Additional Comments from Labor Senators

1.1 At the outset of these additional comments, Labor Senators on this committee wish to thank the members of the Parliamentary Joint Committee (PJC) on Corporations and Financial Services as well as the secretariat in delivering their final report on whistleblowing reform. Labor Senators acknowledge the significant work that went into a comprehensive, bipartisan report.

1.2 Labor Senators also want to thank Professor AJ Brown for his tireless efforts in advocacy for best practice whistleblowing policies both here in Australia and abroad. Labor Senators thank him for his submission and testimony to both this inquiry and the PJC report.

1.3 Labor Senators endorse the sentiment of witnesses such as Mr Jeff Morris, who succinctly stated that whistleblowing plays a crucial role in good corporate governance:

> the whistleblower is not the enemy; he is the last line of defence in corporate governance.[1]

1.4 Whistleblowing often involves disclosures by current employees or past employees. Labor Senators believe that all employees should feel safe in their workplaces and that any acceptable whistleblowing framework must ensure that there are strong protections and that there are severe consequences when reprisals occur.

The government is acting on Whistleblowing Reform—because it was forced to—and yet still takes a minimalist approach

1.5 The government previously committed to introducing a bill which would make changes to whistleblower protections 'consistent with the recommendations' of the PJC Report and an expert advisory panel, and which, at a minimum, would match the 'substance and detail' of the whistleblower protections included in the Fair Work (Registered Organisations) Amendment Bill 2014.

1.6 However, this bill falls far short of the PJC report.

1.7 What is also clear is that, in some key areas, the whistleblowing protections set out in this bill set a lower bar than the whistleblowing protections set out under the Registered Organisations bill. Under the Registered Organisations bill, registered organisations have an explicit duty to support and protect whistleblowers and whistleblowers have a lower threshold to meet when seeking compensation.[2] The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 does not place an explicit duty to support and protect whistleblowers and sets a higher threshold for whistleblowers who are seeking compensation.

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1 Mr Jeff Morris, *Committee Hansard*, p. 28.

2 Professor A J Brown, *Committee Hansard*, p. 8.

1.8 Witnesses were divided on whether the duty in the Registered Organisations Bill was an appropriate duty to use. Professor Brown was supportive of this standard. By contrast, Dr Chaikin doubted the workability of this duty and stated that it

> may have an unintended consequence of imposing onerous, complex and costly obligations on companies.[3]

1.9 Despite these differing views, one thing did become clear during the course of the hearings before this committee. This government has decided that a standard which it applied, without hesitation, to Australia's unions, is now not appropriate for Australia's corporations and banks.

1.10 Labor Senators also see the links between this legislation and the Banking Royal Commission - a Government forced to act despite the volume of evidence pointing to the need for action and, when the Government finally acts, there are questions over their commitment to true reform. As put by Mr Morris:

> I guess I see this as a bit of a parallel thing to the banking royal commission, where the government's finally, kicking and screaming, bowed to the inevitable and had a banking royal commission, but it has scandalously under-resourced it—one commissioner for 12 months. It's kind of like just playing a game of paying lip-service to something. What troubles me is the parallel here—that this is called whistleblower legislation but, compared to what it could achieve, this is just a pale shadow of the real thing. I guess you could say we've got a clayton's royal commission and, in a sense, this is clayton's whistleblower legislation. When you look at the recommendations of the PJC, and indeed, the submission of Professor Brown, it's just apparent that there's so much more that could be so easily achieved. What I don't understand is that the benefits that would flow through it are so massive.[4]

Role of Unions

1.11 This bill contains no mention of the role that unions could play in providing assistance to people looking to make disclosures. This was raised in evidence from the ACTU.

> Senator KETTER: Why have unions been cut out of this legislation?
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> Mr Clarke: I'm not sure, but I can simply point to: if you conceive of this as a situation that is highly likely to operate, whereby employees are being the whistleblower on their employers, and you're setting up legal protections for employees against the actions of their employers, I just can't see a basis consistent with the way the rest of the law works to say that you'd exclude the role of free unions there.[5]

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3 Dr David Chaikin, Response to Questions on Notice, 2 March 2018, p. 4.

4 Mr Jeff Morris, *Committee Hansard*, p. 29.

5 *Committee Hansard*, p. 21.

1.12 Questions on notice to Professor Brown also indicate his support for unions, professional associations and Employee Assistance Programs in providing professional assistance to those seeking to make disclosures.[6]

1.13 Labor Senators remain concerned that the attitude of this Government is to establish one rule for companies and other rule for unions. This bill, and the lack of inclusion of registered organisations such as unions, is yet another sign of this political philosophy.

PJC Report

1.14 There are also concerns that this bill might be the Government's only response to whistleblowing in this term of parliament. Treasury officials reiterated that the Government is yet to release its response to the PJC report, tabled on 13 September 2017. According to Treasury:

> It's probably not correct to characterise the task as implementation of the PJC report, because the PJC report still has to be accepted by government. The process that the panel was involved in was providing a considered view and feedback and so forth about the PJC report, as well as about an earlier version of this bill. That's the process that it was engaged in, and that was to assist the government to come to a view about, firstly, the bill and then, secondly, about the PJC report. The second part is still with the government, and I don't know what the government's position on that will be.[7]

1.15 Given the current reporting time of this report, the lack of public commitment by the Government to release its response in the near future and that there may only be 12 or so months until the next election, Labor Senators find it unlikely that this Government will introduce further legislation to implement additional whistleblowing reform in this term of parliament.

Concerns about the effectiveness of this legislation

1.16 Concerns raised about this legislation were widespread and varied.

1.17 Professor Brown raised five concerns in particular:

a) Separation of criminal and civil remedies;

b) Making civil remedies available for detriment flowing from a failure in duty to support or protect (irrespective of individual intent or belief)

c) A best practice version of the reverse onus of proof

d) A reasonable filter against individual personal and employment grievances

e) Realistic and appropriate protection for third party (e.g. media/public) disclosure.[8]

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6 Professor A J Brown, Response to Questions on Notice 2 March 2018, p. 12.

7 Ms Kate Mills, *Committee Hansard*, p. 63.

8 Professor Brown, S*ubmission 21*, p. 1.

1.18 Professor Brown's submission also makes it clear that this legislation is actually a departure from the PJC's recommendation to bring together whistleblowing legislation into a single act.

> I think the history shows, including history internationally, that most agencies will say that it's easier if, if the legislation pertains to them, that it be contained in their own legislation. The recommendation of the parliamentary joint committee, which I certainly advocated for and support, was specifically to take a step back from that and look at, for the Australian circumstances, what's the most efficient and effective way to approach it from a business regulatory point of view. That is why everybody from the Law Council to the Governance Institute to the Australian Council for Superannuation Investors et cetera have all ended up advocating that, yes, it should be, if it can be-and technically I think it can be-placed all in a single act. Even though there will clearly be different implications and consequential amendments still for different regulators.[9]

1.19 These concerns are so serious that Professor Brown expressed scepticism about whether the scheme could work effectively without further amendments:

> The thing is that unless these things are fixed, in my view the scheme won't work. I'm just happy that they can be fixed, and that there is still an opportunity to fix them.[10]

1.20 Regarding the separation of civil and criminal liability, Labor Senators note the responses by Dr Chaikin and Treasury Officials in response to this specific concern, and also note responses to Questions on Notice from Professor Brown that reiterates the concerns about issues arising from the lack of separation despite the evidence heard during the hearing.

1.21 The Uniting Church summarises the bill this way:

> The Bill fails to provide actual proactive support for whistleblowers and will leave them still having to find a lawyer and fend for themselves in accessing protection or seeking compensation for retaliatory action.[11]

1.22 Mr Morris expressed similar concerns:

> The subtle thing about this bill is that it is tied up in trying to put in place a legal process for compensation, among other things. It is such an overly legalistic process that I think the people who have drawn up this bill have perhaps lost sight of the fact that to a prospective whistleblower the prospect of having to navigate a legal minefield with the possibility of getting some compensation is only marginally more attractive than the current situation, and, as I said, the vast majority of people won't come forward.[12]

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9 Professor Brown, *Committee Hansard*, p. 4.

10 Professor Brown, *Committee Hansard*, p. 13.

11 Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 22*, p. 1.

12 Mr Jeff Morris, *Committee Hansard*, p. 26.

1.23 It is incumbent on the Government to explain how this bill will not lead to outcomes suggested by witnesses such as the Uniting Church and Mr Morris.

External Disclosures

1.24 On external disclosures, many submissions stated that the current test of an 'imminent risk of serious harm or danger to public health or safety or to the financial system if the information is not acted on immediately' is too restrictive.

1.25 The design of protections for external disclosures warrants careful consideration. Some submissions noted that the design of such provisions must keep in mind the importance of not prejudicing ongoing investigations. However, Professor Brown put the view forward that making adequate provision for external disclosures would help to incentivise a high standard of systems and procedures for internal whistleblowing. He also noted that Jeff Morris would not have been protected under this bill when he made his disclosure to the media:

> Senator KETTER: Is there a risk that limiting external disclosures lowers the bar for internal procedures that companies set?
>
> Prof. Brown: It's not just a risk; it's a certainty because part of the policy reason for acknowledging the legitimacy of media disclosures, at least as a last resort or in necessary circumstances, is the imperative that gives to companies and employers to get their own whistleblowing misconduct processes in order, in order to limit and prevent the need for people to go public. I think it's understood now, within government and more broadly, that that's a policy objective. So, unless the threshold operates correctly to provide that incentive, it doesn't provide that incentive to actually make companies set up good systems and procedures, because companies can accurately look at the act and say, 'They've got no chance of being protected if they go public anyway'.
>
> CHAIR: So you're saying that the matters that Mr Morris took to the media back then wouldn't meet the statutory test in this bill?
>
> Prof. Brown: Not in my opinion.[13]

1.26 This outcome is in contrast with the previous assurances of Minister O'Dwyer who last year said that 'the Turnbull Government is determined to change our whistleblower laws to better protect people like Jeff Morris'.[14]

1.27 One notable departure between the corporate whistleblowing and tax whistleblowing regimes is that corporate whistleblowing allows for emergency disclosures to a journalist or a member of parliament while tax whistleblowing is not afforded the same opportunity. The explanatory memorandum uses an example to make it very clear:

> Example 3.5: Disclosures to third parties

13 *Committee Hansard*, p. 7.

14 The Hon Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Address to the University of Melbourne Whistleblowing seminar, Melbourne, 23 June 2017.

> Andrew believes his current employer, a multinational enterprise, is avoiding tax through the use of artificial arrangements involving related offshore entities, and has disclosed this to the ATO.
>
> Andrew regularly contacts the ATO seeking updates on the action taken in response to his disclosure. However, the taxpayer confidentiality laws prevent the ATO from divulging taxpayer information to Andrew. Andrew decides to provide the relevant information to a newspaper which subsequently publishes it. As a consequence Andrew loses his job and is unable to get another job in his field because his former employer won't provide him with a reference.
>
> Andrew's disclosure to the media is not eligible for protection under the tax whistleblower protection laws, and he is unable to use those laws to seek compensation.[15]

1.28 The Uniting Church on this matter states that:

> We are concerned that the ability to make disclosure to the media (s.1317AAD) in the amendments to the Corporations Act are not repeated in the amendments to the Income Tax Assessment Act. That would appear to mean that public whistleblowing about corporate tax avoidance and tax evasion is not contemplated under the Income Tax Assessment Act.
>
> However, if the tax evasion or tax avoidance is by a corporation then the whistleblower making a public disclosure would gain the protection of the amendments to the Corporations Act, but that would not apply if the public disclosure was about a person or an entity not covered by the Corporations Act. Further, the ability to make disclosures to the media are too limited and should be permitted where the appropriate authorities have not responded adequately to a disclosure within a reasonable period of time.[16]

Other concerns about the bill

1.29 Labor Senators also wish to mention other issues which, at the time of this report, have not been sufficiently addressed by this Government:

a) The concern raised by the Queensland Nurses and Midwives Union that large charities and not-for-profits might not be captured under this legislation (in the context of whistleblowing in aged care facilities)[17]

b) The Law Council of Australia's concern that volunteers are not covered by this legislation[18] (noting that Dr Chaikin advises that they would be covered as 'unpaid contractors')

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15 Explanatory Memorandum, p. 74.

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

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

18 Mr Morry Bailes, *Committee Hansard*, p. 17.

c) That partnerships, such as those of the big four accounting firms would not be captured under the corporate whistleblower protections. Both the Law Council of Australia and Treasury could not conclusively answer this question:

> Senator KETTER: You've mentioned that partnerships are not covered by the scope of the bill. Of the big four accounting firms, are any of those covered by the scope of this bill?
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> Mr Golding: I am not an expert on the legal organisation of large accounting firms, but my suspicion, on what I do know, is that no, they wouldn't be covered. There are some incorporated entities within those accounting firms, but the employer would typically be the partnership, I would expect, but I am no expert on corporate law.
>
> Mr Bailes: In as far as the law is concerned, there are two models. Certainly the traditional model is a partnership model. There are now incorporated legal practices, but they are less than more. I too can't speak for the accounting world.[19]
>
> Senator KETTER: I move on to another subject. Time is limited. I've been asking other witnesses about the status of the big four accounting firms because of the fact that they're considered to be partnerships. Whether they have other structures as well is another question. I put to you the situation of an employee of a big-four accounting firm who blows the whistle on his or her employer because of the fact that the firm is promoting aggressive tax practices amongst its clientele. Is that whistleblower protected?
>
> Ms Mills: My understanding is that the accounting firms like the large law firms—and I was a partner of a large law firm—set up service companies and the service companies employ the staff. I don't know whether that's the case in relation to every single accounting firm or every single partnership that's a law partnership, but it's a quite common practice. To that extent, certainly the employee would be covered. If it's the case that they're a true partnership and there's no company sitting behind it, then, yes, there's a risk that they would not have any protection under this bill, but it would depend on whether they're making the complaint purely about the accounting firm in that scenario or whether, in fact, because that advice is ultimately being provided to a company, it's about the regulated affairs of that company, and therefore they would have protection because that is a corporation that's covered by this bill.[20]

1.30 Labor Senators also note concerns raised about adequate resourcing for this legislation:

> These include, for example, the committee's recommendations relating it to the creation of a single whistleblower protection act covering all areas of Commonwealth regulation beyond the bill's corporate financial service and tax entities; access to non-judicial remedies, for instance, through the Fair Work Commission under the Public Interest Disclosure Act 2013; an

19 *Committee Hansard*, p. 17.

20 *Committee Hansard*, p. 59.

> agency empowered to implement the regime, such as a whistleblower protection authority; **and appropriate resourcing for effective implementation** (emphasis added).[21]

Eligible Recipients

1.31 Submissions from stakeholders such as the Law Council of Australia, , Australian Institute of Company Directors (AICD), Australian Banking Association, Herbert Smith Freehills, and the Governance Institute of Australia raised concerns that the broad array of eligible recipients might place undue burden on internal compliance policies within companies. Quite junior supervisors might have to go through complex training so as to be able to properly handle disclosures that are made to them.

> Refining the definition of 'eligible recipients' to ensure that the designation is only applied to people who are in an appropriate position and to prevent extending the responsibility for handling disclosures to people who may not be appropriately qualified (recognising the penalties that can flow from mishandling).[22]

> The expanded definition of eligible recipient now includes a person who supervises or manages the individual. In some organisations this may be relatively junior employees and this will place a substantial training and compliance burden on organisations. Given the very broad scope of disclosable conduct, companies may be required to expend a lot of time responding to complaints which are outside the intended scope of the legislation. If this change is to proceed, clarification is needed to ensure that the obligations imposed are realistically achievable.[23]

1.32 Mr Trevor Clarke of the Australian Council of Trade Unions suggested one way to resolve this matter was through the use of external investigators, but also acknowledged that the current drafting of the bill may make it difficult to pass on confidential information to the appropriate people:

> I'll raise a couple of points in response to some of the written material. The Institute of Company Directors raised a point about the appropriateness or otherwise of allowing disclosures to be made to line managers. To balance that out, I would say, firstly, that the internal management procedures and policies that are contemplated by the bill permit organisations to appoint another person—external investigators. The extent of the line managers properly trained under the policy may well be to refer the person to the external investigators appointed by the company to deal with these things. I've pointed out in the submission all the reasons as to why companies might want to go down that path.
>
> The management of investigations can be difficult in terms of who is actually given the job of doing the investigation. Not everybody who receives a disclosure or is entitled to receive a disclosure is actually going

21 Mr Morry Bailes, Law Council of Australia, *Committee Hansard,* p. 14.

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

23 Law Council of Australia, *Submission 32*, p. 2

> to be the right person to try and investigate the thing. That's when you run into these problems with the way the confidentiality provisions operate. You can't have every line manager in the business fully trained to conduct an internal investigation. You need potentially some relief in relation to the way the confidentiality provisions operate so that you don't get in a situation where there's no way for the internal manager to refer the thing up the train without disclosing information that could lead to the identity of the whistleblower becoming apparent. I think that's one of the technical areas where some additional thought needs to be given to it. Perhaps the way around that at a practical level is to take the hint that's given in relation to the way policies should be drafted, for companies to basically appoint the KPMGs of the world to be their external investigators in relation to these matter. There are clearly benefits also for a company, legal and otherwise, to be able to say a disclosure was made about this and it was fully investigated by an independent investigator.[24]

1.33 It is incumbent on this Government to explain how this problem will be resolved, and the provision of guidance on internal whistleblowing policies in a timely fashion would help to provide such guidance.

Position of Labor Senators

1.34 The Government should release its response to PJC report as soon as practically possible.

1.35 The Government should release guidance on internal whistleblowing policies in a timely manner, particularly given the concerns raised about the range of eligible recipients.

1.36 Noting the issues raised during the course of the inquiry, Labor Senators will continue to consult with stakeholders on this bill.

Senator Chris Ketter
Deputy Chair

Senator Jenny McAllister
Senator for New South Wales

24 Mr Trevor Clark, *Committee Hansard*, p. 20, p. 22.