the bill as it stands would mean that nothing more would be done and that it would be an opportunity lost,[129] while some like the Law Council seemed to suggest that it would be better to withdraw the bill altogether and 'get it right'.[130] Most however, do suggest that the bill should be passed acknowledging that the bill is an improvement on current arrangements, and is at the very least a good step towards reform.

3.84 The committee also notes that the Australian Competition and Consumer Commission remarked that passing this bill would not preclude further development of whistleblower protection.[131] Furthermore, it notes Dr Vivienne Brand's suggestion to include a requirement for review in the bill, so that the possibility of further development is kept open, and, in particular, the recommendations of the PJC that had not been implemented will remain under active consideration.[132] It believes this suggestion is worthy of consideration.

126 Australian Lawyers Alliance, *Submission 17*, p. 5; Australian Council of Superannuation Investors, *Submission 13*, p. 3.

127 KPMG, *Submission 15*, p. 4; International Bar Association Anti-Corruption Committee, *Submission 10*, p. 6.

128 For example, Ms Louise Petschler, Australian Institute of Company Directors, *Committee Hansard*, 6 March 2018, p. 34;Dr David Chaiken, , *Committee Hansard*, 6 March 2018, p. 37;

129 For example, Whistleblowers Australia, *Submission 29*, *passim*; Mr Jeffrey Morris, *Committee Hansard*, 6 March 2018, p. 25, p. 27, p. 31.

130 Mr Greg Golding, Law Council of Australia, *Committee Hansard*, 6 March 2018, p. 15.

131 Australian Competition and Consumer Commission, *Submission 30*, p. 4.

132 Dr Vivienne Brand, *Submission 4*, pp. 1–2.

3.85 The committee notes the reservations expressed by the Senate Standing Committee on the Scrutiny of Bills with respect to the reversal of the onus of proof and the possibility of ASIC's decisions in effect amending primary legislation.

3.86 On balance, the committee is satisfied that the bill is a move in the right direction and will be a valuable contribution to whistleblower protection. It notes that the government is continuing to work on its response to the PJC inquiry, and that further reforms may well be the result.

Recommendation 1

3.87 The committee recommends that an explicit requirement for review be included in the bill.

3.88 The committee notes the concerns expressed about the broad range of possible recipients of disclosures. It notes that a whistleblower is most likely to approach his or her immediate supervisor in the first instance, and that that person might not have the skills to handle the complaint. It suggests that companies will recognise the difficulties that this creates, and will quickly develop ways of handling it, such as designating more senior managers to whom disclosures should be referred.

3.89 The committee notes that there is a danger that entities will not be given a chance to remedy situations before an emergency disclosure is made. On balance, it believes that it can be left to the regulator to involve the company, once it has been notified of an impending third party disclosure.

3.90 The committee notes the clarification by the Department of the Treasury that the definition of journalist is not intended to exclude the public broadcasters. However, it is not satisfied that that is clear as the bill currently stands. The committee suggests that this issue be revisited. The committee also suggests consideration be given to examining other equivalent legal definitions for possible inclusion.

Recommendation 2

3.91 The committee recommends that the definition of journalist be reviewed.

3.92 The committee notes the range of views on the bill and recognises that there is always opportunity to develop or strengthen legislation. Noting its highlighted concerns, the committee is satisfied that the bill will provide a valuable contribution to whistleblower protection in Australia.

Recommendation 3

3.93 The committee recommends that the bill be passed.

Senator Jane Hume
Chair